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difficulties it was intended to remove. It is, lastly, not possible to provide for everything. The Legislature has wisely rejected the proposal to convert the Code into a Digest of the case-law—a law which is more extensive than the Acts around which it has grown. As, however, the new Code becomes the better understood, a reference to the earlier law which it supersedes will become less and less necessary.

It would, of course, have been possible, as it would have been a lighter task, to have noted selected decisions only. We, however, preferred to give as complete a record of the subject as possible, believing that we should do a greater service by endeavouring to disentangle the confusion of that Record than by following the other course. To master technicality one must be a master of it; a position which can only be obtained by a careful and thorough study of all materials available, whatever value may afterwards, and as a result of such consideration, be attributed to them. We have, however, not considered it necessary to deal with two portions of the Code as we have with the rest. These are O. XXXIV. and the Second Schedule containing the Arbitration Rules, The Order is, with some amendments, substantially a reproduction of former sections of the Transfer of Property Act relating to mortgages. These have been already sufficiently treated of in the able hooks of Dr. Rash Behary Ghose and Dr. Gonr on the subject. The arbitration sections of the former Code have, with some slight alterations, been incorporated in the Second Schedule as a temporary measure only, the Legislature having expressed its intention of shortly dealing with the subject afresh in a separate Act. We have, therefore, in these circumstances, only recorded the cases decided since the date of the last edition of the late Mr. Justice O'Kinealy's Civil Procedure Code.

We have said that the Code is, to a large extent, what it was. At the same time it is to be noted that a considerable number of important amendments have been made which x

will be found explained in the Commentary. The chief merit of the new Code is that these amendments, and the general scheme of which they form a part, recognize principles which we think make for the effective administration of justice. In this country both the litigants and Courts are apt to attribute excessive importance to what is but the mint, the anise, and the cummin of the law. Procedure is not, as seems sometimes to be supposed, an end in itself, but merely the machinery by which the Court does its work. Nextly, as it is not possible to foresec every contingency which may arise, it is not possible to provide such a machinery as will be effective to meet every want. The terms of the law itself must therefore be flexible. and to the Judges should be given a wide discretion in its administration. Freedom of action, if given, will often enable them to deal justly with eases which the most skilfully constructed provision may fail to meet. The Legislature has recognized that it is not possible to frame a fixed and rigid Code in such a manner as to sufficiently meet the varying needs of an area so diversified as that to which the Code applies. The provisions as to rules enable such variations to be introduced as may be necessary. To the latter are relegated matters of mere machinery. As they now stand they continue substantially, though with important amendments, the former state of things. But the High Courts may add to or alter them as necessity requires. Those provisions only are retained in the body of the Code in which some degree of permanence and uniformity has been considered desirable. In the amendments introduced an endeavour has been made to state general rules of procedure rather than to provide in detail for every possible contingency. The Select Committee very rightly state that they hold it "to be a sound view that excessive elaboration of details of procedure tends to cramp the action of the Court, and in eonsequence to encourage technicalities." Limitations have in several instances been removed, such as those which existed on the scope of shits (the issues in which,

however, are to be clearly defined), the power of remand, powers in second appeal, and so forth. Technical objections to jurisdiction, misjoinder, and the like are sought to be iliscouraged, and greater powers of amendment are given. A wider discretion is given to the Judges, the Select Committee observing that "the principles of procedure are now so well understood that the Courts may be trusted to apply them intelligently in cases for which no provision may be made in terms." Stuart, C.J., once spoke of those "who refused to know anything about procedure beyond the letter of the Code itself" (5 A. 522). The present Code, on the other hand, recognizes in sect. 152 the inherent jurisdiction of the Court to do what is right where the Legislature has failed to make provision for any particular ease which may arise. It will be no longer possible to say that the Court can do nothing, though justice requires it to do something simply because the Code is silent on, or there is no reported decision in which a Judge has had to deal with the point raised. "Procedure," said Lord Penzance, "is but the machinery of the law after all-the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when, in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subscree" (L. R. 4 App. Cas 525). It will be well also to bear in mind the dicta of the Judicial Committee that they will look to the essential justice of the case without considering whether matters of form have been strictly attended to (2 M. I. A. 344), and that (6 M. I. A. 410, 411) it is of the ntmost importance that the Courts of this country shall constantly bear in mind that by their very constitution they are to decide according to equity and good conscience, and that the substance and merits of the ease are to be kept constantly in view.

J. G. W. A. A.

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	Muhammad Askarı ı Radhe Ram Sinch 130 131 532 95
Mt Keemee v Luchman Das 217	
Mt Maharani t Nanda Lal Misser 1943	Muhammad Awais 2 Har Saher 280
Mt Malcebun v Mt Rashida 318	Muhammad Ayab & Muhammad Mo
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Mt Michal Kooer t Lallee 885	Muhammad Bharr Bhann Topan 1279
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THE CODE

OF

CIVIL PROCEDURE.

ACT No. V. or 1908

, PASSED BY THE GOVERNOR-GENERAL OF INDIA IN COUNCIL.

Received the assent of the Governor General on the 21st March, 1908.

An Act to consolidate and amend the laws relating to the Procedure of the Courts of Civil Judicature.

WHEREAS It is expedient to consolidate and amend the laws relating to the procedure of the Courts of Civil Judicature, It is hereby enacted as

Previous Legislation Up to the year 1862 the Courts in the Presidency Towns and in the Provinces were governed by different rules of procedure The Supreme Courts were governed in matters of procedure by their own practice. rules and orders, and certain tets (1) The Provinced Courts were governed by Acts and Regulations particularly applicable to them (2) In 1859 the first Code of Civil Procedure (Act VIII of 1859) was passed which exacted that where it came into operation the procedure of Civil Courts was to be regulated by it only (3) This Act, however, was originally intended for up, he it in in the Courts not established by Royal Charter and it was not till the year 1802 that it was extended to the Courts in the Presidency Towns the Supreme Courts and the Courts of Sudder Dewanns Adambet in the three Presidency Towns were abolished Letters Patent constituting the present High Courts were granted in pursuance of an Act of Pirliame it of the be a 1-1. 21 & 25 Vict c 101 With the abolition of the Supreme Courts, their former procedure in civil cases between party and pirty was abolisted and by the 37th section of the Letters Pitent establishing the High Court of Clarica, and the corresponding sections of the Letters Patent establishing sum lar courts at Ma lives

⁽¹⁾ becates VIII of 18.2. VI of 18.1 (2) See the Schedule to Act V of 18.1 which was passed to repeal certain Acts and

legulan nambro grath political (in Courage Certal Edicity Loud Charles (3) See A CVIII of José a See

and Bombay, the proceedings in civil surt between party and party brought in the High Courts, were to be regulated by Act VIII of 1859 and by such further or other enactments of the Governor General in Council in relation to Civil Procedure as were in force at the date of the several Charter Provided alway that the regulation of such proceedings respectively should be subject to such laws and regulations as should be thereafter made by the Governor General in Council in relation to such proceedings. This was modified by the Sith sections of the new Charters of 1855, which run as follows "And we do further ordain that it shall be lawful for the said High Court. Ac from time to time to make rules and orders for the purpose of regulating all proceedings in civil cas which may be brought before the said High Court, in luding pro eedings in its Admiralty, Vice-Admiralty, Intestate and Matrimonial Juri dictions respec Provided always that the said High Court shall be guided in innling such rules and orders, as far as possible, by the provisions of the Code of Critical Procedure being an Act pas ed by the Governor General in Council and bein-Act No VIII of 1859, and the provisions of any law which has been made, iniciding or altering the same, by competent legislative authority (1) Other Acts relating to the adoption of the Code of 1809 by the High Court are mentioned below (2) The Acts passed after 1809 modifying and amending that Code are niven below (3) In 1877 the second Code vas chacted (Act A of 1877) This very considerably amended and added to the Code of 1833 Whereas the latter contained 388 sections only the former contained 652. This Code was followed by amendia, Acts (4) and then by Act MIV of 1852, which was also recalled in fart and amended by subsciuent Acts ()

The pre ent Code repeals that of 1857, as allo the ar cadin Acts VII of 1888, AH of 1891, V of 1891, MH of 1895 The chi f feature of the present Code is the di finction drawn lety cen matters dealt with ly the Act vir the e matters which affect nore than one Province and matte san which it is a central that there should be uniformity in all Provin a and min or matters which are relegated to a selectule and treated as mere rules which may be viried or amended by the Ifigh Courts and Chaf Courts The rul are to a liree extent section of the Code of 1852 and illed in cert in a round dided tum other As reard the late of the let the reater number of after tion perhaps occur in the prist in rel to to execute a althou hieth gart of il Chelia I ministed art illure in letter The rust one rlum, tour heavy have I in hto the removed from the Code or how from the silve tel a grate I till of I F, which came into free or the

1st January 108

"Consolidate and amend'—The Code is a consolidating Act. The method of construction to be adopted in the case of such a Code has been expounted by Lord Herschell (1) in terms which have been adopted by the Privy Council (2) and cited and applied in other cases in this country (3) Dealing with the largist hills of Lychango Act, which was intended to be a Code of the Law relating to negatially instruments, he said—

"I think the proper course is in the first instance, to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any con sideration derived from the recious state of the lase and not to start with inquiring how the law previously stood and then assuming that it was probably intended to leave it unaftered, to see if the words of the enactment will bear an inter pretation in conformity with this view. If a statute intended to embody in a code a particular branch of the law is to be treated in this fashion it appears to me that its utility will be almost entirely destroyed, and the very object with which it was enacted will be frustrated. The purpose of such a statute surely was that, on any point specifically dealt with by it the law should be ascertained by interpreting the language used, instead of as before, by roaming over a vist number of authorities in order to discover what the law was extracting it by a minute critical examination of the prior decisions dependent upon a know ledge of the exact effect even of an obsolete proceeding such as a demurrer to evidence I am of course, far from asserting that recourse nay never be had to alle precious state of the law for the purpose of aiding in the construction of the processions of the Code If, for example, a provision be of doubtful import, such resort would be perfectly legitimate, or, again, if in a code of the law of negotiable instruments, words be found which have previously acquired a technical meaning or been used in a sense other than their ordinary one in relation to such instru ments, the same interpretation might well be put upon them in the Code I give these as examples merely, they, of course do not exhaust the category however, I am venturing to insist upon is that ile first step taken should be to interpret the language of ile statute, and that an appeal to earlier decisions can only be justified on some special ground '(1)

It has been said that a reference to the previous history of the law and legislation on the subject is one of the means by which a Court is entitled to seek assistance in construing an act of the Legislature (a) And the practice of the Calcutta, Madras and Bombry High Courts has been to consider as aids towards construction the history of the transition of an Act through the Legislature and to refer to the Reports of Law Commissioners Proceedings of the Legislature Council, Reports of Select Committees, Draft of Bills and

⁽¹⁾ In Bank of England t Vaghano Brothers L P App Cas (1891) 16 at PP 144 145

⁽²⁾ In Norendra Nath Sircar t Kamalba

ann Dani 23 J A 18 28 (1890)

(3) Dagdur Panchom Singh Gangaram 17

B 382 (1892) Damodura Mudaliar i Secretary of State 18 M 91 (1894) hondaya Chetti r Narasimbulu Chettr 20 M 103

(1896), Lala vuraj Iroad i Golab Chand,

²⁸ C 517 (1901)

⁽⁴⁾ See also Administrator General of Bengal v Prem Lall Mullick, 22 C 788, Lalla Suraj Prosad : Golab Chand 28 C 517 (1901) and other cases discussed post

⁽⁵⁾ Prabhalarbhat v Vishwambhur Pandit 8 B 313 (1884), Administrator General of Bengal v Prem Lall Mullick, 21 C 707, 771 (1894) per Trevelvan J, citing Ho'mo v Guy, L P 5 Ch D 900

Statement of Objects and Reasons The Privy Council have, however, in the case of the Administrator-General of Bengal v. Prem Lall Mullick.(1) observed upon the use of these means of interpretation, expressing their disapproval of the practice of referring to the proceedings of the Legislature which result in the passing of an Act A large number of decisions exist upon this question, which is one of some difficulty.(2)

It is, no doubt, a well-established rule of construction that when the terms of an Act are clear and plain, it is the duty of the Court to give effect to them as they stand, according to their plain meaning, neither adding to, nor subtracting from them The Legislature must be taken to have intended to mean what it has so plainly expressed, and when the terms of an Act admit of but one incaning a Court is not at liberty to speculate on the intent of the Legislature, or to construe them according to its own notions of the reasons supposed to have been the cause of its enactment (3) The primary question, in short, is not what may he supposed to have been intended, but what has been said (4) Where, however, an Act has been considered not to clearly express the intention of the Legislature, it has for some years been the practice of the Calcutta, Madras, and Bombay High Courts (5) to consider (as aids towards construction) : (A) The history of previous Legislation, (6) (B) and of the transition of an Act through the Legislature, viz -

(1) 22 C.,788, S C., 22 I A 107 (1895); followed in R t. Sri Churn Chungo, 22 C 1017, 1022 (1895)

(2) See an Article on the Interpretation of Statutes in the Wadras Law Journal, vol v n 250, by E H. Monnier, where a full analysis of most of the cases here given will be found

(3) Gureebullah Sirear t Mohan Lall Shaha, 7 C 127, Buzloor Ruheem : Shum sponnissa Begum, S.W. R. P. C. 3, 12, R. t. Lal Krishna Vithal, 17 B 577, 578

(i) Per Lord Herschell in Brophs e Attorney General of Manutolis, L. R. (1895) Atr Cas 216

(5) The Allahabad High Court Lebl, en tle other hand, in Kadir Bakah t. Bhawani Pre vd, 14 A 145 (1991), dissenting from It r Kartick Chunder Das, 14 C 721, and Breesh Chinder Sangal r. Hiru 1 Hyde, 100, that the meaning of an Act is to be gathered solely by reference to the Act" itself and not to any official report of proceed. ings in the Legislative Council These two cases are, therefore, in accord with tho Privy Councilcase now considered (Administrator-

(6) Prabhakarbhat t Vishwambhar Pandit. S B 313 (1881) [held that the pre existing state of law, as recognized by the Tribunals, is one of the chief me ins of interpretation] In Lahamelminus Begum t Secretary of State, 1886-1889, the High Court (11 C 67), no well as the Privy Council (17 C 590), fully reviewed the earlier legislation in order to determine upon the construction of Act IX of 1817 Similarly the Allahabad Lull Bench in R + Babu Lal, 6 A 509 (1881), conside red the provinces of Fuelish law and the

General of Bengul t Prem Lall Mullick)

- (a) Reports of the Indian Law Commissioners . (1)
- (b) Proceedings of the Legislative Council: (2)
- (c) Reports of Select Committees of the Legislative Council (3)
- (d) Drift stages of a bill. (4) and
 - (c) Statements of Objects and Reasons. (5) attached to bills

The question of the right to make use of these aids to construction came before the Privy Council in the case referred to The Calcutta High Court in

the previous and subsequent course of legisla tion in construing Act II of 1874 See also R + Fischer, 14 V 342 (1891), and numerous other cases

- (1) Shark Moosa v Shark Essa, 8 R 241 (1884), where Sargent, CJ, adopting the view of Lord Westbury in In re Mew. 31 L J Bankruptey, 87 Inhere the Lord Chan cellor referred to a Report of the Commissigners on Rankruntes lawl, held that the Reports of Law Commissioners could be referred to in aid of the construction of a statute In R . Ghulet, 7 A 44 (1884). Duthoit, J , with the apparent approval of his colleague, Straight, J , referred to such reports The admissibility of such reference was ex pressly ruled in Romesh Chunder Sanyal t Hiru Mondal, 17 C 852 (1890) However, in Tarack Nath Sircar t Prosono Coomar Ghose, 19 W R 48, 53 (1873), Couch, C J. said "You cannot interpret Acts by Reports of Commissioners'
- (2) Matheora Kant Shaw v India General S N (o, 10 C 166 (1883) [reference by Prinsep, I , to speech of member in charge of a bill when moving for leave to bring it in and when introducing a bill] , Fadhu Jhala t Cour Mohun Jhain, 19 C 541 (1892) fa specch of a member introducing a hill and assigning its objects and reasons may be looked at], Yesu Ramji Kalnath e Balkrishna, 15 B 583 (1891) [Sargent, C.J., referred to speech of member when presenting Report of Select Committee on bill and moving its considera tion), Fadhu Jhala : Gour Mohnn Jhala, supra [Prinsep, J , quoted speech of member in charge (Mr Peacock) made even during debatel But as to speeches of others upon a lill, it has been held by the Bombay Righ Court in Gopal Krishna Parachure + Sakho hrav, 18 B 133 (1894), that the debate on the bill, when before the Council, is not to be referred to However in Chunilal Panalal t Bomanji Mincherji Modi 7 B 310, 315 (1893), Birdwood I, referred to the speech

not only of a member introducing a hill, but of a member speaking upon an amendment, and see also Mahomed Jackanta t. Ahmed Mahomed, 15 C 137 (1887) The Allahabad High Court, on the other hand, has held generally that the Courts cannot look to the dehates of the Legislature Kadu Baksh t Bhawani Prasad, 14 A 145 (1892), Maharaj Tewari v Har Chran, 26 A 144, 137 (1907); and see Goundu Pilla t Thayammal, 14 V L J 209 (1904)

- (3) R : Kartick Chunder Das, 14 C 721, 723 (1837). Romesh Chunder Sanyal : Hallar Mondal, 17 C 832 (1890). Fadhu Jahlar : Gour Mohum Jiwin, 19 C 544 (1892), Administrator General v Prem Lall Mullick, 21 C 732 (1894). Yesu Rampi kalnath v Balkrishna, 15 B 633, 655 (1891), Ramchandra Josehi Hasa Kassum, 16 M 207, 219, 212 (1893), Mahomed Jackariah : Alimed Mahomed, 15 C 139 (1837). The Allahahad High Court lays, however, held to the contrary that these reports cannot be referred to Kadir Baksha
- Bhan an Fresch, 14 He (1892) (4) In R + Kartick Chunder Das, 14 C 720 (1887), s 22 of the Draft Bill on Fridence was referred to, but in Shal Moosa: Shal, Pess, 6 R 201 (1884), it was keld that the Court could not look at the various forms in which a bill was brought before the Legis lature
- Jaturo

 (5) Tadhu Jhala v Gour Mohun Jhala, 19
 C 645 (1892). Administrator General t
 Prom Lall Mullick 21 C 732 (1894).
 Shaik Moova t Shaik Fesa, 8 B 241 (1884)
 However, an Mathora Kant Shaw t India
 General S N Co, 10 C 166 (1883), Prinsep,
 J. considered it unusual to refer to the
 Objects and Reasons, though he did in thiat
 case read an abstract from the Legal Mem
 ber s speech containing the Objects and
 Reasons, and in Kadir Baksh v Bhawani
 Prosad, 14 A 145 (1892), the Allahalad
 High Court held that the Objects and Reasons
 attached to a hill could not be referred to

The same reasons which

that case (The Administrator General of Bengal v Prem Lail Mulhek). (1) in

and of the construction of Act II of 1874, referred (a) to the course of legislation, (2) (b) the statement of the objects and reasons of the Act, (3) and (c) Report of the Select Committee (4)

The Privy Council, before whom the ease came in appeal, (5) held with

regard to (a) that (1) "a positive enactment in a statute of 1874 can not be qualified or neutralized by indications of intention gathered from previous legislation upon the same subject. And there is no legislation subsequent to that of 1874, with respect to the power of an executor to make over his office with all its rights and habilities to the Administrator-General, '(6) and (n) that it is against reason and authority to insintum the proposition, "that in dealing with a Consolidating Statute, each engetment must be traced to its original source, and when that is discovered, must be construed according to the state of circumstances which existed when it first became law. The very object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date, in order that it may form a useful code applicable to the circumstances existing at the time when the Consolidating Act is passed"(7) With regard to (b) and (c), the Privy Council observed as follows -(8) "The two learned Judges who constituted the majority in the Appellate Court, although they do not base their judgments upon them, refer to the proceedings of the Legislature which resulted in the passing of the Act of 1871, as legitimate aids to the construction of sect 31 Their Lordships think

exclude there considerations when the clauses of an let of the British Legislature are under construction are equally eggent in the case of an Indian Statute."

The question next to be considered is how far, if at all, does this decision of the Privy Council affect the practice of the Indian Courts to which reference has been made. The result of their Lord-lines decision appears to be as follows.

it right to express their dissent from that proposition

has been made. The result of their Lordships decision appears to be as follows—
(1) Pre-existing legislation may still be referred to as an aid towards construction, (4) subject to this that (a) if the terms of an his are d ar positine, and express, they cannot be modified or neutralized by inductions of intention to be gathered from previous legislation upon the same subject, (b) that in the case of a Consolidating Act, it must be construed not with reference to the executive access existing at the time of the preceding dets but in relation to those existing at the time of the Consolidating let (10). This list datum it is conceived,

refers to cases where the two sets of excumstances differ (1) In all cases, how ever, the proper course is in the first instance to examine the language of the Act, uninfluenced by considerations as to the previous state of the law, and to resort to a consideration of the latter only if the meaning of the Act itself he not cloar

(u) Reports of the Indian Law Commissioners -These were not referred to in the lower Court, and the Privy Council have said nothing directly as to They have however, indicated that the law in these matters should be the same as that which prevails in England, and according to this test reference is permissible See Lord Westbury s view in the case of In re-Mew, cited ante, p 5 p (1) In the ease of Chini Lal Mancherom a Manishankar Atmaram (2) the Bombay High Court in dealing with the Easements Act referred to the recommendations of the Law Commission

(m) Proceedings of the Legislative Council -Upon a reference to some of the terms of the Privy Couocil judgmeet, it would seem that reference to these is not oow permissible But in the cose of In re New. (3) the Lord Chancellor read a speech made in the House of Commons by the member who introduced the Bankruntev Bill of 1860 The Privy Council itself also in Hebbert ; Purchas (4) referred to the Commons' and Lords' Journals and to the details of a conference between the two Houses of Parliament And in the Queen t Bishop of Oxford (5) Bramwell, J. read passages from the Lord Chancellor's Speech made in the House of Lords upon the Church Discipline Act Bombay High Court has, however, since held that it is not permissible to refer to the speech of the Legal Member of the Indian Legislative Council when proposing the enactment of a bill (6)

(1) Reports of Select Committees of the Legislative Council - These were referred to by the High Court in The Administrator General & Prem Lall Mulhek The Privy Council must, therefore, it seems he taken to have disapproved of the reference to those reports, though reverting again to the English rule upon which the Privy Couocil rested their judgment, it appears that Sir George Turner, LJ in Drummood v Drummond (7) referred to tho proceedings of a Select Committee of which he had been a member. In the case of Assam . Pathumma (8) the Madras High Court referred to the report

of a Select Committee

(v) Diaft Stages of a Bill -These were not referred to in the principal case either in the judgments of the High Court or Privy Council But they appear to fall within the principle of exclusion laid down by the latter, and

ticilar rule contended for is not to be found among the previously existing laws. It is sufficient if the provision relied upon is a part of the Act, whatever the description of the purposes of the Act may be Daimodden Puk t Kaim Tarilar, 5 C 300 303 (1879)

(1) In the cases of In re Mew, 31 I J Bankruptey 87 a Consolidating Act was con strucd with reference to circumstances exist ing at the time of the earlier Act where how ever the ever metances had solehangellas it had in the I my (ouncil case) at the time of the latter Act See phecryptions in Mail I J supra 289 290

(2) 18 B C16 G25 (1893)

(3) 31 I J Bankruptes 8", supra

(4) L. P 3 P C 648 619

(5) 4 O B D 535

(C) 1 r (annadhar Tilak 22 lt 125 128 (1895)

(7) L. I 2 Ch App 32 4"

(A) 22 At 454 204 (1890)

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The Priva Council decision has been shortly referred to by the Calcutta High Court in the case of the Queen Impress * Sri Churn Chungo (1) where Prot. I (Prinsep and Macpherson, JJ, concurring) said "We do not promose to consider the history of the Penal Code from its original draft by Lord Macaulay in 1810, to its becoming law in 1860. Their Lordships of the Priva Chuncil, in the recent case of the Administrator General of Bengal * Prem Lall Mullick, have held that it is not competent to refer to proceedings of the Legislature in Sectionary of the Priva Council was also referred to by the Bombay High Court in R * Gangadhar Thal (5) in which it was broadly stated that it is inadmissible to take as an aid in constraing an Act the proceedings in the Legislative Council which is sulted in the pis ing of that Act

In this case and whether or not admissible to construct he Acts to which to construct the Acts of the Legislature are instructive historically, if one has to consider not what the statute says but what may have been the motives of one or other party in promoting the legislation (6). And there is but little doubt that there will be a continued reference to such Acts of not as technical at any rate as private as Is towards the comprehension of the intention of the Legislature.

The primary que tien in each case is of course. What are the firsts? It is however in continent full in this country to disting in the facts of near in I y are of and each of (7).

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The Act must be taken as one continuous Code, the different sections being simultaneously enacted in view of each other (1) The Court must be goveroed by the language of the Legislature without considering what may have been its intention, if the words themselves are clear (2) Its limited function is not to say what the Legislature meant, but to ascertain what the Legislature has said that it meaot (3) It is always dangerous to paraphrase ao coactment, and not the less so if the enactment is perhaps out altogether happily expressed (4) Where the Code contains provisions upon a particular question, it must be tested, not by general principles but by the expressions of the Code which relate to that question (5) Where two procedures or two remedies are provided, one of them must not be taken as operating in derogatioo of the other (6) In many cases reference has to be made to judicial precedeot. For it is a priociple neculiar to the Eoglish Common Law (7) that a decided case has an authoritative and hinding force and is, subject to certain well-known limitations, to be followed in other similar cases. It is, however, an unfortunate circumstance that the greater hulk of the reported Indian cases deal with questions of adjective law, unfortunate because a great divergency of opinion, such as exists touching the interpretation of rules of procedure, limitation, stamp or registration, is to be avoided, involving, as it does, uncertainty in the administration of justice and an encouragement of appeals, which in many cases are due to the hope entertained of overturning the judgments of the lower Courts, not upon the merits, but upon some technicality or other (8)

In this country the use of judicial precedent frequently leads to abuse

Every case is independent of every other, and no decision upon facts forms a precedent for any other decision. And every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the ease in which such expressions are found. A case is only an authority for what it actually decides It cannot be quoted for a proposition that may seem to follow logically from it (9) "The only use of nuthorities or decided cases is the establishment of some principle which the Judge can follow out in deciding

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⁽¹⁾ Jonardan Dobey t Ramdhone Singh, 23 C 739, at p 743 (1896)

⁽²⁾ In re Mancharji, 5 Bom Il C R, O C J 55, 58 (1868) Possibly this was meant, though it is not clear, when it was said, that for the application of Equilable considerations there is, as a rule, no room in malters of procedure Debi Daval a Bhan Protap, 31 C 433, 440, 441 (1903)

⁽³⁾ Lala Surva t, Golah Chand, 27 C 721. at p 755 (1900)

⁽⁴⁾ Durga Chowdhram r Jewalur Singh, ISC 23, at p 30 (1890)

⁽⁵⁾ Bhup Indar r Bijat Bahadur, 23 A al pp 156, 157 (1900) As to the use of Headings, Interpretation Clauses Illustra

tions, and Marginal Notes, see Authors Evidence Act, 5th ed , pp 100, 101

⁽⁶⁾ Ajudhia Prasad : Bilmukan I S 1 351 (1896), per Wahmood, J. Rung Lail Misser t Tokhun Misser, 25 W R 301, at p 305 (1876)

⁽⁷⁾ The Roman law and modern con tinental systems derived from it reject the notion See Article in 6 Born L. P 180

⁽⁶⁾ See Article in 7 Mad L. J 300

⁽⁹⁾ Per Lord Hald urv, L.C., in Quinn r Leathern, 1901, A. C. 500, cited in Jehangie e Secretary of State, 6 Born L. P. at p 149 (1903), and see as to dietz Rowlandson r Champion, 17 M 21, at p 27 (1893)

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The primary question in each case is of course, What are the facta? It is, however, a common fault in this country to disregard the facts of a case in fixour of authorities (7)

The next question is, What are the words of the Code itself?

- (1) 18 B (36, 625, 626 (1813) (2) 14 C 83 (\$40 (1887)
- (3) 18 B (16 (25 (18)3) (4) 22 C 1017, 10 3 (18)5)
- (5) _2 B 112 120, 137 (1635)
- (1) Let I lot, C 1 1 Kndir Bakah t
- at p 49 (1899) Jenkins CJ, dealing with as 16 and 17 of the Code, said tl is case only illustrates how important it is that Courts should first ascertain with accu ries and appreciate the facts under con sideration before turning their aftention to

The Act must be taken as one continuous Code the different sections being simultaneously enacted in view of each other (1). The Court must be governed by the language of the Legislature without considering what may have been its intention, if the words themselves are clear (2). Its hunted function is not to say what the Leashture meant, but to ascertain what the Legislature has said that it meant (3) It is always dangerous to paraphrase an engetment, and not the less so if the engetment is perhaps not altogether happily expressed (1) Where the Code contains provisions upon a particular question, it must be tested, not by general principles but by the expressions of the Code which relate to that question (5) Where two procedures or two remedies are provided, one of them must not be tallen as operating in derogation of the other (6) In many cases reference has to be made to judicial precedent. For it is a principle peculiar to the English Common Law (7) that a decided case has an authoritative and binding force and is, subject to certain well known limitations to be followed in other similar cases. It is however an unfortunate erroumstance that the greater bulk of the reported Indian cases deal with questions of adjective law, unfortunate because a great diver gency of ominion, such as exists touching the interpretation of rules of procedure, limitation, stamp or registration, is to be avoided involving, as it does, uncertainty in the administration of justice and an encouragement of appeals, which in many cases are due to the hope entertained of everturning the judgments of the lower Courts not upon the ments but upon some technicality or other (8)

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⁽¹⁾ Jonardan Dobey v Ramdhone Singh 23 C 738 at p 742 (1896)

⁽²⁾ In re Mancharii 5 Bom H C R O C J 55 58 (1868) Possibly this was meant though it is not clear when it was said that for the application of Figuriable considerations there is as a rile no room in matters of procedure Debi Dayal z Bhau Protap 31 C 433 440 441 (1903)

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⁽⁴⁾ Durga Chowdhran; t Jewahir Singh 18 C 23 at p 30 (1890)

⁽⁵⁾ Bhup Indar t Buai Bahadur 23 A at pp 1°C 157 (1900) As to the use of Headings Interpretation Clauses Illustra

tions and Varginal lotes see Aitlors

Evidence Act 5th ed pp 100 101 (6) Ajudhia Prasad v Balmukand 8 A 354 (1886) per Mahmood J Rung Lall Misser t Tokhun Misser 25 W P 304 at

⁽⁷⁾ The Roman law and modern continental systems derived from it reject the notion See Article in C Bom I 1 186

⁽⁸⁾ See Article in 7 Mad L J 309

⁽⁹⁾ Per Lord Halsbury I C in Quinn t Leathern 1901 A C 506, cited in Jehangir v Secretary of State 6 Bom L R at p 181 (1903) and see as to dicta Rowlandson t Champion 17 M 21, at p 27 (1893)

the case before him "(1) Lord Mansfield, CJ, said, ' It certainly is very hard upon a Judge if a rule which he generally lays down is to be taken up and carried to its full extent This is sometimes done by counsel, who have nothing else to rely upon; but great caution ought to be used by the Court in extending such maxims to cases which the Judge who uttered them never had in contemplation If such is the use to be made of them, I ought to be very cautious how I lay down general maxims from the Bench "(2)

It is well to bear the remarks cited in the last paragraph in mind, though, of course, the nature of procedure law does not always admit of their applica tion In many cases the rules are of an artificial and arbitrary character. though in others, such as those dealing with bar by judgment or by suit and the like, questions of principle are widely involved

As Holloway, J, said, the application to practical life of sound principles presents no more difficulty than that of empirical maxims (or, we may add, caso law), based mainly upon a misunderstanding (or lack of understanding) of the great practical jurists, whom all admit to be the only guides (3)

In questions of procedure it is generally important that there should be uniformity of decision, and that existing practice should not be upset; (4) for

 In rc Hallet's Estate, 13 Ch D 712. per Jessol, MR , Osborn & Rowlett, per Jessel, MR, 13 Ch D 774, 785 Sec remarks of Edge, CJ, and Straight, J, in R & Gobardhan, 9 A 528, 555, 575 (1887), R v Mahomed Humayoon Shaw, 13 B L R 353 (1874) Lord Mansfield, in R v Bem bridge, 3 Doug 332, said "The law does not consist of particular cases, but of general principles which are illustrated and explained in those cases", and as to dicta, see remarks of Best, CJ, in Richardson v Mellish, cited in R v Chagan Dayaram, 14 B 346 (1899) "The expressions of every Judge must be taken with reference to the case on which he decides, otherwise the law will get into extreme confusion ' Mr Ramanathan, & C. in his speech on behalf of the Ceylon Bar upon the news of the death of Sir John Phear, Inte Chief Justice of Ceylon, said called 'uncertainty of the law' is nothing more than the uncertainty of all trained Judges as to the true facts of the case and the proper principles of law applicable to it He (Sir John Phear) made the Bar argue cases upon first principles of law Before his advent legal principles were of little avail in the determination of a case unkes supported ly a judgment of a competent Court here or in Ingland If in arguing an altocate cited a decil d case without Loing into first remergles In would ers, 'I d'ut want buth ritis. Let us a he there even as a

mathematician would solve a problem by applying the axioms and propositions we have learned in our books' If they passed on to authorities too speedily he would say 'We do not want authorities just yet, they are only of corroborativo value Let us selve the question by the proper application of first principles and then look into authorities to discover whether our conclusions on first principles are correborated by them ' In this way first principles became paramount ' (Ceylon Court, April 10, 1905, cor Sir Charles Layard, C J , and Monemeff, J)

(2) Brisbane v Dacres, 5 Taunton, p 162 (3) Do Soura v Coles, 3 Vad H C R 384.

at p 420 (1868) (4) Tulkumarı t Ghanshyam 31 C 511, at p 513 (1903), per Rampini J . Mundal & to v Fazul Ellahil, S C C Rep 2 of 1912, 3 Feb 1911, cor Jenkins (J, and Wood roffe, J In Dymond : Croft, 3 Ch D at p 515, James L J , said What my decision would have been if this point had come before me in the first instance I need not say The rule (as to substituted service) has already been construed by Huddlestone B in accord ance with what seems to have been the general understanding of the Judges in Chambers and it is very important that there should be uni formity of decision And see per Pilge C J . in Sheo Prasad : Lalit Kuar, 18 A at p 109 Settled principles of law administered 13 a Const of Justice ought not to be lightly disin such cases it is often not so much the nature of the rule as the fact that there is a fixed rule which really matters. In Sadasna Pillai v Ramalinga Pillai, (1) the Privy Council said. "The alleged consensus of the Indian Courts being thus established, their Lordships, whatever their opinion upon the construction of this clause might have been, had the question been resulted and not think it would be right to run counter to so long a course of decision upon what is in fact merely a question of procedure, it being admitted that the plaintiff may assert rights of this nature, if they exist, in a separate suit."

"It is the duty of a Judge not to declare what he considers the law ought to be, but to decide what, according to the best of his judgment, he finds it is; and if he finds a principle laid down upon competent authority it is far better to accept and apply it broadly and honestly, even if he is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to cases which manifestly come within it "(2). The reasons, however, which Judges have assigned for their opinions have not the same degree of authority as the decisions themselves (3) As regards these, if two cases are not to be reconciled, the authority which is at once the more recent and the more consistent with general principles ought to prevail (4) As already stated, if a principle is laid down upon competent authority it is far better to accept and apply it broadly and honestly, even if the Judge is not in his own mind satisfied with the foundation of the rule, than to attempt to fritter it away in its application to eases which manifestly come within it (5) The same rule applies when dealing with the provisions of the Code itself "We ought not," said Sir Barnes Peacock, CJ, "to fritter away the law by construing words according to a mere technical sense instead of giving them a broad meaning so as to embraco all cases intended by the Legislaturo to be provided for ' (6)

The Courts here must be guided in the first place by the terms of the Code itself, and, secondly, by those decisions of the Indian Courts which interpret the Code and which are binding on them. The Subordinate Courts are bound to follow the rulings of the High Courts, to which they are subject, where there are different rulings of different High Courts, (7) and in the absence of such

turbed or doubt east upon them without very sufficient reason. And as to overruling a series of precedents, see Prabhakarbhat v Vishwambar, 8 B 313, 317 (1881), kusum Kumari v Satya Ranjan, 30 C 999, 1093 (1993)

^{(1) 15} B L R 383, at p 398 (1875), 5 C 21 A at p 228

⁽²⁾ Usiliv Hales L R 3 C P D 327, per Lord Coleridge, R t Chagan Dayaram 14

B 352 (1890)
(3) Caledoman Rulway & Walkers
Trustees, 7 App 259

⁽⁴⁾ Per Lord Selborne, L.C., Campbell 2 Campbell, 5 App Cas 787, 793 In the High Court a case of this kind would be referred to

a Full Bench. See also Caledonian Ry. Co. Walkers Trustees I. R. 7 App. Cas. 259, 279, Redgravee Hurd, L. R. 20 Ch. D. I, 14. Ex. parte. Reynolds. 1b. 294, 298. As to judgments of Courts of co ordinate jurisdients of consecutive Courts of co. App. 440. Smith. v. Lambeth Assessment. Committee L. R. 10 Q. B. D. 327, 328, An re. Buller's Settlement, 8 Jur. N. S. 205.

⁽⁵⁾ Per Lord Coloridge, in Usill t Hales, 3 C. P. D. 397

³ C P D 327
(6) Hurro Chunder v Shooroodhonee, 9

W R 492, at p 406 (1868)
(7) Swamirao Narayan t Kashinath
Arishna, 15 B 419 (1890), Balaji Ganesh t
Sahharani Parashram, 17 B 555 (1892)

ruling will do well in following the decisions, if any, of other High Courts and Chief Courts in India As regards the High Courts themselves, Norris, J, sitting on the Original Side of the Court, said with reference to a decision of an Appellate Bench of the same Court, that though he was not prepared to say that he should consider every judgment of an Appellate Bench building upon him when sitting on the Original Side, yet every such judgment should receive respectful consideration and careful attention and should be followed, unless the Court was very clearly of opinion that the conclusion arrived at was an errongous one (1) As regards Appellate Benches all are bound by decisions of the Privy Council and by Full Benches of the same Court and if one Appellate Bench differs from a previous decision given by another the matter must be referred for determination of a Full Bench (2) The High Court is, however, not bound by, though it will give respectful consideration to, the decisions of another High Court As regards other countries, reference may be made to English case law, when in point, as also to the decisions of those countries such as the United States.(3) whose law is derived from a common source with our own As regards, however, the decisions of the United States Courts, citation should not be generally approved unless where it is shown to be necessary by reason of the novelty of the point involved and the want of Indian or English pre cedents (4) As regards these latter it has no doubt, been said that "the Code of Civil Procedure does not prevail in England, and we must interpret its terms as best we may without reference to English cases"(5) It 19, however, submutted with all respect that this is neither a correct nor useful view of the matter. The Courts in this country can ill afford to disregard the results of the learning and experience of the English Judges for the most part they have been glad to avail themselves of both has been where either general legal principles are involved-principles of common application in all countries, or in those in which English notions of jurispriidence prevail-or in cases where sundar provisions to those pre valling here oxist elsewhere, as in the case of many sections of the Code which are based upon or taken from the English rules under the Indicature Act. Where it was argued that an English decision had no application to India, the Privy Council said, that though that case would not be binding as an authority upon a Court in India not administering English law, then Lordships were far from holding that, decided as it was on the application of

⁽¹⁾ Oriental Bank t Gol ind Lall, 9 C 604 at p 407 (1883) [but kee Jul bayya t Krisbno, 14 M at p 191 (1890)] for example, the discussion of an Appellate Bench might proceed upon law or practice different from that prevailing upon the Original Side of the Court Out 1 other land, a decision on appeal from the Original Side would be clearly Linding See Saril Chand Mitter t Mohun Bill 25 (art) 350 (1898)

⁽²⁾ the du lee cannot ref r to the 1 dl 1 encli with out the concurrence of the effect Clubramate Bindston Clund r 7 W R

^{277 (1867)} A Judge of the High Court sitting alone to hear cases below Rs 50 cannot make a reference to the Lull Bench, Nalu Monded t Cholim Multh, 25 C 856 (1898)

⁽³⁾ See Malcolm + Smith, Taylor's Rep 283 288 (1548), Braddon's Abbott, il 342 449 per Sir Laurence Peel, C.J., Searminga i Stamp 5 C.P. D 245 303

⁽⁴⁾ See In re Missouri Steamship (o., 42 Ch. D. 321, 330, 331

⁽⁵⁾ Sourm lea M lum Jagore e Stromoni D 1c 28C 171 at p 175 (1900) per Ramp m and Fratt 11

a maxim expressing a principle recognized by the laws of all civilized countries. it did not afford a rule applicable to circumstances of the same character in India (1) So also. West, J. 10 delivering the judgment of the Full Bench (2) dealing with a question arising under sect 622 of the former Code, said "In such a conflict of opinions as has prisen on the subject we are now considering, it may be useful to see how similar questions have been dealt with by the Courts in Eugland Their decisions can, of course, only afford analogies, not precedents, for Courts so differently constituted as those in Iudia, but these analogies poiot to principles of general application, and thus repay our attentive consideration. As niready stated, many of the provisions of the Code are taken from the English Rules and Orders, and there is no reason why the decisions given on those Rules and Orders should not be applicable here, or on such portions of them as are of equal application in this country and in England Where a priociple declared in an English decision does not depend on any peculiarity in Eoglish law it may be applicable here (3) Again, where a Colonial Legislature has passed an Act in the same terms as an Imperial Statute, and the latter bus been authoritatively construed by a Court of Appeal in England, such construction should be adented by the Courts of the Colony.(1) though, of course, when the Indian Legislature has rejected or declined to follow the law of England upon a particular neut the case is altogether different (5)

It cannot, however, be too much insisted upon that procedure is more Its rules should be observed, but it is to be remembered that those rules exist to enable the Courts, in a settled and convenient manner, to dispense justice. Mere techni ality is to be avoided therefore as much as possible This does not mean that the provisions of the Code are to be disregarded, but they are tu be construed liberally, and if found to have been infringed it must be seen whether such infringement has affected the juris diction of the Court or the ments of the case (6) Courts of law should be especially eareful in dealing with technical objections to see what effect their decision will have in defeating substantial justice (7) The Court may how ever find itself constrained to set aside nn order on a ground which his unfor-

mate e will look to she resential casti e of the case without considering whether matters of form have been strictly attended to, Chird harce Sing r Korlahul Sing 2 M 1 A 314 (1810) In Bishishur c Nam Churup 5 MI II (R 25 25 (1872) Stuart CJ. sail that he did not desire to apply a ri t rules to any unnecessary requirements of legal art to work out the requirements of the

(7) Haranan l r Prosunno 9 C 703 at n 76% ger Sir Li hard Carth, C.J. (1853) . S C.12t L P 53,555, an lecethed; tum of Lerl Donman, Cal., cital in Malabala r. Kut Lant v 21 1 373 at 1 381 (1895) 1 1t is always unit a art to defeat in the la addense to better al and arbitrary rul a-

⁽¹⁾ Madras Railway r Zemindar of Carve tm (garum, 22 W R 279, at p 281 (1874)

⁽²⁾ Shun Nathan e Soma Kashmath, 7 B 341, at p 359 (1883)

⁽³⁾ Nandi Singh e Sita Bam 16 C 677

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⁽⁴⁾ Trimble : 11:11, 5 Mp Cas 312. Nathama Natchiar e Dorasinga Tever 21 A We must construct each act on its own wording and in accordance with its own con lext," Mata Din t hazim Ilusain 13 1 at p 457 (1891) In construing an Act pre vi ions ol other statutes which are in pure material may be referred to 1-am r Patlumms, 22 M at p 502 (1807)

^(*) P r Ghulet 7 A 41 30 51 (1881) (6) See a D), por to the John al Com-

tunately no relation to the merits of the case, as for want of jurisdiction, even though no objection has been taken by the parties (1) So in the case now cited,(2) the Privy Council said "This objection to the award was apparently not brought to the notice either of the Suhordinate Judge or of the High Court But the statute is there, and the Judges were bound to take judicial notice of it " And the Court is bound to take indicial notice of a change in the Statutory Law while a suit is pending, and a party is not estopped from calling attention to it, since the Court is taken to have known it (3) And though it is exceedingly undesirable that any suit should fail on account of any technical objection, such, for instance, as that of misjoinder, at the same time when the objection is raised at the earliest opportunity, and when serious inconvenience and expense are likely to he caused to the parties, it is impossible for the Courts not to adjudicate upon the objection, and to reheve the parties from it (4) Rules of procedure are, however, mere machinery, the means by which the Courts are enabled to dispense the justice for which they exist. As the Privy Council have said, it is of the utmost importance to the right administration of justice in the Courts of this country that it should be constantly horne in mind by them that by their very constitution they are to decide according to equity and good con-cience, and that the substance and merits of the case are to be kept constantly in view (5) Again, Lord Penzance said (6) "Procedure is but the machinery of the law after all-the channel and means wherehy law is administered and justice reached. It strangely departs from its proper office when, in place of freilitating, it is permitted to obstruct, and even extinguish, legal rights, and is thus made to govern where it ought to subserve "

The Code is not exhaustive.—The Code is not exhaustive. It is not uncommonly thought that it is sufficient to defeat an application or to reverse an order that no particular section of the Code can be eited as an authority for it. It is true that Stracley, CJ,(7) stated that the Code contained the whole law of Chul Procedure. We are not, however, aware of any other authority to this effect, and that observation was not adopted by Banerjee, J, in the same case, and both in earlier and liter cases in the same Court it wis held that the Code was not exhaustive (8). The latter view, it is submitted, is unloubtedly the correct one, and is supported by numerous cases to which reference will be made. Indeed, in one of these, Mahinood J, said (9). "I may therefore at the outset state that, according to my view of the rules of construction applicable to statutes like the Civil Procedure Code, the Courts it, not to act upon the principle that every procedure is to be talent.

⁽¹⁾ Joynarius Englit Mudhoo Sudun, 16 C 13 (1858), Vaithmatha Pillart P (P C) 17 C W N 1110 (1913)

⁽²⁾ Paja Harnarun t Chaudhrain Bhagwant, 13 A 300, at p 304 (1831)

⁽³⁾ Lakshini Bibi Kujimi t Atd Bihary Allar, 40 C 534 (1-13)

⁽¹⁾ Sudhen lu t Durga Dass, 14 C 135 at p. 435 (1857)

^() Huno mapers at Paulsy & West Babooc, 6 M I A at pp 410, 411 (1856)

⁽⁶⁾ In Kendall : Hamilton, L R 4 App Cas at p 525 cited in 22 A 320

⁽⁷⁾ Habil Baksh : Baldeo Prasad, 23 A 167, at p 173 (1901)

⁽⁸⁾ Durga Dilal t Andraji, 17 A 20 at p 3i (1831). Dh nhal Singh t Phinkkar Singl 15 A 84 95 (1833) per Sir John I Le, C J

⁽⁹⁾ Varsingh Das & Wangal Dub v. 5 A

at p 1-2, 173 (1852)

as no bilitial, unless it is expressly provided for his the Code, but, on the conacree mun inle that every 150 clure is to be understood as permissible till it is shown to be arounded by the law. As n matter of several principle, uro labely me cannot be uses uncel and in the recent case, therefore, it rests upon the defendants to show that the suit in the furni in which it has been brought is problemed by the rules of procedure numberable to the Courts of Justice in Inlia (I) This statement, if it is not to be liable to miscon cention, is in need of explanation and qualification. It is not to be supposed that it was intended to warrant any and every tule of procedure which a Court may arbitrarily choose to device or to follow. It has been already nounted out (2) that the Cole is exhaustive on the natters in respect of which it declares the law, that is on any point execut colly deelt with by it, the law must be ascertained by reference to its provisions. The Code, however, is not exhaustive in the sense that for instance, the Lydence Act has been and to be, the around artion of which, it has been held, in effect, prohibits the introduction of any kird of evidence not specifically authorized by the Act itself. The Code hands the Court so fir as it goes (3). If it prescribes a particular course, in a particular case, that course must be taken. If, on the other hand, as in the case of the former section 561 (non-omitted), it contains in express problettion, the latter must be given effect to. Many matters are dealt with under a settled practice (1) But even such a practice however inveterate a unnot be legal if it is contrary to an express engetment or is meansistent with it (5) It was however pointed out by Wilson, J., in the case cited.(6) that if the Court had power before the introduction of the Code

(1) So in Hadha Arshen e Itadha Perhad, 18 C 515, 58 (1850), the Court field that in the absence of any prevision in the Code directing an application to be made for execution of an entire decree, a second application for execution was not barred. See observation of Mahmood, J. "Liverything is permissible unless there is some probabition against it, in Muhammad Subaiman e Muhammad Aur Khan, 11 A at pp. 287, 288 (1888).

(2) Ante, p 9

L R 210 (1904), Glyn t Bennaud, 2 Tayl & Hell, 196, at p 205 (1857) | But if the practice has been departed from in this instance, what is the practice of a Court compared to the direction of a statute , per Pecl. UJ 1 A fortiors, a definite provision of law cannot be evaded on the ground of con vemence, Rim Prosad : Sacht Dassi, 6 C W N 585, at 589 (1902) . Balkaran Rart Gobind Nath, 12 A 129 (1890) In Palmer 1 Hutchiason, 6 App Cas 619, cited in Bar Amrit t Hambhan, 8 B at p 389 (1884). the P C said that 'ne practice of the Court can confer upon it any power or juris diction beyond that which is given to it by the charter or law by which it is constituted ' Shiva Nathaji v Joma Kashinath, 7 B 341, 344, 348 (1883) As to an incorrect practice. see Nathmull t Walharrao, 19 B 350, 351 (6) Doorga Charan Das t Nitto Kally.

supra, at p 820 (1880), followed, Pun chanun Sugh v Dwarka Nath Roy, 3 C L J 29 (1905), Huhum Chand Baid t hamalanand Singh, 3 C L J 67 (1905)

⁽³⁾ Doorga Charan Diss t Nitto Kally Dossee, 5 C 819 (1889), Punchanun Singh t Dwarkanath Roy, 3 C L J 29 (1905), Hukum Chand Baid t Kamalanand Singh, 3 C L J 67 (1905)

⁽⁴⁾ See Prabhakarbhat t Vishwambhar, 8 B at pp 316, 317 The established practice of the Court in matters of procedure is the law of the Court, unless at he inconsistent

law of the Court, unless it be inconsistent with some higher law or tegal principle," per West, J, delivering judgment of Fult Bench

⁽⁵⁾ Jehangir v Secretary of State, 6 Bom

to make an order, and that power is not expressly taken away by the Code. it must remain (1) So it was held in that case, that although Chapter XXVI of the former Code only provided for suits to be brought by a pauper, the Court had yet power to allow a defendant to defend in forma pauperis So also in a case (2) which dealt with the inquiry into the question of minority, where a suit was brought by a person professing himself to be adult, but demed to be such by the defendant, upon which an issue was raised for trial, the Court pointed out that sect 442 of the former Code did not apply to the case, which was not provided for by the Code It however referred to the practice which prevailed before the Code was passed, and held that that practice had not been abrogated by any provision in the Code, and must be considered to be in force (3) As regards, therefore, matters not specifically dealt with by the Code, the Courts are empowered to act under and according to their original powers and practice Cases may, however, arise for which no provision can be found, either in the Code or in previous enactments or practice. As the Code does not affect previously existing powers expressly given and acted upon, neither does it affect the power and duty of the Court to act according to the well known rule (governing alike the rules of substantivo and adjective law (4)) in cases where no specific enactment exists, according to justice, equity, and good conscience. Court has therefore in many cases, where the circumstances require it acted upon the assumption of the possession of an inherent power to do that justice for the administration of which it alone exists (5) So it has been held that

⁽I) So the purisdiction of the High Court to imprison for contempt, which it has inherited from the Supreme Court, and which was conferred upon that Court by the Charters which invested it with all the powers and authority of the then Court of Iving s Bench and Court of Chancery, has not been removed or affected by the Civil Procedure Code Mastin 2 Lawrence, 1 C 655 (1870) And see Legal Remembrancer v Matilal Ghose (1913) 41 C 173 (the Calcutta High Court can commit for a contempt within its or ginal jurisdiction but not for contempt of a Mofussil Criminal Court), and in re Amrita Bazar Patrika, 17 C W N 1253 (1913)

⁽²⁾ Beni Ram Bhutt i Ram Lal Dhukri, Lt C 189, 190, 191 (1886)

 ¹³ C 189, 190, 191 (1886)
 (3) Scoalso Ghanu Krishna e Pam Dus 20
 162, 165 (1897) , Rattan Bare Chabildas,

¹¹B 7, 11 (1889)
(1) Sees 21, Ben, Reg. III of 1793, s. 17
Med Reg. II of 1592. Assempt: Process, 5
Bom II C. R., O. C. J. 1 et p. 27 (2677). See
now, Act. Mil. of 1887 (Bengal Y. W. P.
iii. Vesum Civil Courts). 8, J7 (2), and
Act. III. el 1871 (Value C. Onl Courts). 8, 18,
Ihr r. Copul. Stant. 6. A. 501, 150, 189.

⁽the rule governs alike substantive and adjective law], Lalla Sheo Churn i Rain annuan Dobey, 22 C 8 at p 12 (1804), where the rule was applied in the absence of any statutory provision. These principles, however, are to be invoked only in cases for which no specific rules may cust—Rain Coomar i Chandrucanto Mookerjee, 4 I A 23, 50 (1876), Jügdeo Avann i Raji Singli, 15 C 656, 44 p 664 (1888)

⁽⁵⁾ Pinchinan Singha i Dwarka Nath Roy, 3 C L J 29 (1905) , Hukum Chand Banl v Kamalanand Singh, 3 C L J 67 (1905), Pasik Lall Dutt : Bidhu Mukhi Dasi, 10 C W N 719 721 (1900) Gurdeo Singh t Chandral ah Sungh, 5 C L J 611 (1907) Sir John Tage, CJ, said am most reluctant to decide questions of procedure on the basis of Courts having inherent rower to invent procedure for themselves, yet when I find that the Legislaturo has provided no proceduro to le followed in cases which must and do arise I am compelled to hold in such cases that such inher at power does exist in the Courts I ratherwise the work of the Courts could not be disposed of, and the Courts

althou h the Code contained no express travision on the matters hereinafter mentioned the Court has an inherent inner ex debito justifiae to consolidate suits, (1) to postpone the trial of some of several suits pending the decision of a test or coverning action (2) according to common practice to advance the hearing of the suit or accelerate the hearing of an appeal. (3) to ascertain whether or not it has before it the proper parties. (1) to add (sect 12 of the former Code not being exhaustive) parties. (5) to entertain the applica tion of a third rerson in le mide a parts to a suit (6) to allow a defence in forms paupers (7) in stay on the ground of convenience proceedings in a cross suit . (5) to inquire whether a plaintiff is, as he professes himself to be, an adult and if the finding be in the negative, to suspend proceedings, (9) to decide one question and to reserve another for further investigation the Privy Council noming out that it did not require any provision of the Code to authorize a Judge to do what in this matter was justice and for the advantage of the parts s, (10) to remand a suit in a case to which neither sect 562 nor sect 566 of the last Code applied (11) to stay the drawing up of the Court's own orders or to suspend their operation if the necessities of justice so require (12) to dismiss an application for execution when the applicant fails through his own lackes to put the Court in a position to proceed with his application (13) to proceed forthwith to decide an application for

would lave no power to I ring litigation in such cases to a clase Dlonkal Singh t Phakkar Singh 15 t at p 0 (1893) and in Rangit Singh : Ilahi Baksh 5 A 520 522 (1883) Strart CJ spoke of those who refused to know anything about proced ire bryond the letter of the Code itself

(1) Nebal Singh e Alai Ahme 1 15 W R 110(1871) Peacocky Pylnath 10C 58(1883) halicharan : Surja humar (1912) 17 C W N 526 See notes to O II rr 3 G and 7 post

(2) See notes to same and Vithu v Sara

van 5 Bom H C P A C J 30 32 (1868) (3) Dharram Singh t Kishen Singh 12 C L R 532 533 (1883) As to the principle Pon which the Court acts in allowing causes to be advanced see Pawson : Samuel 1 Cr & Ph at p 181 182 where the Lord Chan cellor sa d That it could not be assumed upon an application of this kind that a cause would occupy but a short time in hearing and that although any objections which tho defendant might personally make to the application were entitled to very little atten tion yet that it was due to the other sintors of the Court whose causes were also waiting to be heard that no one shoul I be allowed a precedence unl as upon some special reason being shown why justice could not otherwise le effectually a lministere l in it and that a atrong case would therefore be required to sustify a departure from the ordinary course

(4) Muhamma l Husain t Khusalo 10 A 223 (1898)

(5) Gayanananda t Kristo Chandra 8 C W N 404 (1901)

(6) Oriental Bank : Charriol 12 C 642

(1886) (7) Doorga Churn Dass t \itto Kally

Dossee 5 C 819 (1880) (8) Mcclieev Kasowice 4C L R 282(1879)

(9) Beni Ram Bhutt : Ram Lal Dhikri 13 C 189 191 (1886)

(10) Mauly: Muhammad v Mahammad Abdul 24 1 A 22 32 (1896)

(II) Durga Dhal v Anoran 17 A 29 (1894) Ganesh Bhikaji i Bhikaji Krishna 10 B 398 at p 400 (1880) See also notes to O VI r 17 O VII r 11 post dealing with the cases where a Court of Appeal has amended a plaint and remanded the case for re trial the view expressed by Rampini J in Dhani Ram v Bhagirath 22 C at p 714 (1895) not having been accepted

(12) Mussamut Brij Coomarce i Ramrick Das 5 C W N 781 at p 796 (1901) and see Hukum Chand Baid t Kamalanand Singh 3 C L J 67 (190a)

(13) Dhonkal Singh t Phakkar Singh 15 A 84 (1893)

execution on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application, and that act has not been done. (1) to stay, apart from the question whether the case fell within sect 545 of the former Code, the carrying out of a preliminary order pending the hearing of an appeal. (2) to stay proceedings in a lower Court pending appeal and to appoint a temporary guardian of a minor upon such stry , (3) to control the Court premises , (4) to admit an appeal from an order granting a review on a ground not referred to in sect 629 of the last Code, but which is a necessarily appealable ground where an appeal is allowed, (5) to retransfer a suit withdrawn, (6) to deal with an application to set aside an order made ex parte, and to set it uside upon a proper case being substantiated, (7) and to set aside an order obtained by fraud and made without jurisdiction, (8) to amend a power of attorney by putting in the name of the attorney which has been omitted by mistake . (9) to rehear a matter before the order passed by the Court has been perfected (10) The Court in practice allowed amendments of written statements in cases not provided for by sect 116 of that Code, as also amendments of applications for execution in cases other than those provided for by sect 245 of the same Code (11) It has been held that the Court has power to prevent an abuse of its procedure, and to stay or dismiss frivolous or veratious actions, (12) to return a plaint after it has been presented and admitted (13) or in cases not mentioned in sect 57 of the last Code (14)

Dhonkal Singh t Phakkar Singh, 15
 A 84 (1893)

⁽²⁾ Balkishen Sahu t Musst Khugno, 8

C W N 572 (1904)
(3) Punchanan Singha Dwarka Nath Rov.

³ C L J 29 (1905). (4) In re Khoda Bux Khan, 15 C 638 (1888)

⁽⁵⁾ Ramanadhan v Narayanan, 27 M 602,

^{607 (1904)} (C) Gurdeo Singh & Chandrikah Singh,

⁵ C I. J 611 (1907)

⁽⁷⁾ Richee Tulsiman & Hittihir Mehato, of W N 81 (1903) The Pull Bench adding that there was nothing in the Code to militate against this view Sudevi Devi te Sovaram Agarwallah, 10 C W.A. 306, 310 (1906), Shee Prosunne t Buldharee Lall, 13 W R 232 (1870), Ramchandra Narayan t Draupude, 20 B 281, 287 (1895)

⁽⁸⁾ Sarat Chandra Mookerje t Mahemed Hossein, 8 C W N 468 (1904)

⁽⁹⁾ Chayyemannessa t Basirar, 37 C 399

<sup>(1910)
[10)</sup> Padmabatit Pasik, 37 C 253 (1909) and it was held that the Court had power to assign a guardian of lifem to a d fendant who was of ure sind mind, then, hort so adjut, ed. Lakker Drevit Uma hant 14 C W > 256 (1909). This power it in w

given by O XXXII r 15

⁽¹¹⁾ Junat Dube v Kalo Charan, 20 A 478 (1896) This was no doubt thought to be justified by reference to s 647 of the last Code Sattappa v Jogn, 17 M 67 (1893), but that section had no application to proceedings in execution which are proceedings in suits, and s 245 of that Code hud no words corresponding to clause (c) of s 53 of

the same Code
(12) Atturmoney Dosvee : Bepin Behary
Dhir, Suit 875 of 1901, Cal II G Jan 2.1,
1906 Pryag Singh t Raja Singh, 25 C
203, at p 206 (1897) See notes in Annual
Practice to a 24, sub s 5 of the Judicature
Act, 1873, and Lee t Ashwin, I Times R
291, scandalous counter claim Sham
Kishero t Shooshibloosun, 5 C 707 (1880),
Zamindar of Tunit Bennayya, 22 M 155,
158 (1898) [scandalous memorandum of
appeal, where it was beld Court had in
herent jower to stop abuse of its records]

⁽¹³⁾ Prabhakarbhat: Vishwambar, 8 B 31, 318 (1851), the Calcutta High Court, however, has held that this was covered by a 57 of the former Code. See notes to Ord VII r 10

⁽¹¹⁾ Ladhap v Hari, I Bem I R 17d (1899)

or to restere to its files any ease which the Court has itself removed therefrom un letermined, as where a case has been struck off under a misapprehension that the parties had settled it (I) It has been held that if sect 206 of that Code did not amily, the Court exercising appellate inrisdiction had an inherent mirisdiction to I ring its decrees into accordance with its judgments,(2) and that although se t 463 of that Code applied only to cases where persons have been adjudged hundres under the statute, and was silent as to persons not so adjudged, the Court would in the interest of justice (the provisions of Chapter XXXI of the former Code not being exhaustivel, abnoint guardians ad litem of such persons, and allow them to sue by next friends (3) A Court has inherent inisdiction to amend the plant and decree.(1) and to allow a set off of costs against nurchase money in a case not provided for by sect 211 of that Cole (i) So also it was held that though there was no special provision in the Cole enabling the Court to refuse, on the ground of traud, to confirm a sale, such as there was in the case of irregularity, neither was there any provision declaring that the Court should not have such a power, that there was no necessity for any special provision, and that if a Court were nowerless to repress frond, and was bound to rathly it, "equity and good conscience," the leading principles of administration of the law, are violated, and the Court had inherent jurisdiction to refuse to confirm the sale (6) The Court has an inherent power to present an aliuse of its processes and is competent to reverse an order made in the absence of the opposite party without service of notice upon him, and which the law directs should be served (7)

What has been said applies generally. Other questions arise in regard to the original sule of the High Court, which has inherited all the jurisdiction and powers of the Supreme Court (8). It has been held that the powers of the High Court in its original Civil Jurisdiction are not limited in all cases to those given by the Code, and in many respects its procedure is peculiar to itself (9).

dealt with

notes to Ord XXVIII r 11

⁽¹⁾ Deen Dyal e Ram Coomar, 9 W R 283 (1869)

⁽²⁾ Muhammad Namuullah t Ullah, 14 A 220, 229, 237 (1892)

⁽³⁾ Nablui Nhan r. Sit., 20 A 2 (1871) Venkatramana Rambhat v Timapps Do Vappa, 16 B 132 (1891), kadala Reddi v Naris, 24 M 504 (1901), Prameuhiram Dinanath v Bai Ladkor, 23 B 655 (1899), Rasik Lall Dutt v Bidhu Mukhi Divs, 10 G W N 710 (1900) This matter is now

⁽⁴⁾ Narayanasante Nat as, 16 M 424, at p 427 (1892), per Muttusam Ayyar, J, Karım Mahomed e Rajooma, 12 B 174 (1887) [the Court has inherent power over its own records so long as these records are within its power, and it can set right any mistako in them), and this power, as regards decrees, was held to be independent of s 2 OS, 682,

and 632 of the former Code, Muhammad Naim ullah t. Ibsanullah, 14 A. 226, 229, 247 (1892) See Ann Pr., 1995, pp. 300, 361,

⁽⁵⁾ Ishri t Gopal Saran, 6 A 351 (1884) for another carns omissus in pre emption law, sen Kashi Nath + Mukhta Prasad, 6 A 370, 373 (1884), and notes to Ord XX r 14, post

⁽⁶⁾ Subbah Rau v Srinivasa Rau, 2 M 264, at pp 207-269 (1880) And see as to the inherent power in cases of fraud and mis representation Birl Mohun v Raibuna, 20 C 8, at p 9 (1892)

⁽⁷⁾ Krishna Chandra v Protap Chandra,

³ C L J 276 (1906)
(8) Atturmoney Dossee a Hurry Doss

Dutt, 7 C 74, 75 (1881)

(9) Mohabir Singh v Kartick Singh, Suit
757 of 1895 July 31, 1995, Cal H C Hiru

⁷⁵⁷ of 1896 July 31, 1905, Cal H C Hirp Juna: Narran Mulp, 12 B H C R 129, at

These instances (and there are doubtless others) are sufficient to show. firstly, that the Code is not exhaustive, there being matters with which it does not deal, and that in such cases the Court will, in the absence of any other express provision, exercise that inherent jurisdiction to do such justice between the parties as the nature of the case requires There are, however, cases in which a question may arise whether the exercise of a power or the right to make an application is derived entirely from express legislation So the right of appeal must be given by the enacted law, or equivalent authority,(1) and it has been debated whether a question of costs is one of procedure or one affecting vested rights,(2) in which case it was held that the power to award costs was derived entirely from Acts of the Legislature As pointed out, however, by Sir Barnes Peacock, CJ, the laws cannot make express provision against all inconveniences, so that their dispositions shall express all the cases that may possibly happen, and it is therefore the duty of a Judge to apply them, not only to what appears to be regulated by their express provisions, but to all the cases to which a just application of them may be made, and which appear to be comprehended either within the express sense of the law, or within the consequences that may be gathered from it (3) So as is well known, sects 11-14 (formerly 13 and 14), of the Codo do not embody the entire rule of res judicata, which as a principle exists independently of the statute enacting it, and indeed, even as regards sect 13 itself (now sect 11), it has been said that it cannot be applied too literally (4) The principle has therefore been applied to cases with which the Code does not expressly deal (5) In the undermentioned case, (6) Blur, J, said that there are cases of misfeasance grosser than anything provided for in the Code, and that he declined to believe that those are cases where a High Court must fold its hands and allow obvious injustice to be done. At the same time, it is well to bear in mind the observations of Sir John Edge, CJ, adopted by Sir John Stanley, CJ "Justice, equity, and good conscience," he said, "are captivating terms, and before a Judge applies what may appear to him at first sight to be in accordance with justice, equity, and good conscience, he must be careful to see that his views are based on sound general principles and

departed in some respects from Act VIII And see Jointee Chunder v Anundo Lall Dosa, 14 W R A O 1 (1865), where the Court held that though there was no power under the Code of 1859 to order parties not on record to pay costs, yet that the High Court had the same equitable jurisdetion in this respect as the Supreme Court had

p 116 (1875) [the Civil Procedure Code must be considered in conjunction with the rules and practice of this Court? In Gobind (bandra t Ganga Dhye, 17 B L R 333, at p 335 (1871) Phear, J, speaking of the original side practice as regards plaints, said "We in some slight measure deviate from strict observance of the practice laid down in Act VIII (of 1859) because and this Court has power to mould its procedure as it thinks fit, only keeping as near as it reasonably can to the procedure pre scribed by Act VIII' And see per Markby, J . in Cumming t Green, 4 B L R App. 75 76 (1870) dealing with the question of appear ance . But in this Court the practice, over since its establishment, appears to have

⁽¹⁾ Minakshi Naidu : Subramanya 11 M

^{26 (1897)} (2) Yonosuke t Oekerda, 21 li 779 (1897)

⁽³⁾ Hurro Chunder v Shooroodhence Debia 9 W R 402 at p 406 (1863)

⁽⁴⁾ See post, notes to s 11, post

⁵⁾ Ib

⁽⁶⁾ Durka Dihal : Anoraji, 17 A at p 31 (1891)

count to a first a the rections of the levels of a mathematical to a superficient of the superficient of the superficient of the superficient and the superficient of

It has been able by a select that the property of a top at in carreller while the Colon to a first any magnetary make rate on of the constitu to not the torrest to show and of the state on reletts encourse them in the alternations of the state to be according to write counts and (ed a rea of) here to a see a retime found to tiend with reference to charge 15 cl the lb 5 Court Charlet Act, 21 & 25 Arct c. 101 will I very last els a to do not be natter nor unlet discussion Timelane after the light for its a lit. In the cost gives the power of superits but a mean it rains to Costs. This part copies under the head of the annihate much tion of the High Courts (6) Under clause 21 of the Letters Paters, the law county and culoud conditioners to be analysis by the Hall Court in the exercise of its appellate minds tion is the law, equity and rule with the Court in which the proceedings were originally instituted usel to lave applied by the case. The priceedings therefore of a subordinate Court are revived under sect. 115 (hormorly (22) or superintended under clause 15 on the ground that such Court did not comply with the law which governs In such cases, therefore, it is necessary to ascertain firstly, what the law is which coverned the subordinate Court in the proceedings complained of, and, secondly to determine whether that law has been given effect to. It is abatous that a superior Court exercises jurisdiction under clause 15 or sect 115 (formerly 622) only when the Court below has done wrong Neither provisions andly when the Court below has done right-that is, has acted according to the law which controls it. If a subordinate Court declines jurishiction because there is no section of the Code which empowers it to not the Hall Court must determine whether it had an inherent jurisdiction or not in the matter. If it had, then the High Court interferes because the subordinate Court was bound to act according to instice, equity and good constrence. The subordinate Court has jurisduction, but declines to exercise On this the High Court intirleres and compels the subordinate Court to exercise the inherent jurisduction it has Clause 15 does not enable the

^{(1) 1}bn Hasan e Bry Bhukan, 26 1 at p 427 (1901)

⁽²⁾ In re Pleaders of High Court 8 B at 143 (1883)

⁽³⁾ Debnaryan Dutt t Chumlal Ghose 41 C 135 (1913) See Delnaram Dutt t Ramsadhan Mondal, 17 C W N 1143 (1913), Kwaja Muhammad Khan t Husam Begam, P C (1910), 32 All 410; 37 I A 152, 14 C W N 809

⁽¹⁾ Sepante

⁽⁶⁾ Hukum Chaud Baid : Kamalanand Sungh, J.C. L. J. 17 (1975), Resik Lall Dutt : Bidliu Mukin Desi, 10 C. W. N. 719, 721 (1906), Lauchauan Singh : Duarka Nath Roy, 3 C. L. 1 29 (1905)

⁽⁶⁾ See judgments in Chappan t Moddin Kutti, 22 VI 68 (1898), dealt with in the notes to a 115, post

High Court to say, "It is quite true that the lower Court had no power to make the order, but we will the power given by clause 15 is not an original but a superintending power. It resumes that the subordinate Court had jurisdiction but has wrongly declined to exercise it. If the subordinate Court had jurisdiction it is because of the inherent power and duties cast upon it by the rule which binds it to act in all cases where no specific provision exists according to equity, justice, and good conscience. It has been recently held that proceedings on applications for enhancement of rent under sect 27 of the Choix Nagpur Tenancy Act (Beng. VI of 1908) are judicial proceedings, and the Deputy Commissioners in performance of their duties under that Act are Courts subject to the appellate juri-diction of the High Court, which has jurisdiction to interfere when the Courts of Collectors bave either exceeded, or failed or refused to exercise, the jurisdiction vested in them by that Act (1)

Inherent jurisdiction—The inherent jurisdiction of the Court to which reference has been made in the last paragraph has now been expressly recognized in sect 151 of the present Code

"The laws '—In the under mentioned case,(2) Stuart, C J, speaking of this expression as occurring in the Preamble of the preceding Code, ob erred that it meant all the laws in operation at the time of the passing of the Code including the General Clauses Act of 1868, but, as has been pointed out (3) this is not correct, as the expression must be used with the words "relating to the procedure,' etc., and the General Clauses Act cannot be deemed a law "relating to the procedure of the Courts of Civil Judicature'.

"Courts of Civil Judicature"—Subject to what is hereinafter stated, the Preamble shows that the Code applies to all Courts of Civil Judicature. Its provi ions will therefore govern the procedure of all Civil Courts in British India, subject to the provisions contained in this preliminary portion of the Code and to any other special Act providing a special procedure for proceedings under it. The general power to entertain suits of a Civil nature except suits of which coenizance is barried by any chactment does not include a general power to make declarations (4). The Act applies to suits in the ordinary civil juri-diction. As to other case, see the following paragraphs.

Special jurisdiction. (a) Insolvency jurisdiction.—In obvency procedure is civil procedure. Insolvency procedure governing the Provincial Courts was formerly dealt with in the Code, but is now the subject of a reparate Act (III of 1991). The modern via populable to the Province Tewn of Cal min Malma and Le play, is contained in 11 & 12 Vit to 21 (1848). Clause 18 of the Letters Paten. 1865, provides that the In object Court in the Presidency Towns shall be feld before one of the

⁽¹⁾ Fartik Giarlia G. ... of Cra Cha. 1 (1878) discriting from Fa. 11 of Fritzian Malit. 40 (18) (18) Cra art Later 1 Thakur 1 (18 mag 1 1 18) Cra (1878) Mality (rate 1 mg 1 12) Fatraik, 35 (1911) (1911) (1911) (1911) (1911) (1911) (1911) (1911) (1911) (1911) (1912) (

Judges of the High Court (called the Commissioner in Insolvency), and the High Court and any such Judge thereof shall have and exercise within the Bengal Division of the Presidence of Fort William and the Presidency of Madras and Bombay respectively, such powers and nuthorities with respect to original and appellite jurisdiction and otherwise as are constituted by the laws relating to insolvent debtors in India. The Insolvent Court in the Presidency Towns is constituted by a separate Act of Parhament. It is a Civil Court existing for the purpose of giving reliof to persons unable to pay their debts. By the Royal Charter Act, 1861 (24 & 25 Vict. c. 104), upon the establishment of the High Courts the Sunreme Courts were abolished In 1862 and 1865 Letters Patent were granted The Insolvent Court was not then merged in the High Court, but continued in existence side by side with the High Court The appeal to the Supreme Court (Iusolvent Act, sect 73) and the power to make rules (ib sect 76), were transferred to the High Court (1) But though the Insolvent Court is a separate tribunal from the High Court it nevertheless stands in such a special relation to the High Court that a limitation or exclusion of the latter's jurisdiction may indirectly limit or evelude its own (2) Sect 5 of the Insolvent Act gives the jurisdiction, which is that of the Supreme Court Sect 18 of the Letters Patent declares the jurisdiction to be that constituted by the laws relating to Insolvent Debtors in India But under clause 44 of the Letters Patent this is subject to the Legislative powers of the Indian Government Therefore when Act V of 1872 declared that the High Court at Bembay had no jurisdiction in Sind it was held that the petition must be dismissed, though the Insolvent was a European British subject (3) But the Supreme Court's jurisdiction was twofold-local as regards the inhabitants of the cities and personal as regards European British subjects residing in any part of the territories subject to the Presidency Governments So it was held that an European British subject residing in the Bombay Presidency but outside the local limits of the High Court's jurisdiction, was entitled to netition . (4) and that though the personal jurisdiction did not now exist as regards civil actions, it had not been interfered with as regards the Insolvent Court This would appear also to have been the view of Percock CJ (5) but not of Markby, J (6) though in the latter case the actual decision was that the jurisdiction of the Insolvent Court was limited to the Bengal Division of the Presidency of Fort William that is Bengal proper the petitioner's permanent residence being in the North Western Provinces

The Insolvent Court is a Civil Court ats proceedings are civil proceedings and (as was apparent from Chapter X of the former Code now repealed) its procedure is Civil Procedure But under sect 120 nothing in this Code extends or applies to any Judge of a High Court in the exercise of

⁽¹⁾ In re Bhagwand is Hurjivan S B 511 1884)

⁽²⁾ In re James (urric 21 B 405

⁽³⁾ Ib 40o

⁽⁴⁾ Inre (corgo Blackwell J Bom H C R 461 (1572) In re James Currie, 2L B 405.

^{411 (1896)}

⁽⁵⁾ In re William Cockburn 2 Ind Jur N S 326 (1867)

⁽⁶⁾ In re Tiethins an Insolvent, 1 B L. R.,

O C 84 (1868)

jurisdiction as in Insolvent Court (1) Orders in insolvency are not orders under the Code of Civil Procedure They are orders under a special law, but they are under a special law in which different procedure is provided (2) Execution is not taken out from this Court as it has ne machinery for the purpose Formerly the Insolvent Court availed itself of the machinery of the Supreme Court as auxiliary to its own Subject to the provisions of the Charter Act and Letters Patent, the High Court exercises the same jurisdiction, took over all the work, and inherited all the powers that vested in the Supreme Court, whose jurisdiction it superseded. The Inselvency Act, however, has nothing to do with precedure in execution, which is governed by the Civil Procedure Code (3) So although the Insolvent Court determines the substance of the questions relating to the insolvent's estate, the proceedings in execution and the judgment are the High Court's Thus a judgment entered up under sect 86 of the Insolvent Act, in the name of the Official Assignee against the insolvent, is entered up in the ordinary jurisdiction of the High Court (4) The Previncial Inselvency Act does not interfere with any right of appeal to the Privy Council which may otherwise exist (5)

(b) Admiralty jurisdiction -The ides regulating Admiralty practice were framed when the Code of 1859 was in ferce Rule 54 directs that preceedings not previded for by the rules shall be regulated by the rules and practice of the High Court in suits brought in it in the exercise of its ordinary original civil jurisdiction The Code applies to proceedings on the Admiralty side of the High Court, sect 645A of the former Code was held to show that this is so (6) In Vice Admiralty cases, the effect of appearance, the mode of objecting to the jurisdiction, and the mode of questioning the validity of a pleading, (7) the admission of appeals (8) and costs (9) are matters governed by a settled practice under the Code, the Privy Council rules issued under Statute 2 & 3 Wm IV c 51, having no operation, except in case of suits in rem in which ne appearance has been entered, and of other matters to which the Code cannot be applied (10) Though the Admiralty rules de not apparently contemplate a suit in rem and in personam being combined, they do not expressly or by necessary implication forbid it (11) In a case such as an application for consolidation not provided for hy either the Rules or the Code, the practice of the Court of Admiralty in England ought to be followed, so far as such practice can be applied to this country by analogy (12)

See In re Horman Ardesir, 17 B 334,
 (1892), so s 545 did not apply, ib at
 340

^{340 (2)} In the matter of R Brown 12 (at p

C31 (1886) (3) In re Bhagwandas Hurjivan & B 511,

⁽¹⁾ Navisahu t Turner, 13 B 720 (1889) (5) Chatapart Singh Digar t Kharag

Singh Lachmiran, P (, 10 () 5 (1913)

⁽c) Blombay and Persia & & Ce r Mep

herd 12 B 237, 240, 241 (1887)

⁽⁷⁾ In re ship Fanny Skolfiell, 17 C 337 (1889)

⁽b) In re ship Clarif on 17 (66 (1889) (9) In re steamship Draclenfels 27 (* 860, 889 (1900)

⁽¹⁰⁾ In re ship Fanny Skolf eld, supra

⁽¹¹⁾ Boml as Persia 5 N to t Shepherd,

⁽¹²⁾ In re ship Falls of I tirick, 22 (511

⁽¹⁶³⁴⁾

(c) Testamentary and intestate jurisdiction -the procedure in testamentary and intestate jurisdiction whether in the High Court (1) or Proxincial Courts, is governed by the Indian Succession Act. (A. of 18(5). and the Probate and Administration Act (V of 1881), and by these Acts the proceedings in relation to the granting of probate and letters of administration ire except as in those Acts otherwise provided, to be regulated, so fir as the circumstances of the ease will admit, by this Code (2) In any case in which there is contention the proceedings shall take, as nearly as may be the form of a regular suit according to the provisions of this Code, in which the netitioner for probate or letters of administration, as the case may be is the plaintiff and the person who may have appeared to oppose the grant is the defendant (3) Although a petition before a caveat has been entered is not suit in the ordinary acceptation of the term sect 647 of the former Code. which provided that the procedure for suits should be followed so far as it could be made applicable in all proceedings other than suits and appeals, made the provisions of the Code applies ble to all miscellaneous civil proceedings. Having therefore regard to this section and sects 238 261 of the Succession Act, it has been held that Chapter XXVI of the former Codo was applicable to petitions for probate (4) If the provisions of the Code are inconsistent with those of the Probate and Administration Act those of the Code must prevail as it is the later enactment (5)

The Code only applies so far as the circumstances of the cise admit, and though generally applieshle, the circumstances peculiar to testamentary cises must be considered. So though probate proceedings are generally regulated by the Code it was held in the undermentioned case that the Court was not justified under sect. 177 of the former Code (corresponding with O AVI r 20) in deeding against a carcator because he refused to answer a question and in dispensing with proof of the execution of the will though that section would be applicable under proper circumstances (6). So also unless a will is proved in some form no grant of probate can be made merely on the consent of parties. Hence an apreciment or compromise as regards the genuineness and due evecution.

(1) Mr Stokes in his Commentary on the Succession Act expresses an opinion that having regard to the definition of D strict Judgo in s 3 of that Act (and the same definition is repeated in the Probate and Administration Act) as the judge of a principal Civil Court of original jurisdiction this section applies to proceedings of High Courts in their testamentary and intestato jurisdiction and that their proceedings also must be regulated by this Code of Umrao Chande Bindraban Chand 17 A 475 (1895) In re Monohur Mookerjee 5 C 756 (1880) Escof Hasshim Dooply t Fatima Bibee 24 C 30 (1896) Yeshwant : Shankar, 17 B 388 (1892), In re the will of Dawubar 18 B 237 (1893) By the Rules of the Calcutta High Court the procedure in all cases is to

be regulated so far as the circumstances of the case admit by the rules of procedure lad down in the Succession Act whether that Act itself applies to the law or not and in cases in which such rules are inapplicable the procedures to be regulated by this Code, Rule 63 Belchambers, R. 6.

- (2) Act \ of 1865 ≡ 238 Act \ of 1881,
- (3) Act \ of 1865 s 261 Act V of 1881,
- s 85
 (4) In re the will of Danubar 18 B 237
- (5) Esoof Hasshim Dooply r Fatima Bibee, 24 C 30 33 (1896)
- (6) Ravji Ranchod Naik t Vishin Ran chod Naik, 9 B 241 (1884)

of a will if its effect is to exclude evidence in proof of the will, is not lawful within the meaning of O XXIII r 3, of this Code (1)

(d) Matrimonial jurisdiction—In the case of matrimonial causes as regards matters of procedure, all proceedings under the Indian Divorce Act between party and party are subject to the provisions therein contained to be regulated by this Code (2). Thus any question as to the time within which a respondent may file an answer to a petition is to be decided not by the Rules of the English Divorce Court but by the provisions of the Code dealing with written statements (3). But by sect 7 of the Indian Divorce Act, which does not apply to questions of procedure, (4) the Court is enabled to follow the principal rules of the English Divorce Act in all matters which are not expressly dealt with either in the Act itself or in the Code. Thus the Court has adopted Rule 158 of the English Rules and ordered a husband to give security for his wife's costs (5). In a recent case in the Bombay High Court where a Parst had married a Christian in London and had remained there it was held that the jurisdiction was limited to Christian subjects residing within the Presidency (6)

Special Courts (a) Small Cause Courts—See notes to sects 7 and 8, post These are Courts of inferior jurisdiction and when in a Presidency Town are subject to the order and control of the High Court (7)

(b) Mamlatdars' Court —The object of the Mamlatdars Act (Bom, Act III of 1876) was to consolidate and amend the law relating to the powers and procedure of Mamlatdars' Courts — The purpose of the Act was temporary only, and chiefly to provide for the cultivation of the land and to prevent breaches of the peace until the Civil Court should determine the rights of the disputants—and such being its purpose the procedure provided is of a very summary character (8) These Courts are Civil Courts and subject to the revisional jurisdiction of the High Court (9) The Act however provides a

⁽¹⁾ Monmohini Gulia i Banga Chandra Das 31 C 357 (1903)

⁽²⁾ Act IV of 1869, s 45

⁽³⁾ Abbott v Abbott 4 B L L (O C) 51 (1869)

⁽⁴⁾ Abbottv Abbott sugra Kingt King CB 416 419 (1882) the principles and rules referred to are rules of quasi substantive ruler than of mere adjective Lw. A + B, 22 B 612 (1888)

⁽b) Mayhow r Mayh w 19 B 293 (1894), f llowed in Ceorgucof das r Ce rgucof ulus 29 C (19 (1902) and as te costs of appeal, Lowled Lowle 4 C 200 260 -41 (1578)

⁽⁶⁾ Nusservanjec Pestonj e trl sr Wadis r Henorm Nusservanj c 331 125 (1913) r H mton r H mton 10 18 122 (1856) (jimsh tion of Calutta High C rt when l frilant r s I mt Inglint) S all High r 1 Batl 17 (W N edzi (1913)

⁽⁷⁾ In re Ji , war 1 or, 5 C la 1 170

⁽¹⁸⁷⁹⁾

⁽⁸⁾ Ganpatrum Johnna Ranchi od Harib has 17 B 645 (1892)

⁽⁹⁾ hasam Sabeb v Maruti 13 B 552 (1888) and as to the jurisdiction of the High Court over the Mamlatdars Courts as sub ord nate Courts and applications under s 115 rost the cases therein cited and case in last note and Natickha t Ablil All: 18 B 449, Dattatraya : Vaman 21 B 88 (1895) Sayad Cadalla t Sayad Ha t Maya, 21 B 238 (1899) [Minor may sie] Climaya t Can gava 21 B 775 (1890) [dispossess on of third person] Ningappa v Alexel pa 21 B 3)7 (1900)[11]. Balvartrao : Sprott 23 B 761 (1899) [jurns 1 ction of Mambatdar over off cers of Government] S m Copal Bl egale t Vinavak Blikamlint, 2, B 395 (1900) [natural water course-obstrutt n-injune I on I

special procedure and there is no indication in it of any intention that the rules of this Code should apply to cases for which the special procedure makes no provision. The provisions of the Code therefore do not apply to such Courts in Rombay (1)

(c) Revenue Court -The term is defined in sect 5 clause (2), nost, which see There is a distinction between Rent Courts and Civil Courts as referred to m the Rent Acts. Civil Courts being Courts exercising all the powers of Civil Courts as distinguished from the Rent Courts, which only exercise powers over suits of a lumited class But a Rent Court is a Civil Court in the sense that it decides civil questions between persons seeking their civil rights (2) It has therefore been a question in certain cases whether Rent Courts being Civil Courts in the latter sense their procedure is, in the absence of any special provision, governed by the Code. The answer to this question is to be determined not so much by an inquiry into the ques tion whether they are Civil Courts, but whether, assuming they are such. the provisions of the Acts constituting those Courts do not exclude the provisions of the Code, in other words are those Acts complete Codes in them selves or are they governed in matters upon which they are silent by the Code? This question, which has arisen with respect to Act XII of 1881 and Act X of 18.9 is dealt with no t

In the majority of cases however, no such question can arise as most of the Tenancy Acts make special provision as regards the applicability of the Code to proceedings in Revenue Courts. In the case of Act XVIII of 1881 [Land Revenue Central Provinces) the Code does not of itself apply, but the Chief Commissioner may, with the previous sanction of the Governor General in Council make rules consistent with the Act for regulating the procedure of Revenue Officers in cases for which a procedure is not prescribed by the Act and may by any such rule direct that any provisions of the Code shall apply, with or without modification to all or any classes of cases before Revenue Officers (3)

The Panjab Tenancy Act (AVI of 1887) provides that the Local Covernment may, with the previous sanction of the Governor General make rules consistent with the Act for regulating the procedure of Revenue Courts in matters under the Act for which a procedure is not prescribed thereby and may by any such rule direct that any provisions of the Code shall apply with or without modification to all or any classes of cases before those Courts Until rules are made and subject to those rules when made and to the provisions of the Act, the Code shall so far as is apphicible apply to all proceedings in Revenue Courts whether before or after decree (4)

The Lower Bengal Rent Act of 1869 now repealed enacted that save as ofference and the save as ofference and the save as ofference and the save as the

⁽¹⁾ kasam Saheb t Maruti 13 B 532

⁽²⁾ Nilmoni Sinch Deo t Taranath Mu kerjee 9 C 295 300 301 (1887), Ram Lochan t Beni I rosad 13 C W N 791 (1908)

⁽³⁾ Act \\111 of 1881 [repea'ed in part and amended by Acts \VI of 1889, \111 of 1891, and \II. of 1893) s. 19

⁽⁴⁾ Act XVI. of 1887 [amended by Reg \II of 1901] s 88

⁽⁵⁾ Act VIIL of 1869 (B C.) s 34

Tenancy Act (VIII of 1885), the High Court may from time to time, with the approval of the Governor General in Council, make rules consistent with that Act, declaring that any portions of the Code shall not apply to suits between landlord and tenant as such or to any specified classes of such suits, or shall apply to them subject to modifications specified in the rules. Subject to any rules so made, and subject also to the other provisions of the Bengal Tenancy Act, this Code shall apply to all such suits (1). Sects 121–127, 129, 305, 320–326 of the former Code and the corresponding sections of the present Code do not apply to suits for the recovery of rent, and special rules of procedure in respect of certain matters are prescribed for such suits (2). No rules have been made by the High Court declaring any portions of the Code mapplicable to suits between landlord and tenant.

The N W P Rent Act (XII of 1881) appears to contain complete rules of procedure upon the trial of rent suits under it, and it was the opinion of Stuart, C J, in the under mentioned case (3) that it was intended to exclude the provisions of the Code But it was beld by the Full Bench of the Alla habid High Court in that ease, that the Courts of Revenue in the North Western Provinces, in those matters of procedure upon which the Rent Act of these provinces is silent, are governed by the Code, and that therefore the procedure furnished by sects 43 and 373 of the former Cods was applicable to suits tried under the N W P Rent Act, 1881 (4) The grounds of that decision which is in fact, based upon the decision of the Privy Council in Nilmoni Singh Dec v Taranath Mukericc. (5) is that Revenue Courts are Courts of Civil Judicature within the meaning of the Code, and that unless exempted (which thoy were not) by the Code itself they would in all matters, except those in which special procedure is provided in the Rent Act, be governed by the law of the Civil Code The Full Bench decision does not apply where the Act provides a machinery of its own independent of the Civil Procedure Code, as in the case of references of suits to arbitration (6) And though the procedure prescribed by the Code, such as that prescribed by sect 285, of the former and sect 63 of the present Codo may be applicable as between Courts of Revenue of different grades, it cannot be applied where the conflict is between a Court of Revenue and a Civil Court (7)

A similar question arose as regards the Bengal Rent Act, X of 1859, which is still in force in certain places. Formerly it was held, following the Full Bench decision of the Allahabad High Court already referred to, that the

⁽¹⁾ Act VIII of ISS5 s 143

^{(2) 15,} s 148 see also ss 14f 117, 145-

⁽³⁾ Madho Prakash Sugh r Murh Man ohar, 5 \ 106 412 (1883) for amending Acts set let IN of 1887 VI of 1888 s 10 (2)

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^{(7) 9} U 205 (1852) | f llowed in Malaraja of I bartpur r Kacheru D V 710 (1857) [Civil I to educe C le as 37, 432] | Laglular Dayal r Banke Lol -- A 187, 185 (1800)

[[]Gral Procedure Code, ss. 285, 295] In Ondar Singh t Blup Singh, 10 A 496, 498 (1891) the Courtsaid We find in Revenue Gourts that when the Gral Procedure Cole is to be applied it is expressly so provide so that as a general rule tity are outs de the

scope of the Code of Civil Procedure
(6) Lahim un Nisa : Ajudha Lraead, f

^{1 1&}quot;0 (1981)
(7) Raghular Dayal t Bink Lal _2 A
18_ (1999)

Revenue Courts in those matters of procedure, upon which the Act is silent. are governed by the Code, and that in consequence sect 43 of the former Code applied to a suit instituted under the Rent Act (1) The decision of the Priva Council in a preceding case (2) lends support to this view in so far as it was there held that though there was nothing in the Act which provided for execution beyond the Collectors' purisdiction, there was nothing in it to forbid the conclusion that such executions were left to the operations of Act XXXIII of 1852 (an Act to facilitate the enforcement of judgments in places beyond the purisdiction of the Courts pronouncing the same) or the corresponding portion of Act VIII of 1859 (Civil Procedure Code) When a decree for rent made by a Collector under sect 23. Act X of 1859, is transferred for execution to a Civil Court, no doubt the latter assuming the transfer to have been rabilly made will act under the procedure which governs it The Priva Council. however, went further and held that the Collector might make the transfer himself under the provisions of the Code which were applicable, there being nothing in the Rent Act to exclude them. It has however, subsequently been held, upon the authority of the reasoning in the Full Bench decision in Nagendro Nath Mullick t Mathura Mohun Parlu (3) that Act X of 18.99 is a Code complete in itself, and unaffected by the general laws of limitation and that therefore the provisions of this Code do not apply to cases under Act \ of 1859 (4) These eases proceed in substance upon certain of the grounds taken in the dissentient judgment in the Full Bench of the Allahabad High Court, viz that apart from the question whether Revenue Courts are Civil Courts, and Civil Courts within the meaning of the Code, the enactment of a special procedure in a special Act excluded the supposition that it was intended to import into that Act the provisions of the Code upon matters not dealt with hy that Act If it had been so intended it would have been so enacted, as was done in the subsequent Act of 1869 When however an appeal goes from a Collector to a higher Court, the decree which is given on appeal is the decree of a Civil Court, and a second appeal lies to the High Court, according to the same procedure which obtains in respect of second appeals in suits tried in the ordinary Civil Courts (5) In other words, the removal of the matter to a Civil Court brings it under the provisions regulating the procedure of that Court

In the case of a sale held under sect 110 Act X of 1859 it was held that sect 310A, of the former (corresponding to O AXI r 89, of the present) Code. did not apply, as the Code was applicable up to the sale and not after it (6)

The Code does not apply to cases under the Chota Nagpore Landlord and Tenant Procedure Act (7)

⁽I) Adhirani Narain v Raghu Mohapatro, 12 C 50 (1885)

⁽²⁾ Nilmoni Singh Deo t Taranath Mu kerjee, 9 C 295 (1882), Hare Krishna v Bishun Chandra 35 C 799 (1908)

^{(3) 18} C 368 (1891)

⁽⁴⁾ Mokunda Bullav har t Bhogaban Chunder Das, 21 C 514 (1894) Radha Madhub Santra e Lukhi Narain Roy Chow

dhry, 21 C 428 (1893) See Chartan r Lunja, 15 C W N 863 (1911)

⁽⁵⁾ Sadai Naik v Serai Naik 28 C 532.

^{537 (1901)}

⁽⁶⁾ Harish Chandra Ghose r Ananta Charan Patra, 2 C W N 127 (1897)

⁽⁷⁾ Khedu Mahto r Budhun Mahto, 27 C 508, 514 (1900) Act I of 1879, B C, 18 modified by I of 1903 and Bengal Acts IV

Apparently the Code is applicable in eases under the Wadras Rent-Recovery Act (1) But though seet 43 (O II r 2, of present Code) precludes a landlord from sung for ront not included in a previous suit, this does not preclude him from adopting any other remedy the law gives him to recover his rent, as for instance by distraint under the Rent Recovery Act (2)

The Code saves any law by a Governor or Lieutenant Governor prescribing a special procedure for suits between land holders and their tenants or agents, and gives power to the Local Government to modify the Code in its application

to Revenue Courts See sects 4 and 5, post

Judicial discretion -The Code in many of its sections leaves matters dealt with thereby to the discretion of the Court "Discretion when applied to a Court of Law means discretion guided by law It must be governed by rule, and not by humour It must not be arbitrary, vague, and fanciful, but legal and regular' (3) In some sections the word "may ' occurs Great misconception is crused by saying that in some cases "may means "must" It never can mean 'must" so long as the English language retains its mean ing. but it gives a power, and then it may be a question in what cases, where n Judge has a power given him by the word "may ' it becomes his duty to overciso it (4)

Construction of act of Court - The assumption on which all rules of law are founded is that the constituted tribinals are furly competent to carry them out (5) According to the well known rule the Court may presume that judicial and official acts have been regularly performed (6) is to presume that a lower Court has done its duty neglect of duty cannot be assumed at the mere suggestion of an appellant (7) When an act of a Court can be so construed as to have an operation consistently with law, it would be contrary to ordinary rules of construction to attach to it another signification which would altogether destroy its effect (8) Courts, however, should take care that their orders are framed strictly in accordance with the provisions of the law (9) The presumption of regularity is a rebuttable one Irregularity may be shown, and a mistaken petition on the part of a pleader is no ground for the Courts passing an illegal order (10)

(10) Munt Ackjoo e Lall in Pamchunder, 23 W P 400 401 (1877)

of 1897, and V of 1903 and VI of 1908 And see Kartik Chandra Ogha t Gora Chand Mahto, 40 C 518(1913) (appellate jurisdiction of High Court) For case where this Act was extended to a property before the final decree, see Lakshmi Bibi Kujrani a Alal Bihary Aldar, 10 C 784 (1913)

⁽¹⁾ Act VIII of 1865 rejealed in part of Act VII of 1870 . XII of 1873 amended by Act VI of 1888, and Mulras Acts II of 1871, and III of 1890, and sec Act I of 1906

⁽²⁾ Pajah Eswara Dies r Venkatan ver 21 1 230 (1897)

⁽³⁾ Ler Lord Mansfield in Wilken Case 4 Burroughs Rep 2'39 cited in Harluns Salar e Illano Perdal Single 5 (2") (1979) 20", and see as to the manner in

which judicial discretion should be used, Observations of Jardine J, in R : Chagan Dayaram 14 B 331 (1890) 344, 352

⁽⁴⁾ Nichols & Baker 44 Ch D 202 See cases cited in Hukin Chand & P C 337 340

⁽⁵⁾ Gopcenath Singh t Anundmoyco Debia, 8 W R 107, 109 (1867)

⁽⁶⁾ Fudence Act, s 114, ill (c) See notes to this section in Author's Evidence Act,

⁽⁷⁾ Rush Beharce : Nolaye Poddar, Il

W R 485 (1869) (8) Saroda Persand t Infohmeeput 10 B

I R 214 at p 229 (1872) (9) Doucett i Wise I W R 322 (IS64)

PRELIMINARY

(1) This Act may be cited as the Code of Civil Pio- is Short title, commence cedure, 1908 ment and extent (2) It shall come into force on the first

day of January, 1909

(3) This section and sections 157 to 155 extend to the whole of British India the rest of the Code extends to the whole of British India except the Scheduled Districts

Local Extent (a) British India -These words evolude the territories of Native Princes and States in alliance with His Majesty, the relation between such Princes and His Matesty being a political relation and the territories of such Princes and States forming no part of the Butish Dominions although in a political point of view such Princes and States may be subordinate to the British Crown as the Paramount Power (1) They were formerly declared (2) to mean the territories for the time being vested in Hor Mulesty by the Statute 21 & 22 Vict c 106 (1858), other than the settlement of Prince of Wales' Island (Penang) Singapore and Malacea, and the first section of the statute there referred to vested in Her Majesty all territories then in the possession or under the Governments of the East India Company. and all territories which night become vested in Her Majesty by virtuo of the rights transferred to Her Majesty from the East India Company Apparently any new province acquired would become on its acquisition, part of British India (3), Cession of territory confers local jurisdiction (4). The term includes territories eeded "in full sovereignty" or 'in perpetuity there being no difference between the two (5) Prior to the General Clauses Act 1897, it was held not to include cases where as in the case of the British cantonment of Secunderabad, there has been no actual cession of territory . (6) nor in the case of Raj Kote, where the agreement between Government and the Native State, although in different respects dealing with the use of the land and con ferring certain powers and jurisdictions on the officers of Government, did not relate to the sovereignty of the land . (7) nor as in the ease of the Berars, where

⁽¹⁾ Bikrama Singh t Bir Singh 1889 P R No 191 Cited in Hukm Chand 3

⁽²⁾ S 2, Act I of 1868 (General Clauses) (3) Ouseley : Plowden, Bouln 161, 162

⁽⁴⁾ Sayad Muhammad Yusuf ud din v R.

² C W A 1, 9 (1897) in which case there

was held to have been no cession of territory

⁽⁵⁾ Triccam Parachand v Bombay Baroda Railway Co . 9 B 244, 247, 248 (1885) (6) Hossain Ali Mirza v Abid Mirza, 21 C 177 (1693)

⁽⁷⁾ R r Abdul Rahman, 10 B 186 (1885)

land was held under a sort of mortgage as a security for the fulfilment of certain engagements, which was held to be a tenure distinguishable from that on which the Crown held land assigned to it in perpetuity for the purpose of establishing a British station (1) The definition of the words given in the present General Clauses Act (X of 1897) is wider than that given in the former Act of 1868 The expression "British India" is now defined to mean "all territories and places within Her Majesty's dominions which are for the time being governed by Her Wajesty through the Governor General of India or through any Governor or other officer subordinate to the Governor General of Iudia" The effect of this altered definition is to widen the extent of what will be recognized as British India for the purposes of Indian legislation and to avoid the difficulties which arose from its restriction to the territories vested in Her Majesty by the Statute 21 & 22 Vict c 106 The question of the extent of British India will now, under the Codo as well as under most other Acts, depend on the fact of the place or territory being governed by His Majesty without regard to the manner in which this government was acquired, and the result being the samo whether it was acquired by cossion or otherwise, and permanently or temporarily (2) From the first and under both definitions, the words "British India" have had a wider meaning than is understood by the term when used in its merely geographical sense, as appears from the Scheduled Districts Acts, 1874, and the Laws Local Extent Act 1874, the Schedules annexed to which mention amongst other places the Laccadive and Nicobar Islands and Aden as parts of British India (3) So also British Burma is a part of British India (4)

(b) Scheduled Districts-The term is defined in Act XIV of 1874 to mean the territories mentioned in the first schedule thereto annexed and also any other territory to which the Secretary of State for India, hy resolution in Council, may declare the provisions of 33 Vict c 43 s 1, to be applicable The conclusion that a district is a non regulation district does not necessarily lead to the inference that the general Acts of Legislature are there inoperative If the Legislature has made the law in terms large enough to extend to the whole of the British territories in India it must have full effect. It must be seen in each case in what terms the law is expressed especially in respect of its territorial operation (5)

In this Act, unless there is anything repugnant in the 2] subject or context,-Definitions

(1) " Code" includes rules

(2) "decree" means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the

⁽I) Triccam t Bombay Baroda Railway (4) Aga Mahomed Hamadanı v Cohen 13 Co, supra at p 249 C 221 223 (1886)

⁽²⁾ See Hukm Chand 3

⁽⁵⁾ Dick : Heseltine, I N W P 280 284 (3) See Triccam v Bombay Baroda Rul (1869)

any Co . supra at 1 219

malters in controversy in the suit and may be either preliminary or final. It shall be deemed to include the rejection of a plant and the determination of any question within section 47 or section 133, but shall not include—

(a) any adjudication from which an appeal lies as an appeal from an order, or

(b) any order of dismissal for default.

Explanation — 1 decree is preliminary when further proceedings have to be talen before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit It may be partly preliminary and partly final (3) "decree holder" means any person in whose favour a

(3) "decree holder" means any person in whose favour a decree has been passed or an order capable of execution has been

made:

(4) "district ' means the local limits of the jurisdiction of a principal Civil Court of original jurisdiction (hereinifter called a "District Court"), and melades the local limits of the ordinary original civil inrisdiction of a High Court

(5) "foreign Court" means a Court situate beyond the limits of British India which has no authority in British India and is not established or continued by the Governor General in

Conneil

(6) "foreign judgment' means the judgment of a foreign

(7) "Government Pleader ' includes any officer appointed by the Local Government to perform all or any of the functions expressly imposed by this Code on the Government Pleader and also any pleader acting under the directions of the Government Pleader

(8) "Judge" means the presiding officer of a Cuil Court

(9) "judgment" means the statement given by the Judge of the grounds of a decree or order

(10) "Indement debtor" means any person against whom a decree has been passed or an order capable of execution has been made

(11) "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sucs or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sited

(12) "mesne profits" of property means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but shall not include profits due to improvements made by the person in wrongful possession:

(13) "moveable property" uncludes growing crops:

(14) "order" means the formal expression of any decision of a Civil Court which is not a decice

(15) "pleader" means any person entitled to appear and plead for another in Court, and includes an advocate, a valid and an attorney of a High Court

(16) "prescribed" means prescribed by rules

(17) "public officer" means a person falling under any of the following descriptions (namely) —

(a) every Judge,

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(b) every member of the Indian Civil Scivice:

(c) every commissioned or gazetted officer in the military or naval forces of His Majesty, including His Majesty's Indian Marine Service, while serving under the Government,

(d) every officer of a Court of Justice whose duty it is, as such officer, to investigate of report on any matter of law or fact, or to make, authenticate of keep any document, or to take charge or dispose of any property, or to execute any judicial process, or to administer any oath, or to interpret, or to preserve order, in the Court, and every person especially authorized by a Court of Justice to perform any of such duties,

(e) every person who holds any office by virtue of which he is empowered to place or keep any person in

confinement.

(f) every officer of the Government whose duty it is, as such officer, to prevent offences, to give information of offences, to bring offenders to justice, or to protect

the public health, safety or convenience,

(g) every officer whose duty it is, as such officer, to take, ieceive, keep or expend any property on behalf of the Government, or to make any survey, assessment or contract on behalf of the Government, or to excente any revenue-process, or to investigate, or to report on, any matter affecting the pecumiary interests of the Government, or to make, authenticate or keep any document relating to the pecumiary interests of the Government, or to prevent the infraction of any law for the protection of the pecumiary interests of the Government; and

(h) every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty

(18) "rules" means rules and forms contained in the First

Schedule or made under section 1' or section 1'5.

(19) "share in a corporation" shall be deemed to include stock, debenture stock, debentures or bonds. and (20) "signed," save in the case of a radament or decree, includes

stamped.

"Code"-See as to Rules seets 121-131

"Decree "-The term was first defined in the Code of 1877 to mean "the formal order of the Court in which the result of the decision of the suit or other judicial proceeding is embodied. This definition which was found defective received, after several modifications, the form in which it was enacted in 1882 The present Code omits the words "upon any right claimed or defence set up in a Civil Court. substituting the words " which conclusively determines the rights," etc. As regards cases decided under the law prior to 1882 it was observed that the law has been altered by the introduction of a more comurchensive definition of the term decree (1) and that a narrow construction should not be placed upon the language of sect 2(2) But as has been held by the Privy Council the question whether an admidication is an order or decree is to be tested not by general principles but by the expressions of the Code and those words are to be construed in their plain and obvious sense (3) Thus it has recently been held that an order assessing no value, but only reproducing the statements of the decree holder and judgment debtor.(4) and an order assessing the value according to the statement of the decree holder alone, after rejecting the judgment debtor's application for time to prove a ligher value. are not decrees, since they do not involve a judicial adjudication of value (5) There has been a coasiderable conflict of decisions on the former section notable as to the question as to the meaning of the term' right emplayed in the section, as will be seen from the following notes The chief importance of the definition will be found in the question whether in any particular case an appeal lies A decree though not according to law if not appealed against is binding (b) between the parties whether principal or pro forms (7) and their representatives who, after decree cannot open up the original proceedings (8). It creates an obligation superseding that existing before it (9) which is enforceable so long

⁽¹⁾ Madem Hossein t Emdad Hossein 29 C at p 769 (1901) (2) Radha Nath Singh t Chandi Charan

Singh, 30 C at p 663 (1903)
(3) Bhup Indar c Bijai Bahadur 23 1 at

pp 156, 157 (1900)

⁽⁴⁾ Sakhichand t Kulanand 14 C L J 607 (1911)

⁽⁵⁾ Deoki r Bansi 14 C L J 35 (1911) ref rring to Nutren Ira r Harrukchand 12 C W N 542 (1907)

⁽⁶⁾ Sri Raja Papamma e Sri Vira Pratapa, 13 M 249 at p 253 (1896), s c 23 I A 35

⁽⁷⁾ Trilochun Chuckerbutty t Govind Chunder Poy, I Shome, 214 (1576)

⁽⁵⁾ I am Bhunjun r Munder Kocr, 23 W R 127 (1874)

⁽⁹⁾ Navlu r Raghu 8 B 303, 305 (1894) [and it is not subject to modification like a contract], Tatva Vithoji r Bapu Balaje, 7 B 330 (1883)

therefore appealable as a decree (1) These decisions have now been recognised and the section expressly includes a preliminary decree

An order, however, passed in a suit for partition, subsequently to the preliminary decree, appointing a commission to make the partition, is not an order in execution, and, therefore, is not appealable under sect 244 (now sect 47) of the Code. It is an interlocutory order pending the suit which has not been finally decided, and the appellant may take objection to it in an appeal against the final decree (2).

An order directing accounts (see O XX r 16) was not appealable by the Codes of 1859 or 1877 It was only when the amending Act of 1879 was passed declaring that such an order came within the definition of a decree that it became appealable, (3) and it is still within the definition as a pre liminary decree The definition of "decree" implies that an order directing accounts is separable from the rest of the decree adjudicating on the rights claimed or the defences set up in the suit, and therefore though a provisional decree, is appealable (4) An order determining that a certain person is a partner, settling the shares of each of the partners in a business and directing an account to be taken, is a decree and is appealable, and was held to be so appealable in a preliminary stage or when appealing from the final decree (5) But where in a decree to take accounts an order was made which was a mere matter of procedure and not a question as to the rights of the parties, such as an order refusing to require the defendants to give inspection of certain books, the order was held not to be a decree or an order on a question relating to the execution of a decree (6) Morcover, the words "directing an account to be taken" were held to be used in a precise and technical sense (7) Accordingly an order declaring that the defendants were liable to pay such sum as the Government Surveyor might certify was held not to be a decree as it neither cams within these words nor was an adjudication which decided the suit (8) The substitution

⁽¹⁾ Dulim Golab Koor (Radka Dulari Koor, 19 C 463, F B (1892), followed Boloram Doy (Ram Chundra Doy, 23 C 279 (1895) This latter case is overrided on the point whether the preliminary order can be questioned for the first time in the appeal from the final decree by Khadem Hossein i Emdad Hossein, 29 C 758 (1901), which decides th question in the affirmative But see nows 87

⁽²⁾ Jogodishury Delea e Karlash Chundra Lahry, 24 C 725 (1897), it is an order made in further proceedings in the suit before final decree, and not an order in execution of decree ib, at p 739

⁽³⁾ Biswa Nath Chakir Bun Kanta Dutti 23 C 406, 409 (1896) As to the carlier law, see Sreenath Roy r Radhanath Mookerjee 9 C 773 (1882), Rustomji r Kessowji S B 161 (1878) An omission to appeal against the preliminary order was held not to debar

the party from questioning it on appeal from the final decree. Khadem Hossein: E mdad Hossein, 29 C 758, s. c., 5 C W N 617 (1901) But as to appeal see now sect 97 As to the nature of a decree for account see Bhup Indar v Bijai Buhadur 23 A at p 156 (1900)

⁽⁴⁾ Krishnasami Ayyangar i Rajagapala Ayyangar, 18 M 73 87 (1893)

⁽⁶⁾ Bawa Nath Chakı v Benı Kanfa Dutta supra approved in Khadem Hossein v Emdad Hossein, 29 C 758, supra, over ruling Boloram Dey v Ram Chundra Dey, 23 C 279 (1885) Sec Rahimbhoy Habib bhoy i Turner, 18 I A 5 (1890); s c, 16 B 155, but see now seet 97

⁽⁶⁾ Rustomii v Kessowii 8 B 287 (1884)

⁽⁷⁾ Covern Luddha : Morarn Punja, 9 B 183, 195 (1885)

⁽⁸⁾ Ib

of the words "concluently determines" for "decides aloes not appear to effect any change in the law as above stated

'The rights of the parties—The last Code used the words "right claimed or defence set up" There can, we think, be little doubt that what the Legislature originally meant by these words to refer to, were rights of a substantive as distinguished from rights of a merely process at character. In other words, that a decree was, so far as the right elaimed, an adjudication on the merits (that is, the right to recover land, money, etc., claimed in the suit), and so far as the defence set up, an adjudication on the defence which might be grounded either on the merits, using that term in its generally accepted sense, or on some point of law affecting the merits, such as limitation. The contrary construction (1) namely, that the right might be one merely of procedure appeared to be negatived both by the general language of the section and by the circumstance that if it were correct there could not be any occasion for specifically making an order rejecting a plaint, a decree, as such an order directly myslices an adjudication against the planning right to proceed with the suit as brought by him (2).

The view here contended for his been expressly adopted or nipplied in several cases. In nn early case Wilson and Yield, JI, were disposed to hold that a decree must be an expression of opinion agon the rights of the parties, and therefore the dismissal of a sunt on a ground wholly apart from the merits of the case, such as a dismissal under sect of (now O IX r 2) for non service of summons, was not a decree (3) It has been held that a decision under sect 5 of the Court Yees Act is not a decree, and that the right obtained or defence act up must be a right or defence act up in the suit or oppeal, and not a right to have the suit or appeal herad on a particular stamp or the plaint or the memorandum of appeal rejected on account of the stamp (1). Similarly the Allahabad High Court, (5) and was formerly held by the Clientia High Court, (6) that the order of dismissal of an appeal under sect 556 (now O XLI r 17) is not a decree— It was observed by the Court in the first of the Cilentia cases eited that such an order was not "the formed expression of an adjudication upon a right elemed," that through the

⁽¹⁾ Contended for in Hukm Chand, 15,

⁽²⁾ The explanation 1b, 16 that this may have been expressly provided for ex cautela does not seem to us to have much force

⁽³⁾ Luckhy Churn Chowdhry v Budur runssa, 9 C 627 (1882), but see comment on this case in Mal ara, Adhiraj Mansingii v Mehta Harihariam Nashariam 10 B at p 308 (1894), referred to post Previously it had been held that a decision directing a penulty to be enforced under the Stamp Act was not appealable as a decree, as it could not be said to affect the ments of the case or juris diction of the Court Sonaka Chowdhrain t Bluodungoy Shaha, 5 C 311 (1873)

⁽⁴⁾ Balkaran Rai 1 Gobind Nath Tewari, 12 A 129, 166 I B (1890) but a distinction must be drawn according to the decisions of the other High Courts between a question 'relating to valuation and a question as to the clause under which valuation is to be made In the latter case there is an appeal Dada's Naresh 23 B 486 (1898)

⁽⁵⁾ Mukhi t Fakur, 3 A 382 (1880), Mansab Ali t Nihal Chand, 15 A 359 (1893)

⁽⁶⁾ Jagarnath Singh τ Budhan 23 C 115 (1895), Anwar Ali ν Jaffir Ali, ib, 827, dist in Lal Narain Singh ν Mahomed Rafuiddin, 28 C 81 (1990) (dismissal for default in execution)

default the appellant had rather lost his right to obtain the adjudication of his right claimed in the proceedings or suit; that the mere right to be heard did not come within the definition of a decree It was, however, held by one of the Judges of the Bombay High Court,(1) and more recently by a Full Bench of the Calcutta High Court (2) (Prinsep, J, dissenting), that such an order is a decree on the ground as stated by the Bombay High Court that it is an adjudication adverse to the appellant's right to have his appeal heard and it decides the appeal. In the list case it was argued with, as it is submitted, considerable force that the word "right" means a substantial right arising out of the merits of the case, that the mataposition of the words " right claimed " and "defence set up" showed that the right asserted or sought to be enforced meant the right asserted or sought to be enforced in the suit or appeal. It must have some connection with the relief sought, and therefore with the merits of the case, and does not connote the processual right of a party to be heard, which is ancillary to the enforcement of the substantive right claimed in the suit or appeal itself. It was further argued that the words "defence set up" cannot mean the mere upposition by a defendant or respondent to his adversary being heard, but must mean an answer to the relief sought. There must be an adjudicition of right, and in the case of a dismissal for default the Court declines to adjudicate and does not enter into the merits of the case. These contentions were overruled by the majority of the Court (3) Previously, moreover, it had been beld by the Calcutta (4) the Allababad (5) and Madras (6) High Courts, that the analogous case of the dismissal of a suit under sect 102 (now O IX 1 8) was not a decree On the other band, it has been held that an order under sect 381 (now O XXV r 2), dismissing a suit for failure to furnish security for costs, is a decree notwithstanding that the right adjudicated upon in the order under sect 381 is the plaintiff's right to sue and not the right which he claims in the suit (7) On the other hand, an order rejecting an appeal under sect 549 (now O XLF r 10) for failure to furnish security has been held not to be a decree. (8) the Court observing that the adjudication must be on a right

⁽¹⁾ Ramchandra Pandurang Nash v Madhar Purushottam Nask 16 B 23 (1891) (2) Radhar Narth Singh v Chandt Churn Singh, 7 C W N, 486 (1903) where the case is better reported than in 30 C 660 and cases there cited, referred to in Gosto Behary Sirdar t. Hari Mohan Adrik, 8 C W N 313 (1903), in which it was held that an order under s 102 of the former Code dismissing a suit was as much a decree as an order under any other section deciding a suit.

⁽³⁾ The grounds given by the referring judgment were that the order was the capression of an adjudication which was formal, and which decided the appeal. The question, however, remains was it a formal decisive adjudication of a "right" in the sinse m which that word is used in the section? See pp. 488, 489, 7 C. W. N.

⁽⁴⁾ Amrito Lal Mukherjee t Ram Chandra Roj, 29 C 80 (1901), it may, however, be contended that, as this case appears to have proceeded upon the two cases overriled by the last mentioned Full Bench case, it also is impliedly dissented from But sea also Chand Kour t Partab Singh, 16 C. 98, in which the Privy Council held that the dissimisal of a suit in terms of s 102 of the former Code did not operate as res judicata

⁽⁵⁾ Mansab Ali v Nahal Chand, 15 A 359 (1893)

⁽⁶⁾ Gilkinson v Subramania Ayyar, 22 M 221 (1898). Somayya v Subbamina, 26 M 599, at p 601 (1904)

⁽⁷⁾ Williams : Brown, 8 A 108 (1886), but see next case

⁽⁸⁾ Lekha : Bhauna, 18 A 101 (1895)

claimed or defence set up. And it has recently been held by the Calcutta High Court that an order for security in stay of execution is not a decree within the meaning of this section because it does not determine the rights of the parties (1) It has also been held that an order rejecting an application for permission to sne as a pauner and striking the case off the Court's file was a decree, as the matter disposed of was in fact whether the plaintiff had a right to institute the sut, and the effect of the order was to negative that right and to strike the ease off the file (2) Here again the matter has been subject of dissent, it being subsequently held that no appeal will he from an order rejecting an application for leave to appeal in forms paymers, the ground being that it was not an adjudication deciding a right claimed in a suit (3) On the other hand, an order made under sect 366 (now O XXII r 3) that a suit do abate has been held to be virtually a decree, though it is a question to be determined before the suit or appeal is heard on the merits, on the ground that it disposes of the plaintiff's claim as completely as if the suit had been dismissed (4) This decision again has been dissented from by the Allahabad High Court (5) The Allahabad High Court has in one case (6) held that an order giving leave to withdraw a suit under sect 373, or 373 and 582 (now O XXIII r 1, and sect 107). is a decree , but subsequently that Court (7) and the Bombay (8) and Calcutta (9) High Courts have held that such an order is not a decree on the ground that it does not express any adjudication on the thing claimed, but leaves all assues in the suit undetermined and relegates the parties to the position they occupied before the suit was filed Where the Appellate Court passed an order directing the ense to be sent back to the original Court, with orders to pass a formal decree in accordance with the award of an arbitrator, it was held that the order was a decree as the matter was before the Appellate Court on the merits and the order was intended to finally dispose of the matter (10) In the under-mentioned case n person claimed to appear in a suit as guardian. The Court decided that he had not got that right, and it was held, per Tyrrell, J , that that order decided his position in the suit, that the order was a decree and that an appeal

⁽¹⁾ Saraswati Barmania i Golap Das Barman, 41 C 160 (1911), and see Deoki Nandan Singh i Bansi Singh, 14 C L J

Nandan Singh : Bansi Singh, 14 C L J 35 (1911) e (2) Baldeo : Gula Kuar, 9 A 129

<sup>(1886)
(3)</sup> Secretary of State t Jille, 21 A 133

<sup>(1898)
(4)</sup> Bhikaji Ramchandra v Purshotam, 10
B 220 (1885), followed in Subbayya e
Saminadayyar, 18 M 400 (1895), which also

deals with \$ 307 of the former Code
(5) Hamida Bibi t Ali Husen Khan, 17
A 172 (1895)

⁽⁶⁾ Ganga Ram t Data Ram, 8 A 82 (1885) The contrary had been previously held in Kaliya Singh t Lakhraj Singh, 6 A 211 (1884)

⁽⁷⁾ Jagdish Chaudhri e Tulshi Chaudhri,

¹⁶ A 19 (1893), Genda Male Pirbhulal, 71 A 97 (1895) [percur" it does not adjudicate on any right claimed or decido the suit, it decides nothing as to the merits.]

⁽⁸⁾ Patlog v Ganu, 15 B 370, 373 (1890)

⁽⁹⁾ Jogodandro Nath i Sarut Sunduri, 18 C 322, 232 (1891) [ref to Hamalassoor i Suranga, 21 M 421 (1898)], 5yed Abul Hasan i Kashi Sahu, 4 C W N 41 (1899) a c, 27 C 362, 4, however, such an order is apprecial from, and the lower Apps liste Court sets aside the order and dismisses the suit, then the order of the lower Appellate Court is a decree Abdul Hossein e Mari Sahu, 27 A 362 (1899).

⁽¹⁰⁾ Bhugwan Doss Marwari e Nund Lall Scm, 12 C. 173, 176 (1885)

might have been preferred (1) In a recent case in the Bonibay High Court it was said that in applying this definition of decree it will be found that in the reported cases in that Court the rights of the parties with regard to the matter in controversy have been taken to mean general rights (such as rights in relation to status, jurisdiction, limitation and frame of suit) which if decided must have a general effect on the proceedings (2)

Where the plaintiff failed to reply to interrogatories and the Court dismissed the suit under sect 136 (now O XI r 21), it was contended that the order of dismissal was not n decree as it did not adjudicate on the merits of the right claimed. But this contention was overruled and the view adopted that when the procedure of the Court finally disposes of the suit it is a decree (3)

It was observed by Sargent, CJ, in dealing with the objection that the order did not adjudicate on the merits of the right elaimed, that having regard to the numerous authorities the other way (namely, those treating as decrees orders not dealing with the merits), it was too late to reopen the question, although had it been res integra it must be admitted that there was force in the argument based on the words of the section and also on the circumstance of there being a special provision for an order rejecting the suit, and that where the procedure of the Court finally disposes of the suit it is a decree (4)

It appears to be advisable to adopt an interpretation which affords a ready test to distinguish between decrees on the merits and merely processual orders If this is not done each case must be more or less empirically decided as and when it arises and on its peculiar circumstances In such case the general test would appear to be-"does the order finally dispose of the suit?" It may be noted in this connection that in the report of the Select Committee (March 12, 1903) on the Bill introduced in December, 1901, the Committee stated that they omitted the words restricting "decree" to adjudientions "upon the merits," as was proposed to be done because thor might be held to exclude final decisions given wholly upon questions of law But as to this it is perhaps sufficient to point out that while a claim with merits in its popular sense can be defeated by a defence based upon a point of law, such as limitation, it can only succeed by virtue of a favourable adjudication The section, however, has since been expressly amended so on the ments as to exclude any order of dismissal for default. This appears to indicate that the "rights of the parties" referred to do not include mere processual rights, and that to constitute a decree there must be an expression of opinion on the rights of the parties in the sense of an opinion upon the merits of the ease, that is on the right asserted in the suit or upon the defence whether of law or fact, set up to defend such alleged right Moreover, a dismissal for default does not "conclusively determine" the right of the party against whom it is passed

"Civil Court"—In the corresponding definition in Act A of 1877, the word "civil," which was introduced in the last Code, found no place—It has been held that a Civil Court does not include a Revenue Court in the N. W. P.

⁽¹⁾ Buldeo Dis t Gobind Shinkar 7 A 914 (1885) (2) Nariyan Balkushini (1994) Juriyan

⁽³⁾ Maharaj Adhiraj Manningji i Mehta Harriharram, 19 B 307 (1894)

⁽²⁾ Narayan Balkushu i Copal Jis (4) Miharaj Adhiraj Mansingji i Mchta (ihadi 33 B 302 (1914) (4) Mariharum, L. B 307 (1894)

and the term "decree" in this Code does not include the decree of such a Court (1). Though the words "Cod Court" have been now omitted, probably as an increasing the definition of course only applies to such Courts.

"In the sult,'—Where there is no exil suit there is no decree, and in consequence no appeal (2). No doubt there is authority for the view that the term "suit" is a very extensive one,(3) but the term ought to be confined to such proceedings as under that description are directly dealt with by the Code, or such as by the operation of the particular Acts which regulate them are treated as suits (1). The term "suit" has not been defined for the purposes of the Code (5). The conjunction of the words "suit or appeal" in the last Code appeared to show that appeals, which are often considered a stage of the suit, are not to be deemed to fall within it. The section now refers to suit only. The word is wide enough to cover every proceeding, whether original or appellate, terminable in such an adjudication (as is referred to in the first part of the clause), under this Code.

The particular orders mentioned in the second clause of the last Code as constituting a decree did so by way of addition and exception to the general definition of that term in the first clause (6). This, as has been pointed out,(7) is particularly evident from the mention of orders passed in execution proceedings under seet 211 of the last Code as they cannot be said in any sense to finally decide the suit or appeal, though an order rejecting a plaint may be said to finally determine, so far as the Court which makes the order is concerned, that the suit as brought will not lie, and may have been made a decree on that ground (8). The enumeration of orders was held to be exhaustine, and not merely illustrative or explanatory (9). Though it cannot be said that the rule was always strictly observed (tride post), analogy could not extend the term to any orders other than, though like, those specifically mentioned

(a) Execution proceedings—Under the last Code, sect 617 (now sect 11) was held to show that applications for execution were not suits, but only proceedings in a suit, and appeals from orders on applications were dealt with

⁽¹⁾ Onkar Singh v Bhap Singh, 16 A 496 (1894)

⁽²⁾ Minakshi t Sul ramanya 11 M 26 (1889) Thus a decision under s 5 of the Court Fees Act not being a decree no appeal les Balkaran Rai t Golind Nath Tewari,

 ¹² A 129, 156 (1890)
 (3) Venkata t Venkatarama, 22 M at p
 257, and see Bhoopendro v Baroda, 18 C

<sup>500, 504 (1891)

(4)</sup> Wathus t Fox infia at p 948. The general power under sect 9 to try all suits of a civil nature except those expressly or implicitly barred does not involve a similar power to make declarations. Bai S Vaktub v Thakore Agazimih, 13 H 676 (1910)

⁽⁵⁾ See Watkins v Fox 22 C at p 948 (1895) The third section of the Limitation Act distinguishes suits from appeals or

applications (6) Hukm Chand, 27, 28

⁽⁷⁾ Ib

⁽⁸⁾ It is essentially different from an order admitting a plaint, as such an order determines nothing, but is merely the first step towards putting the case in a shape for determination. Justices of the Peace for Calcutta t Oriental Gas Co., 8 B L R 433 (1982).

⁽⁹⁾ Covern t Morarn, 9 B 183, 195 (1885), Dulhin Golab Kocr v Radha Dulari Kocr, 19 C at p. 468 (1892)

held (1) to be so under the Code of 1859. A settlement case under sect 104 (2) of the Bengal Tenancy Act, before it was modified by Act III of 1898, B C, was held not to be a suit (2) Proceedings contemplated by sect 27, Act VIII of 1805, Madras, are summary, and an order passed in them cannot, it was held, be said to have decided a suit or appeal and was therefore not a decree (3). An order under the Indrin Trusts Act, refusing to remove a trustee, has been held not to be a decree (4). An order appointing a person a member of a committee, under sect 10 of the Religious Endowments Act 1863, has been held by the Privy Council not to be a decree for the purposes of sect 540 (now sect 96), their Lordships observing that "there was no citil state respecting the appointment" (5). An order refusing (6) or granting (7) leave to sue under the Religious Endowments Act is not a decree nor is an order passed on a contempt of Court (8). There appears to be no change in this respect.

Rejection of a plaint—An order rejecting a plaint is a decree, what ever may be the grounds, or absence of grounds, for that order. In every case an order falling within sect 54 (now O VII r 11) is a decree (9). The words are, however, not limited to the eases provided for in sects 53 and 54 (now O VI r 17, O VII r 11), post (19). Nor does it male any difference that the rejection may be due to a misapplication of the rules of the Code or practice (11). So not only is in order rejecting a plaint on the ground that it is insufficiently stringed (12) a decree, but also an order given on the ground that the plaintiffs are minors (13). And orders which are substantially in effect orders rejecting plaints have been held to be decrees, as an order returning a plaint for including causes of action which could not be joined without leave of the Court, (14) or an order under sect 331 (now O XXI r 99) refusing to number and register a claim as a suit, which is of the same offect as a refusal to register

⁽¹⁾ Reasut Hossein v Hadjee Abdoelish,

³ Î a 221 (1870)

(2) Upadhya Thakar v Persidh Singh,
23 (at p 729 (1806) Proceedings under
ss 84 (Coghun Mollah t Rumeshur, 18 C 271 (1801), Peary Mohun Mukerjit Buodi Churn Chuckerhutti, 19 C 485 (1822) and
30 of the same Act [10saun Bux t Mutook dharec Lall, 14 C 312 (1887)] are not suits
An order under s 37, Act VIII of 1860, was held to be a decree Projendro Commar Ry

t Krishna Coomar Glose, 7 C 684 (1881)
(3) Perumal t Bajagopala, 13 M 248

⁽¹⁸⁹⁹⁾ (4) Nathu Wilson t McAfee, 19 A 131

⁽¹⁸⁹⁶⁾ (5) Minakshi t Sibramanya, 11 f A 160

^{(1887),} s c, 11 M 26 (6) kazem Ali i Azim Ali ki in, 18 (352 (1831)

⁽⁷⁾ Mozaff r Alix Hedayet Hessin 11 C 581 (1907)

⁽⁸⁾ Goda Ram v Siraj Mil, 27 A 380 904)

⁽⁹⁾ Muhammad Sahl a Muhammad Jan, 11 A 91, 93 (1888)

⁽¹⁰⁾ Beni Ram Bhutt i Ram Laf Dhul ii, 13 C 189 (1886)

⁽¹¹⁾ See lest case in which the issual course would have been to suspend proceedings [see Rattonbart Chabildas, 13 B 7, 11 (1889)] and Bandhan Singh t Solhu, S A 191, in which s 44, r (a) of the last Code was misamined.

⁽¹²⁾ Ajoodhya Pershada Gunga Pershad, 6 C 219 (1880), ref Muhammad Sadika

[&]quot;lubaumad Jan, 11 A 91, 93 (1888)

⁽¹³⁾ Bent Ram Bhatte Ram Lal Dhukes,

⁽¹¹⁾ Burthan Singh & Solhu, S.A. 191 (1889) As the return for presentation to Truce Curt, see Ral in Dist. Nawal Singl, 1.A. 020 (1879)

a plaint, or which, in other words, amounts to the rejection of a plaint (1) An order refusing to entertain a suit because the section of the law to which it related was not cited in the plant, was held under the Code of 1859 to be a underment The Court pointed out that such an order ought to state whether the suit was dismissed or the plaint rejected, and under what sections respectively (2) An order rejecting an appeal stands on the same footing. An order rejecting a plaint is a decree, and by sect 532 (now O XXXVII r 2) of the Code the provisions thereinbefore contained are made to apply to appeals, so far as such provisions are applicable. An order therefore rejecting or dismissing an appeal is a decree of the Appellate Court under the terms of the definition (3) In the Code there is no separate provision which allows the Appellate Court to "reject" a memorandum of appeal on the ground of its being barred by limitation Sect 543 (now O XLI r 3) is limited to cases in which the memorandum is not drawn in in the manner prescribed by the Code, and it is only by applying sect 54 (c) (now O VII r 11), mutatis mutandis (as provided by sect 582, now sect 107, O AXII r 11) to appeals that the Code can be understood to make provision for rejection of appeals as barred by limitation Sect 4 of the Limitation Act says that the appeal shall he dismissed. It is clear therefore that such an order of dismissal is a decree as it disposes of the appeal (4). So an order dismissing an appeal as being presented out of time.(5) rejecting an appeal as not duly presented the vakalutnamah being executed in favour of two vakils but accented only by one . (6) or for deficiency of court fee . (7) an order rejecting a memorandium of appeal on the ground that it contained language disrespectful to the Court of first instance. (8) have been held to be decrees On the other hand, it has been held that an order returning a memorandum of appeal on the ground that the value of the suit was beyond the pecumiary limits of the Court's juri-diction is not a decree as it did not decide but refused to decide the appeal (9) And an order returning a plaint for presentation to the proper Court is not a decree (10) Where there is no appeal and no appellate decree there can be no second appeal. Where an appeal petition having been presented bearing

⁽¹⁾ I omndro Deb Rankut v Ram Jugo dishwari Dabi, 14 C 234 (1886), fell Gopaln t Fernandes, 16 M 127 (1892)

⁽²⁾ Sheikh Golam Ehya t Lalla D sorga

Dyal 3 W R , Act \ , 17 (1865) (3) Gunga Das Dey 1 Ramjoy Dev 12 C

^{30 (1885)} See Mathura Mohun t Amiruddi, S C W N 64 (1903) where an appeal was dismissed on the ground that no appeal lay

⁽⁴⁾ Gulab Ras e Mangh Lat, 7 A 42 (1884) [foll , Raghunath Gopal v Nilu Nathyu, 9 B 452 (1885))

⁽⁵⁾ Ib , Gunga Das Dev & Ramjov Dev. supra, Saminatha e Venkatasul ba 27 M 21 (1903), Rakhal r Ashitosh, 17 C W \ 807 (1913)

⁽f) Avvanus r Naral boorl anam, 16 M 255 (18 12),

⁽⁷⁾ Bup Singh t Mukhraj Singh, 7 A 887 (1882) An order dismissing an arrival in a suit for non payment of the additional stamp duty which should have been paid in respect of the plaint and the petition of an real, has been held to be a decree under the general words of the definition Mela Mal : Harbhay P R No 165 (1884) cited in Hukm Chand, C P C, p 23

⁽⁸⁾ Zamındar of Tunı v Bennavya, 22 M

^{155 (1895)} (9) Mahabir Singh t Behari Lal, 13 \ 320

⁽¹⁸³¹⁾

⁽¹⁰⁾ Chinnasan'i Pillair Karuppa Ldayan. 21 W 234 (1890), [foll, Wahidullah + Kanhava Lati, 25 A 174 (1902)], Dalin Single v Kundan Sin h, 30 A, 58 (1913).

an insufficient court fee stamp was returned to the appellant and was presented again after the period of limitation, and the appeal was refused it was held that no appeal lay (1)

"The determination of any question within sect 47 or sect 144
—These are orders of the Court executing a decree determing any question
relating to the execution discharge or satisfaction of the decree, provided that
these questions arise between the parties to the suit in which the decree was
passed or their representatives, and orders for restitution upon the variance
or reversal of a decree It is stated that the word "uithin" has been substituted
for "mentioned or referred to in" with a view to bringing within the definition
of decree orders against sureties (see sect 145) and orders as to Court fees in
pauper suits (see O XXXIII r 13), and thus providing for appeals therefrom
It has been recently held that an order on an application under O XXXIII r 13
for payment under O XXXIV r 10 or 11 is an order under sect 47 and appeal

able accordingly (2) The Privy Council (3) and the Courts in India (4) have held that a narrow construction is not to be placed upon the language of sect 47 (formerly sect 244) The object of that section is that the Court having the parties already before it should decide all questions relating to execution, etc arising between them in place of allowing one or the other of them to put his adversary to the delay and cost of a separate suit in cases in which but for this section it might be possible for him to do. In order to affect this object completely without injustice to the parties an order under this section has been jucluded within the definition of 'decree' so as to allow an appeal (5) It is of the utmost importance that ill objections to execution sales should be disposed of as cheaply and as speedily as possible (6) where a proceeding is sought to be set aside, that proceeding is one which relates to execution, and if the contest as to its validity is between the parties to the suit the specific ground on which the proceeding is impeached, whether it be fraud in the execution proceedings or other ground, is not material within the meaning of sect 47 (7) The expression ' relating to execution etc in sect 47, is wide and somewhat vague though perhaps necessarily so and has caused some difficulty in several cases, but once a case is held to come within these words, the lin seems plain enough (8) The matter must be deter mused by an order under sect 47 and not by separate suit and such an order is a decree and as such appealable

It was not, however, the intention of the Legislature to render all orders (irrespective of their insture) inade in relation to the execution of a decree

⁽¹⁾ Venkatarayadu r Rangayya Appa Ran 21 M 152 (1897) dist and dissented from in Mathura Mohan Pid r Amiru I h Shilako 8 C W N 64 (1903) in which it was su i

<sup>448 450 (1911)
(3)</sup> Prosunno Kun ar Sunyal t Kali Das Sanyal 10 C (33 (5) (18)2)

⁽⁴⁾ Hira Lal Ghose : Chundra Kanto Ghose 26 C 539 541 (1899)

⁽⁵⁾ Mohendro Naram Chaturaj v Gopal Mundal 17 (769 773 (1890)

⁽⁶⁾ Prosunno Kumar Sanyal v Kalı Dıs Sanıal 19 C 683 659 (1892)

anjai 19 C 683 689 (1892)
(7) Krishnan : Arunachalam, 16 M 447

⁽¹⁾ Arishian t Arinachalam, 16 W 447 113 (1892) See s 17 post

⁽⁸⁾ Wilhendro Narain Chiluraj & Gopal Mundal 17 C 71 / 773 (1890)

Under the list Code it was held that the definition of "order," even in sub clause 14, could not be u ed for the purpo e of defining the word ' order in the previous part of the section, Levin e it expres ly excluded everythms in that part (1)

Preliminary decree - See note on "Corclinately determines"

"Dismissal for default '-bee note on "The rights of the porties'

"Decree-holder' and "judgment debtor'-The second term mean only and person against whom an order has been made and there is non a reference in the definition to the order being capable of execution The transfer of a judgment-debtor - hability is not recognized, except to a very limited extent in case of his death to his head repre entitive (see sect 50 formerly sect 231 po t). On the other hand a decree-holder may assign his right under the decree or with trin-fer may be affected by operation of lan The words ' and includes and per on to whom such decree or order is tranferred have non been omitted. It was held with regard to the former defini tion that it must not be applied where it was repugnant to the centext. The only rule it was held which would harmonize this section and the provisions relating to the execution of assigned decrees was that an assignee under an oral assignment has, as such, no locus stands at all to apply for execution but that as regards an assignce in writing or by operation of law the Court has a discretion whether to recognize such assignment or not (2) The definition was held to include a person to whom a share of a decree is transferred (3) Not withstanding the omission the lin is now the time. The representative of a judgment debtor was held to be a judgment debtor within the meaning of sect 258, now O XXI r 2, post (1)

Under the General Clauses Act (a) the word ' person unless there is anything repugnant in the context, includes "any company or association of hody of individuals, whether incorporated or not ' In idmiralty proceedings in rem a vessel is deemed invested with a personality, and the expression ' defen dant "in O I ar 3 and 1 (formerly sect 28), post, includes a vessel (6) And if a

ve sel can he a defendant, it may he a judgment debtor

"District Court"-This section is one of those which, by sect 1 me excluded from consideration when dealing with a question in a Scheduled District (7) to which the Code has not been extended. In some of the e districts the District Judge is designated Deputy Commissioner but in Chota Nagnus the Court of the Judicial Commissioner, and not that of a Deputy Commissioner, is the Principal Civil Court of original jurisdiction and therefore the District Court (S) In the other provinces the Court of the

⁽¹⁾ Behary Lal Pundit : Leder Aath Wallak, 18 C at p 72 (1891) (2) Parvata : Digambar, 15 B 307 (1890)

⁵⁰⁰ U XI r 16, post

⁽³⁾ Gyamonee i Padha Pomen, 5 C 592

⁽¹⁾ Pandurang : Muddhar : 15thilinga Ledds, 30 M 537 (1907)

^{(5) \} of 1807, s 3 (41)

⁽⁶⁾ Bombay and Persu 1 A to t Shephord, 12 B 237, 241 (1887)

⁽⁷⁾ Ram Ratan : Lalta Prasad 17 A 463

⁽⁸⁾ Josnaram Smgh : Mudhoo Sudim

⁵m.h, 10 C 13 (1588)

" Pereign Court" "Pereign judgment." The world reliming will entry in Probability in were smerted to each be the July all two a stee of the Priva Comal from the defect of Doutles Perlub Conta ate. with to and to the Courts in India care the Foreign to retake the Courts of France or of at a 1 that free me parter (2) So also eare the livets in the Native States in to be (i) in feet a god the God one . As to at letterite advante beyond the limits of Buttets helps and retail told by the tenere effected in Butterl ter ered 15 good On account of the exteres non-the distintion of British India the number Lou betomte will not be en large as below but the l'units in Bestlema, Bereste and in British existenments in Satish States will afford the met or livery metaboes of Courts who hathough outside British India are not foreign Courts (1). This definition of "Foreign Court" is for the putpose of this Code only, and does not avail to extend the mindiction of the High Court so as la coal le it to restrain sonts pending in Courts which are outside its futisduction moder the Charler Co. As to foreign and ments, see sects 13-11, part

rr 1 5 6 8 port, who hade d with functions imposed by the Code on Government Pleading As to the definition of Leval Government, see sect 3 (29), Act X of 1897. The words stalkered have been added to meet a practical difficulty and to have been experienced on expenses when it is not essays for the Governup at Pleader to appoint another pleader to conduct the vise

"Government pleader," See O XXXIII or 6 7 % and O XXVII

"Judge" This definition is different from that contained in sect. 19 of the Prud Code as the comments of the tred and Cranned law are distinct "Officer, of course melules "officers, as in the case of two or man Judges constituting a Beach. The term "Court" is not defined (6). Where a Court

(1) In re Phaders of the High Court, 8 B 105, at pp 135, 147 (1883) As to appeals against orders in insolvency passed by a Court of Small Causes exercising the powers of a Subordinate Judge in connection with this section, see Bebi Prasail : Jamna Dia, 23 A 56 (1900), Manckshali r Dutiblat, 27 B 601, 606 (1903)

(2) Bowles t Bowles, 8 B 571, 571 (1881)

(3) Bikrama Singh v Bir Singh (1888). P R No 101, cited in Hukm Chand, 31

(4) Hukm Chand, 31 (5) The Vulcan Iron Works 1, Bisshumber,

13 C W N. 316 (1909)

(6) The lerm has been defined in s 3 of tho Explence Act [see In re Vinkatichala Pillal, 10 M 151 (1887)], but as pointed out

by the Bomlay High Court in It 1 Tulpa,

is composed of more than one officer, each doing separate work allotted to him by the Chief Judge, each officer is individually a Judge, and must be deemed to be a presiding officer of a separate Court (1) As regards the appointment, disqualification, and jurisdiction of Judges, see notes to sect 9, nost

"Judgment"—The term has here a different signification to that it possesses in English law, in which it is used in the sense attached to the term "decree" under the Code Under the former practice it was restricted to a decision of the Common Law Courts, the term "decree" being used in the Court of Chancery This distinction is, however, now abolished, the expression "judgment" being generally used, except in matrimonial causes, in which the term "decree" is still retained (2) The judgment must be based on relevant facts duly proved before the Court, and a Judge should not therefore import into a case his own knowledge of particular facts (3) and it must be founded on a case either to be found in the pleadings or involved in or consistent with the case thereby made (4) A Judge may, however, consult other Judges before whom the trial is not held (5)

Excessive elaboration tends to impair the value of a judgment by defeating its proper object, which is to support by the most cogent reasons that suggest themselves the final conclusions at which the Judge has conscientiously arrived. The Privy Council therefore on these grounds adversely criticized a judgment of a voluminous character recording the fluctuations of the Judge's mind from day to day in the course of an exceptionally long trial, and the officet (often temporary upon him) of a particular piece of evidence or argument of counsel since from such a mass of often conflicting statements it is not easy for a Court of Appeal to extract the precise grounds on which the final conclusion rests (6). Moreover it is a substantial objection to a judgment that it does not dispose of the question as it was presented by the parties, e.g., whereit finds a particular signature to be a forgery which both sides admit to be genuine (7). For the provisions of the Code as to judgments, see sect 33 and 0. XX., post and Judge, sub too.

Meaning of "judgment" under Letters Patent -The term "judg-

- (1) Hukm Chand, loc cit
- (2) Sec Hukm Chand, 11, 12
- (3) See Authors Lyndence Act, 5th ed., p. 115 and notes to s. 121 of that Act and as a three cited and Jeasunt Singree i. Jet Singree 3 M. I. A. 245, at p. 240 (1811), Bamundoss Mookerjee e. Musst Larinet, 7

- M I A 169, at p 203 (1858), Mahomed Buksh t Hossemi Ribi, 15 I A 81, at p 91 (1888), Laksimaya v Sri Raja Vanadaraji, 36 M 168 (but ho may import his general knowledge)
- (4) Eshan Chunder t Shaina Churn, 11 M I A 7 (1860), Mylaporo Iyasami t Yeo Kay, 14 C 802 (1887), Joytara Dassec t Mahomed Mobaruch, 8 C 975, 980 (1882)
- (5) See Luckmidas v Ebrahim, 2 B 644, at p 649 (1878), Parvata v Degambar, 15 B 907, at p 308 (1890), Allcock v Hall, 1 Q B D (1891) 444
- (6) Sri Raghunada t Sri Brojo Kishore, 3
 I A 154, 175 (1876).
 - (7) Ib

¹² B 36 (1887), dissenting from the last munitioned case, and distinguishing between a judicial and administrative inquiry, the definition in the Exidence Act is framed only for the purposes of the Act itself, and should not 1 extended by and its legitimate scope. An Additional Judgo was held to be a District Judge within the meaning of s 112, Act VIII of 1869—Bropo Misser t—Ahladee, 21 W R 320 (1874).

ment" is used in the Letters Pitent of the High Courts, clauses 39 and 40. speaking respectively of appeals to the Privy Council from "any final judgment, decree or order." and from "any welminary or interlocutary audament, decree or order" (1) Clause 15 (and clause 10 of the Allahabad Letters Patent) speak of a "judgment" (without any such qualification) providing that an appeal to the High Court shall be from the judgment (not being a sentence or order passed or made in any criminal trail of one Judge of the said High Court (2) The meaning of this term in this clause has been the subject matter of dis cussion in numerous cases. It is well settled that the term is not limited to the final judgment in the suit. (3) nor, indeed, to a judgment in a suit at all (4) In. however, the first of the cases last cited, a very wide meaning was given to the term, which was held to mean any decision or determination affecting the rights or the interest of any suitor or applicant, it being said to be impossible to prescribe any limits to the right of appeal founded upon the nature of the order or decree appealed from though, assuming that a party had the right to be heard in overs case, it was obvious that the duty of the Appellate Court might vary considerably according to the nature of the order or decree complained of, and that the Appellate Court would rightly decline to interfere where the lower Court had been given a discretion (5) This view has, however, been considered to be too broad (6) and the definition commonly accented is that of Couch, C.J. (7) which has become classical (8) having been approved in numerous cases (9)

- (1) As to ss 39, 40, see Sonbai t Ahmedbhai, 9 B H C R 398 (1872) Chundi Dutt Jha t Pudmanund Singh, 22 C 928 (1895)
- (2) See as to Allahabad (Umrao Chand t Brindaban Chand, 17 A 475, 477, 478 (1893)] and Calcutta (Kai: c Dhumunger, 3 C 228 (1877)] letters patent, and see as to the words excepting criminal trials, In the matter of Horace I jail, 20 C 286 (1901), s c 6 C W N 254 Srinivasa Ayyangar c R, 17 W 105 (1893)
- (3) De Souza t Coles 3 M II C R 384
 387 (1868), Justices of the Peace for Calcutta
 t Oriental Gas Co, 8 B L R 433
 (1872), Sonbait Ahmedibhai 9 B H C R
 398, at p 407 (1872) in Ebrahim r
 Tuckhrunnissa 4 C 531 534 (1878) Garth
- C J., tool a more restricted view of the term
 (4) De Soura v Coles, supra Somasunda
 run Chetti v Administrator General, I V
 148 151 (1876) [which was not an adjudica
 tion in a suit but an order made under the
 Administrator General s. Act, allowing the
 A G commission at a certain rate] Kristo
 Krivor Aceghy v Kadermoye Doves 2
 C L R 583 (1878). In re Narrondas Bhunji,
 14 B, 555 (1890) [order a pointing gurahan]

- In re Janokey Nath Roy, 2 C 466 (1877) [order directing prosecution] In the Goods of Indra Chandra Singh, 23 C 580 (1896) [order under s 90 of Probate and Administration
- (5) See De Souza : Coles supra Sonbai t Ahmedbhai, 9 B H C R 398 at p 401 (1872), Wt Brij Coomaree t Ramiick Dass, 5 C W N 781 (1901)
- (6) It has however been pointed out that though passages in Bittleston s, J. judgment give a more extended nearing to the word judgment the case itself is not in confine with the others. Somssundaran Chetti v Administrator General 1 V 148 at p 151 (1876) and see Huljee Jamail v Hadjre Vahomed 13 B L R 91 at p 101 (1874) where Couch C J, approved of the actual decision.
- (7) The Justices of the Peace for Calcutta • Oriental Gas Co., 8 B L. R. 433, 452, 8 c., 17 W. R. 364 (1872)
- (8) Per Maclean, C.J., in Mt. Bril Cooningee r. Ramrick Das, 5 C. W. N. 781, at p. 794 (1901)
- (9) See Sonbarr Ahmedi har 9 B H (P 398 496 411 (1872), In re lanckey Nath Rev, 2 C 466 (1877), Kally Sconder, Dalin

"We tain!" said Court C.L. Tains "primess" in class 15 mers as de is an will affect the mains of the court of service the profes by description some with a factor is true at the whole state fact or practically, at incommon, the difference between them being that a faul inflament describes the whole course as with and a preliminary or incommon to protect it, begins o'the moves to be described. But the Calcuta High Court has bell it and a manner exercise about a templated by a the term, and wills contained in the definition in high lab that the placed by a the term, and wills contained in the definition in high lab that the service contains which an appeal shall not an appeal will be under class. It only in these cases in which an appeal should under the G de 2° Whetler this be so or may as a question of jurisdiction, it may safely be said that an appeal should edinarily lie where allowed by the Cole, and will in most cases probably he are expensived where it is not.

Touch the marginal area to clause 15 would make it appear that the section was intended to apply only to judgments of Course of original judicious, yet these areas form an year of the original and it has been held that the words of the clause are sufficiently comprehensive to include judgment passed in the exercise of jurisdiction either original (0 or appellars. And therefore an appeal has under this clause from the judgment of a Divisional Cours in the exercise of its appellare jurisdiction when the Judge of the Cours are equally decided in opinion; but under clause 55 the down of the senior Judge prevails (4). Clause 55 (or clause 55 to the Allahriad Levers Parent) was superseded by sect. 575 of the last Code. (5) but the latter section did not take away the right of appeal given by clause 15 and if the Judges differ, but did not refer under sect. 575, there was an appeal under the Levers Parent (6)

r Harrich Chander Chowdhry, C.C. 74, 601 (1831); Tooley M. new Plasser & Sadern Basser, 26, C. 8, 1, 380 (1890); Webs * Provid Singley Add Kari Kimma, 21 C. 475, at p. 475 (1891); Kaber Pesud Parlay r. Ark Kabar, Pesud Parlay r. Ark Kabar, E. C. 1820 (1890); Charde Datt Jha, r. Dy h. new el Sode Rahdan, 26, 28, 305 (1835); M. Reij Comarce R. Cattir, k. Pos. 5 C. W. N. 781, 794 (1991); In the ratte of Horney Lyall, 20 C. 28, 481

(1) Mr. Brij Oo. aree r. Bamer k Pag. 5 C. W. N. 781, at pp. 794, 795 (1991)

(2) Soukar i Develban, 9 R. H. C. R. (20) (1872) and see all stars of the Develf old after a Oriented Gre Ox, expect High area in Natura Willy. 12 R. H. C. R. 128, (1875) as stowhether, closely the lower Ox branch real with tright of appealing to Natural real with the right of appealing to Natural Co. Nat

(3) The created set to H. C. recessionless to an effective of the H. C. fut an integral part of the Mary wallies and related by five problems.

Judic or where the are two Judics of they charries. Fan Benede e Rai Respett, 19 C. W. N. 100, (1997); Guji Nith e Michael, 25 C. 1007 (1998). But if they agree these is no appeal energy to the Party Cuncil. A Den. all Pen h has no jewer to stay powedline pendian on the oriental side fields with me to deep the mark and a faint in Fahimulah. Mahomel e Garth, 20 C. W. N. 91 (1898).

(4) Rames Sharm Voyce of Lachmerett North, 7 W.R. 72, 512 (187); Americki, 7 W.R. 73, 512 (187); Ameriki, 7, Kassin, Ah. 17 W.R. 4 G. (1870). As to appeal from edit of Endish Committee distingtion of the sample Month, for Price Harm In Chamber, 18 W.R. 200 (1872); Nurshippi, Varian Ungham 18 W.R. 200 (1870); as the world parts of the Chamber, 18 W.R. 200 (1870); as the world parts of the Chamber, 18 W.R. 200 (1870); as

(5) Apply Phiman r She lil Khale land 3R 24 (1879); SuGmillanur Phimal iam Gosan, 10 C. 84 (1881, P. B.

(i) Su Gradian in Prochestant 6 scan i. 10 C 844 (1881) [see e. e. 17 C 3, at p. 11 (1880), Ragh math Proche Jirowan Rai, 8 A 100 (1880); Derroband e. Han bank. Moreover, there were cases to which sect 575 did not apply, and to these clause 36 (or clause 27) of the Letters Patent is still applicable (1). There is an appeal from the decision of one of the Judges exercising Admiralty or Vice admiralty jurisdiction (2).

It often happens that Judges composing Divisional Benches, although they concur in the mode of deciding the appeal, either disagree as to some of the crasons or assign different reasons for their judgments. But in order that there be an appeal the difference of opinion must be as to the final and complete decision of the case and not a difference of opinion upon one or more of the points arising in it (3). Points not rused before a Divisional Bench cannot be rused on appeal (4). As to huntation, see below (6)

The following orders have been held to be "judgments" an order rejecting a plunt, (6) orders made in execution, (7) an order passed allowing the Administrator General commission at a certain rate, (8) an order referring it to the Commissioner to take accounts between the parties to a suit, (9) a decision refusing leave to institute a suit on the original side of the High Court, (10) an order appointing a guarden, (11) a judgment dismissing an appeal as barred by limitation, (12) an order in revision, (13) an order refusing stay of execution, (14) an order on an application for readmission of an appeal, (15)

- 13 B 440 (1889), Kashav Pandurang t Vinayak Hari, 18 R 355, 358 (1893), even if the difference be upon a question of costs only, Welendro Chandra t Ashutosh Gan guli, 20 C 762 (1893)
- (1) Hossim: Regam t Collector of Muzaffarnagyr, 11 A. 176 (1889), in which it was held that where the Judges differed on a prelimming question, viz, as to a hether the appeal was barred, the case was governed by the charter and not s 576, disk in Niza yanasami Peddi to Gurin Reddi, 25 M 548 (1901), in which it was held that there was a hearing of the pictution, there having been no hearing of the appeal in the former case
 - (2) In the matter of the Ship Champion,
- 17 C 66, 84 (1889)
- (3) In re Omrio Begum, 13 W R 310 (1870), and see Clunder Kant : Bindabun Clunder, 7 W R 277 (1867)
- (4) Shahazadeo Hazra Begum t hhapa Hossein, 12 W R 498 (1869)
- (5) In re Hurruck Singh, 11 W R 107 (1809), 12 W R 458 (1809)
- (6) The Justices of the Peace for Calcutts t Oriental Gas Co., S.R. L. R. 433, at p. 452 (1872), 1 brahim + Fuckhrunnissa, 4 C. 531, at pp. 534, 535 (1878)
- (7) The Justices of the Peace for Calcutta t Oriental Gas (o, 8 B. L. R. 433, at p. 452 (1872), Kally Soondery Dalas t Hurrich Chund r Chow lbrs, 6 (* 594 (1881) [order

- in P C Department rojecting application for execution], this case was affirmed by P C in 9C 482, s c, 10 I A 4, 10 (1882)
- (8) Somasandaram Chettia Administrator General, 1 M 148 (1876)
- (9) Hirp Jina t Narran Mulji, 12 R H C R, 129 (1875).
- (10) Do Souza t Coles, 3 M H C R 381 (1863), Hadjee Ismail t Hadjee Mahomed, 13 B L R 91, 101 (1874)
- (11) Kristo Kissor Neoghy t Kadermoyo Dosee, 2 U. R. 583 (1878), In re Narrondas Dhanji 14 R. 555 (1890)
- (12) Husami Begam t Collector of Muzaffarnagar, 9 A 655 (1887)
- (13) Chappan e Mordin Kritti, 22 M CS (1898) (followed in Shrw Prosad Bungs hilbar e Ram Chunder Haribur (1913), 41 C 323) Narajanasami Reddir Osura Reddi, 25 M 543 (1901), Venkata Reddir Taylor, 77 M 190 (1894), contra, Ihra Lalt Bai Asi, 22 D 891 (1897), on the ground that the Letters Patent apply only to the original and appellate purefalt them.
- (14) Mt Brij Coomarce i Ramrick Dass, 5 (W N 781, 795 (1991) [order refusing to stay issue of probate and discharge of receiver], contra, firmantii Raja Yarlagadda r Srimantu Raja Yarlagadda, 24 M 358 (1991)
- (15) Ramhari Sahu + Madan Mohau, 23 C 339 (1895), but it was subsequently held that the order could only be set as ile under r 626

an order on an application under sect 90 of the Probate and Administration Act, (1) an order refusing an application to commit for contempt of Court, (2) an order refusing to set aside an award, (3) a judgment dismissing an appeal against an order of a lower appellate Court remanding a case for disposal on the ments; (4) a judgment of a Judge of the High Court sitting singly and remanding a case after dealing with the whole case and setting aside the judgment and decree of the lower Court; (5) an order discharging a rule to set aside a sale (6)

The following orders have been held not to be "judgments "-an order for mandamus, in that it concludes nothing but merely initiates further pro ceedings, (7) an order dismissing application for review of judgment, (8) an order for production and inspection of documents, (9) in order granting or refusing certificate of appeal to the Privy Council on the ground that such an order belongs rather to Pray Council proceedings than to those of the High Court (10) an order dismissing an appeal for default , (11) an order direct ing a prosecution under the Presidency Vigistrates Act, (12) an order determining a particular issue in a suit on the ground that there should not be partial appeals, (13) an order directing the addition of a party to the suit, (14) an order in the Privy Council Department refusing to extend time to furnish security for the costs of the respondent, and directing the appeal to be struck off , (15) a refusal to order security for costs under O XLV r 13, post, (16) a refusal to send for the records under sect 25 of the P S C C Act, (17) an order in second appeal directing the trial of certain issues of law and fact by the lower appellate Court (18)

of the former Code, and that this decision was erroneous so far as it decided to the contrary Fatimunnissa : Deoki Pershad, P B, 24 C 350 (1896)

- (1) In the Goods of Indra Chandra Singh, 23 C 580 (1896)
- (2) Mohendra Lall Mitter 1 Anunc Coomar Mitter, 25 C 236 (1897)
- (3) Toolsey Money Dassee: Sudevi Dassee, 26 C 361, s c, 3 C W N 347 (1899)
- (4) Vasudeva Upadyaya v Visvaraja Thir thasami, 20 M 407, atp 417 (1897) [see Venga navyan v Ramasami Ayyan 19 M 422 (1899). Sankaran v Raman Kutti, 20 M 152 (1896)]. it was hold, however, that therows no appeal
- as s 588 of the last Code prohibited it
 (5) Rai Benode t Rai Pasupati, 13 C W N
 105 (1907), Gopi Nath t Moheshwar, 35 C
- 1096 (1908)

 (6) Russick Lall Paul : Roma Nath Sen,
- 1 C W N xxvi (1896)
 (7) Justices of the Peace for Calcutta 1
- Oriental Gas Co, 8 B L R 433 (1872)
 (8) Raku Bil t Khaja Mahomed, 4
- B I, R, A C 10 (1879), 12 W P 459, S C (9) Soubart Almedika, 9 R H C R 198 (1872)

- (10) Manly v Patterson, 7 C 339 (1881), Mt Amirunnessa: Raboo Bebary Lall, 25 W R 529 (1875), Mowla Buksh v Kishen Pertab Sabi, 1 C 102 (1875), Luff Ali Khan
- v Asgar Reza, 17 C 455 (1899) (11) Mansah Alı v Nihal Chand 15 A 395
- (13) Mansah Ali v Nihal Chand 15 A 395 (1893)
- (12) In re Janokey Nath Roy, 2 C 460
- (1877)
 (13) Fhrahm v Fuckhrunnissa 4 C 531
- (1878), Markby, J, was inclined to the contrary view (14) Kumara Upendra Krishna t Nabin
- Arishna Bose, 3 B L R, O C 113 (1869)
 This was a decision under 8 363 of the Code of 1859 dealing with appeals from orders but the principle of the decision is applicable
- (15) Kishen Pershad Pundayı Tihickdhari Lall 18 (182 (1890)
- (16) Mohabir Presad Singh a Adhikari Kanawar, 21 C 473 (1893), explained in Mt Bril Coomarce t Ramrick Drss 5 C W N 781, at p 795 (1901)
 - (17) Venkatarama Ayyar : Vidalu
- Ammal, 23 M 169 (1900)
 (18) Kali Kristo Pal Chowdhry : Ram

Chun kr Nag OC I R 461 (1881)

"Legal Representative." See notes to sect 50, most.

"Mesne profits"-See notes to O XX r 12

"Moveable property"—"Growing crops 'doubtless include crops of all sorts attached to the soil, and leaves, flowers and fruits upon and juice in trees and shrubs See notes to sects 4 and 16, post

"Order"-Reference should be made to the preceding cases in the commentary on the definition of "decree" Some others not there eited may be noticed A suit having been instituted under the Religious Endowments Act. 1863, the plaintiff desired to withdraw the suit with liberty to sue again. and an order was made permitting him to do so, and directing that the costs be paid from the funds of the institution. It was held that the order as to costs was not a decree, and that no appeal lay (1) Orders for payment of costs under the sections noted in the decision cited are not decrees (2). The decision of a taking officer is not an order (3) An order under O IX r 2 (formerly sect 97), post, has been held not to be a decree . (4) as also orders under sect 10. Act XX of 1863 (Madras Pagoda Act) , (5) under sect 5, Religious Endowments Act (6) (XX of 1863), under sect. 16, clause 7 of Madras Reg. III. of 1802 . (7) an order under sect 18, Act XX of 1803, refusing (8) or granting (9) leave to sue, an order under sect 84 of the Bengal Tenancy Act. (10) under sect 173 of the same Act, (11) the decision of a special Judge under sect 101. clause 2 of the same Act . (12) an order under the Indian Trust Act refusing to remove a trustee, (13) an order rejecting an application to restore an application to set aside a sale, (14) an order awarding compensation under sect 491 of the list Code (15) and under sect 206 of the same Code (16)

"Pleader"—The construction of the last clause presents some difficulty. The meaning, however, of the definition becomes obvious if the clauses of which the sentence is made up are inverted, and it is read thus "Pleader means early person, including an advocate, wall, and an attorney of a High Court, entitled to appear and plead for another in Court." It is only the pleader

⁽¹⁾ Ramakissoor Dossji i Sriringa Charin, 21 M 421 (1898)

⁽²⁾ Shanks t Secretary of State, 12 W 120 1889)

⁽¹⁸⁸⁹⁾ (3) Balkaran Rass Gobind Nath Tewari

¹² A 129, 157 (1890)
(4) Bissequir Bhugut t Murli Sahu 9 (

^{103 (1882)} (5) Meenakshi + Suhramaniya, 11 M 26

<sup>(1887)
(6)</sup> Somasundara e Vythilinga, 19 M.

<sup>285 (1896)
(7)</sup> Narasayya e Collector of Anantapur

⁽⁷⁾ Narasayya v Collector of Anantapur 24 M 95 (1900)

⁽⁸⁾ In re Venkateswara, 10 M 98 (1886), Kazim Mi t Azim Ali, 18 C 382 (1891), D Iroos Banoo t Abdur Rahman, 21 W P 365 (1874)

⁽⁹⁾ Protep t Brojonath, 19 C 275, 285

⁽¹⁸⁹¹⁾ (10) Goghun Mollah + Ramessur, 18 C

⁽¹⁰⁾ Goghun Mollah + Ramessur, 18 C 271, 281 (1891)

 ⁽¹¹⁾ Raghu Singh + Misri Singh, 21 (825)
 (1891), see also Harabandhu + Harish, 3
 (W N (1898)

⁽¹²⁾ Laft Kirut Namin t Palukdhari, I7

C 326 (1889)
(13) Nathu Wilson t. McAfee, 19 A 131

⁽¹³⁾ Attitu Wilson 1. McAtee, 19 A 131 (1896)

⁽¹⁴⁾ Supruddin r Reszuddin, 27 (*, 414 (1899)

⁽¹⁵⁾ Nartsinga r Govinda, 24 M 62, 64

⁽¹⁶⁾ Nalmakshya r Mufakshar Hossam, 28

⁽¹⁶⁾ Nalinakshya r Mufakshar Hossain, 28 C 177, 179 (1900)

duly qualified who is entitled to appear, the valid where and as his qualification entitles him, the advocate where and as his qualification gives him the right, and the attorney where and as he too might be qualified (1)

"Public officer,"-This section is the same as that of the preceding Code. with the slight alterations italicized, and the definition of "public officer" has been taken from that of "public servant" in the Indian Penal Code, with some omissions (2) For the definition of "Judge," see ante, and of "Court of Justice" the Penal Code,(3) which gives the general signification of the expression. The following persons have been held to be public officers under this section, or public servants under the Penal Code, under provisions of that Code which correspond with this -convict warders, (4) a supernumerary person appointed by the Board of Revenue under sect 6, Act V of 1863, (B C), (5) Naib Nazir, (6) a Patwari, (7) the Official Trustee of Bengal, (8) the Official Assignee of the Insolvent Court, (9) a Collector appointed to take charge of the estate of a minor under Act XX of 1864, (10) or as agent for the Court of Wards under sect 204, Act XIV of 1873, (11) an officer in the Indian Staff Corps, (12) the Administrator-General of Bengal since the passing of the Administrator General's Act of 1902 (13) A person nominated by the Collector under sect 69 of the Bengal Tenancy Act, for the purpose of making a division of crops between the landlord and tenant, is not a public servant , (14) though a surveyor employed by the Collector in the Khas Mehal Department is (15) A Cantonment Committee constituted under the Indian Cantonments Act (XIII of 1889) has been held to be a public officer within the meaning of this clause (16)

"Signed"-The word is here employed in a sense more comprehensive

105 (1883) As to the powers and duties of pleaders some cases will be found collected in O Kinealy's Civil Procedute Code in the notes to this section And as to Vakil's proclams before the Privy Conneil, see In Te Twidale, 16 C 630

(2) S 21, therefore in certain cases a

(1) In re Pleaders of the High Court, 8 B

- (2) S 21, therefore in certain cases a person may be a public servant, but not a public officer, eg a municipal commissioner and ongineer R v Nantamam Uttaram, 6 Bom H C R Cr Ca 64 (1809)
- (3) S 20 (4) R & Kallachand Mortrie, 7 W R Cr
- 99 (1867) (5) R + Ram Krishina Das, 7 B T R 446, 16 W R Cr 27 (1871)
- (6) R : Wahmood Hossem, 2 N W P 298 (1970)
- (1970) (7) R t Muds ood deen, 2 N W P 148
- (1870)
 (8) Stated and a Shahunsah Begum a Lergusson, 7 (= 149 (1881), Adial Laterfa

- Doutre, 12 M 250 (1889)
- (9) Joosub Haji Allia Kemp 4 Bom L R 929, s c, 26 B 809 (1902)
- (10) Bhan Balapa & Nuna, 13 B 343, 346 (1888), Narangrav & Lakahmanrav, 1 B 186 (1876), that is the collector appointed at such, but the near is not any where men toned in Act Xv of 1864 as a person who may in 1 is official capacity to appointed administrator, and is not a pullic officer Voltam Ishwar v Haku Rupa, 4 B C 18
- (11) Collector of Bynir : Munivar, 3 A 20
- (1880)
 - (12) Watson v Lloyd 25 M 402 (1901)
 (13) Bholyram Chowdhury v Adminis
- Irator General, 8 C W N 913 (1904)
 (14) Chatter Lal : Thacoor Pershad, 18 C
- 518 (1891) (15) Bajoo Singh t Queen Furpress 26 (
- 158 (1898)
 (16) Ceed Grey r Cantinment Committee of Pene, 31 B 583 (1910)

than that assumed to it in the General Clauses Act. 15 to which is substantially the same as the first clause of this definition of the last Code The second clause of that Cole was first added in the amendar. Bill 11 of 1578 on the ere in I that the use of a seal capable of a techning an impression of the name and title of the person using it is common anonced people of rank in this country. The definition in the last Code after the word "stamped" added "nith the name of the person referred to". The expression "terson referred to" meant the person referred to in the subsequent sections of the table as being required to sign or verify certain documents, and it is not a condition are edent to such person leing able to use a stamp that he should be unable to write his name (1). As regards mitralling, assuming that the pers in signing should, if alle to write write his name in full, and certainly it is proper that this should be done in the case of a warrant -it does not follow that because the signature on the warrant is confined to the initials of the name. it was not the duty of the officer to execute it or that the deliter may forcibly resist its execution (2)

For the purposes of this Code, the District Court is sub-Subordination of Courts Court of grade inferior to that of a District Court and every Court of small Causes is subordinate to the High Court and District Court

Subordination - See notes to seet 2 arte sub toc ' District Court' This connection of Subardinate Courts is not intended to be exhaustive (3)

(1) In the absence of any specific provision to the contrary, nothing in this Code shall be decided to limit or Sai inas otherwise affect any special or local law now in force or any special jurisduction or power conferred, or any special form of procedure prescribed by or under any other han for the time being in force

(4) In particular and without prejudice to the generality of the proposition contained in sub-section (1), nothing in this Code shall be deemed to limit or otherwise affect any remedy which a landholder or laudlord may have under any lau for the time being in force for the recovery of rent of agricultural land from the produce of such land.

Savings -As originally drafted, the Civil Procedure Bill declared that nothing in the Code should iffect (a) the Oudh Civil Courts Act (XIII of 1879), the Ondh Courts Act (XIV of 1891) the Pumph Courts Act (XVIII of 1884), the Central Provinces Civil Courts Act (AVI of 1885), the Lower Burmali Courts Act (VI of 1900), any law under the Indian Conneils Acts (24 & 25 Vict

⁽¹⁾ Miharaja of B nares t Debi Dayat (3) Purshottam t Mahadu Pand 1, 14 B am Noma 3A 575 (1881)

⁽²⁾ tt + Sanki t'risad 8 A 293 (1886)

I R 947 s c, 37 B 114 (1912)

make a remand, that term being used in the former sense, then it is only in the latter sense that an erroneous order of remand can be treated as an order made without jurisdiction (1) Further difficulty has been introduced, it having been held that the same term may mean one thing in one section of the Code and another thing in another. So the term, it has been held, (2) is used in its former sense in sect. 39 (formerly 578), that is, in the sense of local and pecumary jurisdiction and jurisdiction with reference to the subject matter, while the same term in sect. 115 (formerly 622), may, it is said, well be taken to have been used in a more comprehensive sense (3). The term in this section is used in the first of the senses above mentioned.

The judgment or order of a Court without jurisdiction in this lastnucutioned sense is void and a mere nullity (4) Jurisdiction derives from the Soveregn, and in British India has been conferred by the Chriters and Letters Patent of the High Courts, and as regards other Courts by various Acts of the Legislature constituting those Courts, giving them powers and regulating their procedure (5)

This jurisdiction may be of different kinds (a) over the parties, (b) over the subject matter, (c) local, (d) pecuniar. Peculiar powers may be given to particular Courts whilst other Courts may be of restricted jurisdiction. But no Court has power to give judgment respecting a matter not submitted to it for decision, even in a suit involving other matters which have been so submitted (6)

The distinction must be kept between jurisdiction and errors in the exercise of jurisdiction. The proceedings of a Court having jurisdiction over the subject matter and parties are not void, however erroneous they may be A judgment is not void simply because it is erroneous. This is ovident from the very notion of jurisdiction, which is the power to determine and not

⁽¹⁾ Mohesh Chunder Das : Jahruddi Mollah, 5 C W N 503, 512 (1901) [So it has been said that the Judicial Committee in Amir Hasan Khan t Shee Bakin Singh, 11 to 6 (1881), used the term 'jurisdiction," not in the sense that the Judicial Commissioner had no jurisdiction in the first sense of the world to entertain an application for revision, for he had the same powers as the High Court, but that the had executed his legal authority and that the order was sitra ures Har Prasad t Jafar Ali, 7 A J.30 (1885) See Hukm Chand, Pes Jud 161 et seq.

^{(2) 1}b (3) 1b, 514 Har Prasad t Jafar Ah, 7 A 350 (1885), Dhan Singh t Basant Singh, 8 A 519 (1886) per Wahmood J

⁽⁴⁾ See Authors Evidence 1ct, 5thed., note to s 44, where the question of competency, fraud and collusion as affecting jud ments, dealt with, and Hukm Chand, Res Jud. 317, 481 A Court may, however, always inquire

as to whether juradiction canals. This is not an eventos of juradiction over the case takelf, but an investigation of another question, that of whether the conditions of cognizance are statefied. Amitta's 1. Bilarishna, 11 B. 458 (1857), Hurce Presid theories Behary, J. WR 215 (1865). As to the effect of evidence given in a Court without juradiction, its Authories Friedrice hat the director of the Authories Friedrice hat the director of the probabition of inquiry into juradiction by executing Court under 0.21 r.7, see Hari Govind Kallunder 7. Asringrao Kontherica Desphande, 58 B. 144 (1932).

⁽⁵⁾ I the post has to the presumptions affecting jurisdiction, see Authors' Lyidence Act, 5th ed., notes to a 114, ill (c) and under heading 'Pegularity', Hukm Chand, Pes Judesta, 422

⁽⁶⁾ See per James, L.J., in Pobinson v. Dh.deep Singh, 11 Ch. D. 798, Hukin Chand, Pes Judicata, 451

ill repects acted as Judge, that fact is presumptive proof, until the contract be shown, of his due appointment to act as a Judge of the Court (1) If a Judge is validly appointed but is disqualified from trying a suit by reason of his per and interest in it, (2) the judgment is erroneous and vailable but not void (3)

Is uming the existence of official authority and the absence of any disquilification, the next question is as to the purisdiction to deal with the various matters which, in the exercise of his general judicial authority, are brought before the Jude. for his determination

Jun diction, when used in its general sense with reference to a Court of In tice means the power or authority of judging, and that Court is said to be of competent (4) juri diction with regard to a suit or other proceeding, when it has power to hear or determine it or to exercise any judicial power therein (6) Juni diction 'said West J. (6) "according to the exact conception of it famed by the Roman lawer, consists in taking cognizance of a case involving the determination of some juril relation, in ascertaining the essential points of it, and in pronouncing upon them." The word, however, is commonly used in two different senses an use which has led to much confusion. It is not times used to men juri diction in the endinary sense above mentioned, that is, when used with reference to local or pecuniary jurisdiction or with reference to the parties, (7) or jurisdiction with reference to the subject matter (8) of a suit. It is also used to mean the legal authority of a Court to do cert unithing. Thus it has been said that if a Court has "jurisdiction" to

make venand, that term being used in the former sense, then it is only in the latter sense that an erroneous order of remand can be treated as an order made without jurisdiction (1) Turther difficulty has been introduced, it having been held that the same term may mean one thing in one section of the Code and another thing in another. So the term, it has been held, (2) used in its former sense in sect. 99 (formerly 578), that is, in the sense of local and pecuniary jurisdiction and jurisdiction with reference to the subject matter, while the same term in sect. 115 (formerly 622), may, it is said, well be taken to have been used in a more comprehensive sense (3). The term in this section is used in the first of the senses above mentioned.

The judgment or order of a Court without jurisdiction in this last mentioned sense is void and a mere nullity (4) Jurisdiction derives from the Sovereign, and in British India has been conferred by the Chriters and Letters Patent of the High Courts, and as regards other Courts by various Acts of the Legisliture constituting those Courts, giving them powers and regulating their procedure (5)

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⁽¹⁾ Mehesh Chunder Das a Jahruddi Molfah 5 G W N 500 512 (1901) [So it has heen said that the Judicial Committee in Amir Hasan Khan e Shee Bakah Singh 11 G (1881), used the term jurisdiction, not in the sense that the Judicial Commissioner had no jurisdiction in the first sense of the word to entertain an application for revision, for be had the same powers as the High Court, but that he had exceeded his legal authority and that the order was first stress like Prasad c Jafar Ah, 7 A Ja9 (1885) See Hukm Chand Pes Jud 161 (487)

^{(2) 1}b (3) 1b 514 Har I rasad t Jafar Ah 7 A 350 (1885) Dhan Singh t Basant Singh

⁸ A 519 (1886) per Mahmood J (4) See Authors Evidence let, 5thed., note to s 44 where the question of competency, fraud and collusion as affecting jud ments is dealt with, and Hukin Chand, Res Jud 37, 454 A Court may, however, always inquire

as to whether jurasdiction exists. This is not an exercise of jurisdiction over the case itself, but an investigation of duother question, that of whether the conditions of enginetic artistical maritary is Baltinshin 11 B 488 (1887). Hurse Prosid i Koonjo Behary I Hurse Poll (1862). Astum i Watson 3 W P 215 (1863). As to the effect evidence given in a Court without jurisdiction see Authors Lindence bit the direction probability of the probabilities of inquiry into jurisdiction processing Court under 0.21 r 7, see Hart Govand hallundri t Narungma Konberga Desphande 38 119 (1913).

⁽⁵⁾ Left post is to the presumptions affecting jurisdiction see Authors' Evidence Act 5th ed., notes to s 114 ill (*) and under heading Regularity, Hukm Chand, Pes Judicata, 422

⁽⁶⁾ See per James, L.J., in Pobinson i Dhuleep Singh, H Ch. D. 793, Hukin Chand, Pes Judicata, 451

much the power to determine rightly (1) So in the under-mentioned case the Privy Council held that a judicul sale was not a millity and could not be traited as maintained interest and the pure diction of the Court to execute had been complete throughout. It had not been lost by reason of an error in treating a particular person as the leaf representative of the judgment debtor's estate the Court having power to decide wrongh as well as rightly (2)

It is a general principle, that whenever jurisdiction is given to a Court by in continuent, and such jurisdiction is only given on certain epecified terms contained in the concennent itself, these terms must be complied with in order to create and ruse the jurisdiction, for if they are not complied with the

juri du tion does not ari-e (3)

Convent cannot give jurisdiction, which is absent as regards the subjectmute (1) nor probably as regards local or pecuniary (5) jurisdiction. When the Judge has no inherent jurisdiction over the subject matter of a suit, the parties cannot by their mutual consent convent it into a proper judicial process, although they may constitute the Judge their arbiter and be bound by his decision on the ments when these are submitted to him (6).

(f) Hukin Clard Les Indiana 173 482 s what the Court have power to great relief a priteular kind, an error in giving too tuch er in tenough is never onal so long systel an text end its possible power in any exit of the general class, to which the one under onal retion Clongs, ib 460. Andrew Hurthstan Aharte Shoe Birksh Engh, H.C. (1884), ref. Har Prasal t. Jaftr Ali, 7 A tt. 3 (1884), R. Kant kuwa t. Dinu Pa, v. III (1885), Mall med Suleman Khant.

2 m. n. N. 104 (1884), and next note and t. t. t. t. a. 117, and a. C. Bhuren Ira. Nath fixer Lampt Single Hit C. 384 (1912).

(a) William . Nat in . . B 137 (1900)

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(6) See Hukm Chund, Pes Judicata, 411, 412, where it is stated that the question as to the warrer of local juradiction has not yet received an authoritative decision in India In Velayudam & Arunachala 13 M 273 (1889), it was held that there was no warrer of pecuniary juradiction, but the matter was one rolly not of juradiction but procedure See Gourachandra & Valrama 23 M 367 (1899) In Gurdeo Singh & Chandrikah Singh, 5 C I, J 611, 623 (1907) the term

subject mitter" appears to have been used in contradistinction to the other elements

boarfran

Where, however, the Court has jurisdiction over the subject neutrer and over the person and a defendant has some privile, which exempts him from the objection, such privilege may, it has been said, be waived (1). So where the objection to the jurisdiction was based on the ground of the defendant being a Sirdar of the Dekhau, who as such was not subject to the jurisdiction of the Munist's Court which presed the decree, it was held that the defendant must be taken to have waived the want of jurisdiction and that it was too late to raise it when the decree was sought to be executed (2). And there are numerous authorities which establish that when, in a cause which the Judge is competent to try, the parties, without objection, join issue and go to trial upon the merits, the defendant cannot subsequently dispute his jurisdiction upon the grounds that there are irregularities in the initial procedure which, if objected to at the time, would have led to the dispusses of the suit (3).

Under the former Codes it was held that an objection to jurisdiction might be raised at any stage of a suit, even after remand by the High Court in second appeal (1) and that the Court would receive and adulerate a point of

Vishnii Sakharam + Arishnarao 11 R 153 (1886). Roy Bheenendra Nath Chowdhry t halce Prasunno Ghose, 24 W R 205 (1876) [consent cannot give jurisdiction nor alter the nature of the decree An agreement intra ducing Iresh parties cannot be substituted for the decree or become canable of execution as if it was the original decreel. Ramasamy Chettiar t Orr. 26 M 176, 178 (1902) . Akle mannessa Bibi t Mahomed Hatem, 31 C 849 (1904), Kumasasami Reddiar t Sabba raya, 23 M 314 (1899) [transfer of appeal, but absence of notice of transfer may be waived Sankumani e horan 13 M 211 (1889)1. Krishnan Chetti v. Muthu Palandi. 22 M 172 (1898) [appeal], Aukhil Chunder t Baboo Moheence Mohun, 4 C L P. 491 (1879) [id] (1) See Hukm Chand, Res Judicata, 412

(2) Exparte Manohar Bhuvan, 2B H C R 374 (1865), ref, Moru t Gopal, 2 B 132 (1877) It is to be observed, however, that the objection in the former case was taken in execution proceedings, and a Court executing the decree has no power to go into the merits of the decree

(3) Ledgard & Bull, 9 A 191, 203 (1886), P C. P. Bann v Att Gen Ior Ghraltar, 5 P C 515 (1874) [departures from ordnary practice by consent are of everyday occur rence], Sadasva t Ramalinga, 2 I A 219 (1875), s c, 16 B L R 383 [Cont had general jurisdaction though exercise of that jurisdaction was irregular. The P C at p 403 15 B L R stated that they were not

tupressed by the observations of Markby J, in Elowit Singht Bijtyniath, 4 B L R, A C 111, in which it was held that the conduct of the parties was immaternal] Minaksh; t Subrauanja, 14 I A 100 (1887), Sankuman; t Horan 13 M 213 (1889), Vishnu Saklaram; t Krislmarae, 11 B 153 (1886), Puna Bibec t Kheda Buksh, 22 W R 396 (1874), Khemna Gowala v Budoloo Khan, 6 C 20 (1889) [reference to arbitration] See Hukm

Chand, Res Judicata, 468-473 (4) Keshav v Vinayak, 23 B 22 (1897). and see Savad Nambula v Nana, 13 B 424 (1888) Sobjection taken for first time in second appeal], Velayudam t Arunachala, 13 M 273 (1889), Mohan Ishwar v Haku Rupa, 4 B 638, 639 (1880), and cases there cited . Bipin Behary Chowdhry v Ram Chunder Roy, 14 W R 12, 16 (1870), Macdonal J t Riddell, 16 W R Cr 79 (1871), Slri Sidheswar Pandit : Shri Haribar Pandit. 12 B 155 (1887), Chundec Churn Dutt v Eduljee Cowasjee, 8 C 678 (1882) [Small Cause Court reference-new trial-though no objection at the original hearing? In Har Naram Singh v Chaudhram Bhagwant Kuar, 13 A 300 (1891) the Privy Council. holding that a Judge had acted without turis. diction, set aside the decree, although the point was not raised either in the first Court or the Court of Appeal in India Nidhi Lal 2 Mazhar Hossem, 7 A 230 (1884) [provided there is on the record sufficient material to substantiate the objection?

jurisdiction though not taken in the lower Court, hecause acts done without jurisdiction are acts of no legal effect at all and might be set aside (1) At the same time it was said that though the question of jurisdiction might be taken for the first time on appeal, 3 ct if the want of jurisdiction did not appear upon the pleadings, evidence or admissions of the parties, the Court would not, upon a mero suggestion, remand the case to ascertain further facts in order that the question of jurisdiction might be considered (2) The objection should be raised in the course of the proceedings. Ho who having an appeal and a special appeal on a question of jurisdiction, has not availed himself of those remedies, renunciarit juri pro se introducto An omission to urge objections there is to be treated when the proceedings have been completed as con clusive (3) When no objection to the jurisdiction of the first Court was rused in the grounds of a regular appeal and the first Appellate Court declined to hear the question argued, it was held that the objection should have been considered and decided (4) The present Code, however, enacts that no objection to jurisdiction ("place of suing") shall be allowed in any appeal or revision unless taken in the Court of first instance before settlement of issues (sect 21, post)

If a party protest against jurisdiction he is not bound to retire, he can go through the case subject to protest (5) If an objection to jurisdiction is first taken at a late stage of the suit, and the jurisdiction is doubtful, the proper course is to proceed to determine the suit (6). As to the form of the order where an objection to jurisdiction is raised and allowed, see notes to 0 VII r 10 In some cases a party has been held to be estopped from proving want of jurisdiction in a subsequent suit (7) or in further proceedings (8)

Subject-matter —Jurisdiction over the subject matter primarily depends on the nature of the cause of action alleged and of the relief asked — It is not however the existence of a cause of action which constitutes the subjectmatter, but the allegation of such existence (9) Nor is the subject matter of

⁽¹⁾ Gooroo Pensad Roy v Juggobundhoo Mozoomdar, W R Sp No. p. 15, F B (1862), Ramayya v Subbasayadu, 13 M 25 (1889), Rajnaran v Ananga Mohun, 26 C 598, 600 (1899) As regards estoppel agamst pleading want of jurusdiction, see Author Evidence Act, 5th ed., Introduction to Ch

VIII
(2) Naimudda Jowardar i Scott, 3 B L R
283 (1869)

⁽³⁾ Naro Harit Anpurnabat, 11 B 160 n, 171, 172 (1874) tide post, 'Estoppel'

⁽⁴⁾ Motilal Ramdas v Jamnadas 2 B II C R 40 (1865) Otherwise if it were only an irregularity Ram Lishen Upadhia:

Dipa Upadhia, 13 A 580 (1891)

(5) Hamlyn's Bettely, 6 Q B D 63 (1870)

of Ledgard + Bull, 9 A 191 (1880)

rated and allowed but the parts raising it is

responsible for the prior proceedings, see Aftabooddeen Ahmed v Mohmeo Mohm

Doss 15 W R 48 (1871) (6) Bagram v Moses, I Hyde, 284 (1864)

⁽⁷⁾ See Hukm Chand, op eit 416, Naro Hari t Anpurnabai, II B 160, n (1874), ante, Drobo Moyeev Bipin Mundul, 10 W R 6 (1868), Gope Nath t Bhugwat Pershad

 ¹⁰ G 707 (1884), Ooma Soonduree t Bepin
 Beharee, 13 W R 229 (1870), Nehom Royt
 Radha Pershad Singh, 4 C I R 353 (1879)
 Hukm Chand op cit 420, Mohammed

Hossen t Akayya Narain, 2 B L R Ap 42 (1869), Naimudda t Scott, 3 B L R 283 (1879), supra, koylash Chunder t Ashrup Ah, 22 W R 101 (1874) As to s 11 of the Suits Valuation Act, 1887, tile post,

[&]quot;Pecumary Jurisdiction
(9) See Hukm Chand Res Judicata 210

et seq

n suit necessarily identical with the property to which the suit relates. The subject matter of a suit is generally the specific thing sought in it for damages for injuring a carriage the subject matter would in one sense be the carriage, but the object of the suit would be the amount demanded. Where there is no material property concerned, as in a suit for slander, the subject matter cannot be identified with a tangible thing. Where on the other hand the claim is for a particular field, that field as a material object is sought and is regarded as the subject matter of the suit. These meanings of the term are not inconsistent. They are reconciled by saying that the field is the subjectmatter in so far as it is conceived as embraced in the command or adjudication sought. Hence what is sought is the true measure of the subject-matter, not what the suit is about in a wider and vaguer sense (1) It has been recently held by a Pull Bench of the Bembay High Court, that where the main purpose of n suit was to determine a right to immoveable property, a Small Cause Court had nevertheless jurisdiction to entertain it if the relief asked was not for immeveable property, but fer payment of a sum of money (2)

In every suit the plaintiff advances two matters for determination whether ground exists for reserting to the Court for aid, and if it does, the relief claimed as due Neither of these uniters alone is the subject-matter of the suit, to the exclusion of the other, since each alike is matter necessary to be determined in the suit before a decree can be granted to the plaintiff (3) Nor can the nature of the defendant's plea affect the jurisdiction acquired by a Court over the plaintiff s claim (4) Even an equitable claim of set off, to which O VIII r 6, nost, does not apply, will not be taken cognizance of by a Court if it is in excess of its pecuniary jurisdiction, though that circumstance will not affect the jurisdiction of the Court over the suit itself (5) Jurisdiction over the subject-matter must exist throughout the preceedings in the suit Jurisdiction must exist at the time of its institution as well as at that of its disposal (6) The decision in Shamrav & Nilon (7) is not against this view, as the decision is grounded on the encumstance that surisdiction in proceedings taken for the execution of a decree is by law not made to depend on the amount in respect of which the execution is taken, but on the amount claimed in the suit in which the decree was given (8)

The late Supreme Court possessed no Appellate Jurisdiction but a general

Per West, J., in Lakshman Bhatkar t Babaji Bhatkar, 8 B 31, 34 (1883) Hukm Chand, op eit 209

⁽²⁾ Puttangowda v Milkanth Kalo Des phande, 37 B 675 (F B) (1913), and see Vinayak t Krishnarao, 25 B 625 (1901)

⁽³⁾ Harnam Singh t Kirpa Ram, 1887, P R No 1, cited in Hukm Chand, op cit 299, 300

⁽⁴⁾ Gobind Singli t Kallu, 2 A 778 (1880), Babadar t Nawab Jan 3 A 822 (1881), Chandu t Kombi 9 M 208 (1887), Bhaj Mal t Inhora, 1888, P R No 169, cited in Hukm Chand op cit 294, where other similar cases

from the Punjab Chief Court are cited. The value of the suit is not altered by the plea of the defendant, whether that plea be true or false. Jag Lat v Har Narian, 10 A 624 (1888). Shumbho v Frankristo, 13 W R 105 (1870) [jursdiction depends upon the way the suit is framed]

⁽⁵⁾ Brojendra Nath v Budge Budge Juto Vhll, 20 C 527 (1893)

⁽⁶⁾ See Hukm Chand, op cit 405, Chandu

t Kombi, 9 M 212 (1886)

^{(7) 10} B 202 (1886)

⁽⁸⁾ Hukm Chand, op cit 405, 406

as well as a local original jurisdiction embracing matters civil as well as criminal. It executed its own writs and processes throughout the provinces and districts annexed to and made subject to the Presidency of Fort William, such provinces and districts being within the limits of its general juris diction.

The jurisdiction of the High Court is, in some respects, analogous to that of the Supreme Court, but is, in other respects, wholly dissimilar It has an Appellate Jurisdiction, as extensive as that possessed by the late Sudder Court, which it never exercises for the purpose of enforcing its decrees or orders the same being enforced through the subordinate Courts and it has an Extraordinary Original Civil Jurisdiction, and also an Extraordinary Original Criminal Junisdiction, peculiar to itself It has, besides, a Civil Jurisdiction, 2 Criminal Jurisdiction, an Admiralty and Vice admiralty Jurisdiction a Testamentary and Intestate Jurisdiction and a Matrimonial Jurisdiction Sects 11 and 12 of the Letters Patent, constituting the High Court, relate to its Original Civil Jurisdiction, sect 13 to its Extraordinary Original Civil Turisdiction, sects 21 and 22 to its Ordinary Original Criminal Jurisdiction, sect 23 to its Extraordinary Original Criminal Jurisdiction, sects 31 and 32 to its Admiralty and Vice admiralty Jinisdiction, sects 33 and 34 to its Testamentary and Intestate Jurisdiction, sect 35 to its Matrimonial Juris diction, and sects 24, 15, and 16 to its Appellate Jurisdiction Its Ordinary Civil Jurisdiction unlike the Jurisdiction of the Supreme Court, is merely local, as 15 also its Matrimonial Jurisdiction Its Extraordinary Original Civil Jurisdiction is to try and determine any suit being or falling within the jurisdiction of any Court, whether within or without the Bengal Division of the Presidency of Fort William, subject to its superintendence, when it shall think proper to do so, either on the agreement of the parties to that effect, or for the purposes of justice Its Ordinary Original Criminal Jurisdiction is both local and general, and is in all respects the same as that evercised by the Supreme Court on its Crown side Its Extraordinary Original Criminal June diction is over all persons residing in places within the jurisdiction of any Court, formerly subject to the superintendence of the Sudder Nizamut Adamlut at Calcutta, whether within or without the Bengal Division of the Presidency of Fort William, and, in the exercise of this jurisdiction, it has authority to try, at its discretion any such persons brought before it on charges preferred by the Advocate General or by any Magistrate, or other officer, specially appointed by the Government in that behalf Its Admiralty and Vice admiralty Jurisdiction is the same as that exercised by the Supreme Court on its Admiralty side, and by the late Vice admiralty Court Its Testamentary and Intestate Jurisdiction is the same as that exercised by the Supreme Court on its Ecclesiastical side As regards the Original Civil Jurisdiction of the Court, sect 2 of the Letters Patent provides that "the High Court of Judicature at Fort William in Bengal shall have, and evereise Ordinary Original Civil Jurisdiction, within such local limits as may, from time to time, be declared and prescribed by any law or regulation made by the Governor General in Council, and, until some local limits shall be so declared, and prescribed within the limits declared and prescribed by the Proclamation fixing the limits of Calcutta issued by the Governor General

in Conneil on the 10th day of Sentember, 1791 and the Ordinary O ignal Civil Jurisdiction of the said High Court shall not extend beyond the limits for the time being deelared and prescribed as the local limits of such jurisdiction. As no law or regulation has been made by the Governor General in Council declaring and prescribing local limits within which the Ordinary Original Civil Jurisdiction of the Court is to be exercised the limits of the town of Calcutta are the present limits within which jurisdiction is to be exercised (1)

Certain Courts are of hmited but exclusive jurisdiction such as the Presidency and Provincial (Act IX of 1887) Small Cause Courts which have limited jurisdiction of an exclusive character over certain classes of suits for money or moveable property which may be tried summarily and which on that ground are excluded from the purisdiction of the ordinary Civil Courts There are however numerous rulings to the effect that the nature of a suit is not changed because a question of title is incidentally raised in it (2) As to other Courts of exclusive jurisdiction see post "Fither expressly or implied! barred As regards the valuation of the subject matter as giving jurisdiction sec 'Pecuniar Lurisdiction post

Just as sect 9 of the last Code coacted that no person should be exempted from the jurisdiction, so as records subject matter sect. 10 cureted that subject to the provisions of the Code and other enactments to which reference will be made no envil cause is exempted from the jurisdiction of the Civil Courts (tid post) Generally speaking with the exception of Small Cause Courts (3) and Revenue Courts (4) the purisdiction (subject to the conditions mentioned in sect 10) as regards the subject matter is not limited though the power to take cognizance of a particular suit may be affected by its value. So though a Munsif in Bengal may try all suits cognizable by Civil Courts le eau only do so in the case of suits the value of which usually does not exceed 1000 runers

(a) Local jurisdiction -The juris liction of a Court apart from statutors power can only be exercised over persons who are within its territorial limits (5) For the exercic of judicial power this country is divided and subdivided into small local areas varying for different grades of wirts and generally hable to a change by the Executive Government (C)

(I) Secore Dutt t Pam (lunl r Miter l Hyle a I eports 130 (1903) pr Wells J (a) Alacirisami e Innasi 3 M 127 F B (1881) Manappa t McCartl v 3 M 199 1 B (1881) Bapung Kr 1an lo B 400 403 404 (ISOO) Molesh Mal to r Sleakh Liru 2C 4"0 (15"") I II (no rive alarmal les though a questi n of t the nav have been ine lentally rased! Latha e (ulatur 1" W 1 106 (18"1) [tle deci on on t tle is t teenel are except as regards the claim in llat sut? It is the nat re of the sut as I ser bed in the plant and n it enstared the lines will litermines a med to of pay it to its regard the pr

dit on in particular cases flres l'n y a l In vincial Small Court Courts as alse f Courts of Cantinment Manutral san It of Request, are cave e ted in O k neals a Civil Procedur (st n ston 1"

(3) 1 de ant

(4) See as to three Hukm (link 1 a fud ata 2 5 Ohm abat allowed Code notes to a. l arling

(") Hadre haven r Hadre light f

(n) 1) 123 / 11 2) (C) See Hulm Clar 1 Les Je trata 318 et

see In Fe hell cal tir e in respect t local mattera cont oil d wait 1573 when I ral ter ra were alel 1 1 let (reach

The limits of these areas determine the local limits of the Courts' jurisdiction for the trial of original suits and appeals Personal jurisdiction depends on the place of residence or business of the defendant. The former for transitory actions, that is, actions which are brought on occurrences which happen any where, depends on whether the cause of action or part of the cause of action arose within the local limits of the jurisdiction, and for local actions or actions relating to immoveable property or for the recovery of moveable property actually under distraint or attachment, depends on the situation of the property within the local jurisdiction The case of moveable property attached or under distruit is an exception to the general rule that personal property has no locality, by which it is not meant that it has no visible locality, but that it follows the person and is governed by the law which governs him (1) The exception in the Code (2) is probably founded on the fact that in the case given the situs of the moveable property is fixed and cannot be altered by any person at his pleasure, and, perhaps, also for the convenience of judicial administration The limits of these different areas determine the local limits of the Courts' jurisdiction for the trial of suits and appeals. The difficulty exists in what has been fitly described as the localization of suits and rules have therefore been enacted by the Legislature for determining the circum stances in which a suit may be taken cognizance of by the Courts having jurisdiction in any particular area

Chuse 12 of the Letters Patent determine the ordinary original juris diction of the Presidency High Courts, the High Court at Allahabad having ne ordinary original civil jurisdiction (3) There has however been consider able conflict of opinion as to the several essentials of jurisdiction for which provision has been made by these Charters, (4) chiefly as to the nature of "suits for land" To avoid such differences of opinion in the Provincial Courts, the Code, in seets 16-20, post, makes detailed provisions as regards jurisdiction, and in any case governed by those sections there can hardly be any difference as to the character of the local suits to which the principle of territorial juris diction must be held to apply These provisions as also those contained in the Charters are dealt with in the Notes to those sections

It has been held that a Court has no jurisdiction to hear and decide a suit or appeal within its jurisdiction and cognizable by it, if it is instituted in a Court not having such jurisdiction, (5) even though it may be transferred to it by higher judicial anthorny Tho Calcutta Court has held (6) that it

Equity, which were always unfettered by local venue entertained suits affecting lands abroad See Companhia de Mocambique e British South Africa Company, 1892 2 Q B The local limits of the Calcutta High Court were fixed by proclamation of the Governor General on 10th Sept , 1794, and are given at p 401 of Belchamber's Rules and Orders ed 1900

⁽¹⁾ Companhia de Mocamb que e Brita h South Mica Co 1892 2 Q B 397 per Lord Isler

⁽²⁾ S I6 cl (f)

⁽³⁾ As to the distinction between ordinary and extraordinary jurisdiction see Navivalion

v Turner, 16 I A 162 (1889) (4) See notes to ss 17, 18, past

⁽⁵⁾ Pachaoni Awasthe : Ilahi Baksh 4 A 478 (1882)

⁽⁶⁾ Peary Lall Mozoomdar + Komal Lishoro Desin 6 C 30 (1880), Itam Narun Joshy & Parmeswar Narum Mahta 25 C 79 (1897) P + Mangal Tekel an 1, 10 B 2"1 (1680) [Cr I C s 500]

could direct the trunsfer of an appeal only from a Court having jurisdiction to receive and try it, and that decision was approved of by the Judicial Committee (1)

As to the jurisdiction over proceedings in execution of a decree see sect

An appeal cannot be heard upon the ments unless the decree from which the appeal was preferred was passed by a Judge having jurisdiction over the matter in dispute. The Appellate Court is only a Court of Frora, and the trial by an Appellate Court cannot be accepted in place of a trial by the Court of first instance (2) But though the Appellate Court cannot entertain the appeal on the ments where a Subordinate Court has no jurisdiction over the trial of a suit or appeal the Appellate Court authorized to hear appeals from that Subordinate Court has power as such to set assign the proceedings on an appeal (3) So where a defendant appealed from the Deputy Collector to the District Judge and the plaintiff then appealed to the High Court, upon an objection to the hearing of the appeal on the ground that as no appeal (3) to the District Judge afforders no appeal lay to the High Court, the objection was overruled and the High Court reversed the decree of the District Judge and restored that of the first Court (1). As to the effect of absence of objection to jurisdiction see sect 21 nost.

(b) Personal jurisdiction—As already stated jurisdiction is conferred by the various Charters and Letters Patent and Acts of the Legislature to which recourse must be had, to determine the extent of jurisdiction in the case of any particular suit and Court. And such jurisdiction may be considered with reference to the (a) parties (b) subject matter (c) local and (d) necuminary limits.

In the first place this section and sect 10 of the last Code enact general

rules which are applicable to all Civil Courts

Their effect may be generally, though succinetly expressed in the language of Garth, CJ, in a case in which the defendant was master of an Italian vessel (5) "There is no doubt whatever that by the law of this country which is the same in that respect as the law of England Civil Courts as a general rule have juris diction to try all civil with against all persons of any nationality within the local limits of their jurisdiction."

Sect 10 of the last Code dealt with jurisdiction over persons Prior to 1850 Courts presided over by native officers were not competent to tall 0 cognizance of suits to which Europeans or Americans were parties The Code of 1859 enceted the same rule as that contained in sect 10 of the last Code The

- (1) Ledgard v Bull 9 A 191 (1886) B see Hukm Chand Res Judicata 458
- (2) Velayudam ı Arunachala 13 M 273 274 (1889)
- (3) Jwala Proceed v Salig Ram 13 A 575 (1891)
- (4) Ih In the case cited in the last note, as it was held that neitler of the lower Courts hall jurisdiction the High Court set aside the
- decrees of both Courts d smissed the suit and directed that the plaunt be returned for presentation in the proper Court. In these cases if ore is merely an inquiry as to whether purasdiction exists. As it is open to the first Court to make such inquiry so can the Appeal Court if the former errs. See Hinkin Chand.
- Res Judicata 400
 (5) Olner: Lavezzo 10 C 878 882 (1884)

provisions contained in that section were first enacted by Act XI of 1836 and were reproduced in the Code of 1859, and in subsequent Codes Then retention has been considered no longer necessary, the principle of law which it embodied having been sufficiently established

The repeal of sect 151 of the Army Act by 51 & 52 Vict c 4, s 6, has removed the limitation on the general jurisdiction of Civil Courts in regard to suits for deht against officers holding the King's Commission (1) There are particular enactments (2) exempting from the ordinary jurisdiction particular persons or classes of persons, and sect 86, post, contains special provisions relating to princes, chiefs, ambassadors and envoys. There was nothing, however, in sect 10 which affected such personal exemptions, as they were not on the ground of descent or place of birth, but by virtue of special enactments

The exemption of independent foreign Sovereigns from the jurisdiction of all Civil Courts is, as a general rule, universally admitted (3) As to the con ditions in which protected independent native princes may be sued, see sect 86, post "It is an attribute of sovereignty and an universal law that a State cannot be sued in its own Courts without its consent" (4) A Sovereign State may, however, bring and maintain a suit as any other suitor. As to suits by foreign States see seets 84, 87, post In India, however, the Government, unlike the Crown, can be and is often sued. And this is so on account of the original trading character of the East India Company, who in course of time acquired the Government of India, and from whom the late Queen took over the Government The statute 21 & 22 Vict c 106, which transferred to the Crown the possession and government of the British territories in India, expressly provided for a continuance of both the nature and the extent of liabilities with which the revenues of India in the Company s hands were chargeable As the Crown could, however, not be sued as the East India Company could have been, in her own Courts, it was enacted by sect 65 that the Secretary of State in Council should and might sue and be sued as a Body Corporate and that all persons might have the same remedies against the Secretary of State as they could have done against the Fast India

Pike v Carcy, 1897, All W N 203

⁽²⁾ These exemptions generally have refer ence to the head or members of certain families which ruled tracts of country since conquered by the British Government Peference, for instance may be made to s 2 Act \111 of 1868, s 11, Act \V11 of 1863 relating to the consent of the Governor Ceneral to suits against the ex Long of Oudh and the Navab Nazim of Bengal to a 2 Act \ \ of 1873 , s 1, Act \ \ \ 11 of 1858 which enact the same with reference to the Prince of Arcot and certain members of the family of the late Navab of the Caractic nam whin the Act the consent require I being Unt of the Cos mor of Madras to Act Will of 1848 which ensets il same with

respect to certain members and servants of the family of the late Nawab of Surat named in the Act the consent required being that of the Governor of Bombay

⁽³⁾ See Hukm Chand Res Judicata 372 et seq Mighell & Sultan of Johore, 1894. 1 Q B 149 but a foreign sovereign may submit to the jurisdiction by a submission in the face of the Court, as for example by appearance to a writ 1b, per Lopes I J

⁽⁴⁾ Per Sir Barnes Leacock CJ in P & O S N Co : Secretary of State for India ! B H C R App I (1861) Not in Chund r Dex a Secretary of State 1 C 11 (1875), The Secretary of Stat t Harr Blang 5 M 277 (1852)

Company, and that the property and effects thereby yested in the Crown for the nurnoses of the Government of India, or acquired for the said nurnoses. should be subject and hable to the same judgments and executions as they would, while vested in the Company, have been liable to in respect of debts and habilities lawfully contracted and mentred by the Company It may therefore he generally said that the hability of the Secretary of State to be sued depends on that of the East India Company, and the hability alleged must be one incurred on account of the Government of India (1) But as the latter could not be, therefore the Secretary of State cannot be, sued for all its acts. The Company, though established originally for purposes of trade. acquired in time sovereign powers (2) Therefore acts done in the execution of these sovereign powers were not subject to the control of the Municipal Courts (3) Though the principle is well established, there is some conflict of opinion as to what acts ere to he deemed acts of State, and therefore beyond the cognizance of the Civil Courts (4) The meaning of an "act of State" has been defined by the Privy Council to be "something which eppertains to the functions of Government " (5)

Several Indian Acts exempt from the jurisdiction of Civil Courts various acts of executive and revenue officers dono in discharge of the work of administration. See, for instance, Act IX of 1859, relating to the clums to property seized as forfeited, and post, "Subject matter". The exemption in some cover

only extends to certain Courts or classes of Courts (6)

As a general rule, the Court has jurisdiction over all persons, whether subjects or foreigners, (7) present in the State at the time of the institution of

⁽¹⁾ Shivabhajan't Secretary of State, 28 B 314 (1904)

⁽²⁾ See Gibson t East India Co, 5 Bing N C 273

⁽³⁾ Secretary of Stato t Kamacher Boyee Sahiba (Tanjore Case), 7 M 1 A 476 (1859), 8ast India Compana c Syed Allig, 7 M 1 A 578 (1827), Fliphinstone r Bedrechund, 1 Kinapp, P C C 316 (1830), Jehangur s Secretary of State, 27 B 189 (1902)

⁽⁴⁾ See Ilolam Chand, op est pp 372steeq, salig Rlam v Secretary of State for India 1 A Sup 110 (1872), Bhagwan Singht Secretary of State, 2 1 A 35 (1872), Forester tary of State, 2 1 A 30 (1872), Forester tary of State, 2 1 A up 10 (1871-72), Ilari Sadashiv v Shaikh Ajmudin, II B 235 (1886); Moodeley v Fast India C Bro C C 469, Sheo Lall Bohra v Shaikh Malomed, 13 W P C 4 (1876), P A O C v Secretary of State, 5 B II C II App 9 (1861), Nobin Chunder Butt v Secretary of State, 1 C 26 (1875), Secretary of State, 1 C 26 (1875), Secretary of State, 2 M 279 (1882), Apaia Bagaya v Secretary of State, 7 M 400 (1884), Goswan v Madhey dag, 17 B

^{600 (1893),} Shirman t Goswami, 7 B 620 (1878) [Act of State of Loreign power], Johangir t Secretary of State, 27 B 189 (1902), Shirabhajan t Secretary of State, 28 B 314 (1904)

⁽⁵⁾ Sheo Lall Bohra : Shark Mahomed, 13 U. R. P. C. 4 (1869)

⁽⁶⁾ Ly a. 32, Bombay Civil Courts Act as amended by a 15 of Bombay Levenow Juris Act not amended by a 15 of Bombay Levenow Juris Act not active the 15 of th

⁽⁷⁾ See O'mer r Laverro, 10 C 874, 842 (1941)

the suit, whether then presence is temporary or permanent. As regards non resident foreigners, Plouden, J, in Bikrama Singh v Bir Singh (1) said "There is certainly, so far as I can ascertain, no rule of international juris prudence universally recognized that a Muniemal Court is absolutely incompetent to exercise jurisdiction over a non resident foreigner, and it is certain that in many, if not in most, countries the Municipal law authorizes the exercise of jurisdiction in such cases by its own Courts subject, generally speaking, to the condition that notice, actual or constructive, be given to the absent defendant For instance, the Code of Civil Procedure (sect 10 of the last Code) enacted that no person should, by reason of his descent or place of birth be in any civil proceeding, exempt from the jurisdiction of any of the Courts, and in sect 89 (now O V r 25) the Code provides for service of summons out of the jurisdiction while sect 17 (now sect 20) authorizes the Court to take cognizance of certain cuts when the cause of action has arisen within the junisdiction' It appears however, to be generally agreed upon that even the personal service of a summons on a non resident foreigner at his foreign domicile can create no jurisdiction so as to render the judgment enforceable in the Courts of any other State (2) masmuch as no Sovereignty can extend its powers beyond its own territorial limits to subject either persons or proporty to its judicial decision. And there is no principle for holding that the mero possession of property in the foreign country would by leason of the protection enjoyed, confer on the Courts of that country jurisdiction over a foreigner neither domiciled nor resident therein in respect of matters un connected with the property (3) Whilst every tribunal may execute process against property within its jurisdiction, existence of such property affords no sufficient ground for imposing on the foreign owner of that property a duty or obligation to fulfil the judgment (4) See, further, as to personal jurisdiction and 1esidence, eccts 19 and 20, post and notes thereon

No sort of jurisdiction can be obtained against one who was dead when the suit was commenced against him as a defendant or in his name as plaintiff, and a judgment for or against him must necessarily be void (5) If a suit is once validly commenced in any Court, jurisdiction is not taken away by the change of residence or country by the defendant, and the weight of authority is in favour of the view that jurisdiction is not divested by death of either party after the institution of the suit and a judgment rendered after a party s death, though erroneous, is voidable and not void (6)

The general provision of law enacted by sect 10 of the last Code was held

^{(1) 1888} P R No 191, p 509 cited in Hukm Chand op cit 373, where the subject

is generally treated (2) See Hukm Chand op cit 373 the case of foreigners domiciled hero but temporarily

absent is different (3) Nallatambi Mudahar : Ponnusumi 2

^{31 100 101 (18&}quot;9) (1) Schibaly a Westenholz L I 6 Q Ji J55 (18"0), see Ligott on Loreign Jud. ments 137

⁽⁵⁾ Freeman on Jurisdiction, cited in

Hukm Chand op cit 403 409 (b) Pigott on Lor ion Judgments 130 , Hukm Chand op cit 400 407, who points out that in Bepin Behari : Brojo Nath 8 C 357 (1882) a judgment against a person decease i was not treated as voil but den ed the effect of res jul cata on the ground that norther the deceased nor the representatives were parties to the suit in which that judgment was I to nounce 1

not to affect special legislation such as that which has been provided for the care of the persons and property of minors (1)

(c) Pecuniary jurisdiction—Throughout the country there are Courts of different grades having jurisdiction in study of different amounts in certain prescribed local areas. In determining therefore, whether any Court has jurisdiction over any particular suit, regard must be had not only to the nature of the suit but also to the pecuniary extent of the Courts jurisdiction which are to be found in the various Acts under which the Courts are constituted.

The only limit upon the original jurisdiction of the Presidency High Courts is the exclusion of cases falling within the jurisdiction of the Presidency Small Cau e Courts in which the debt or durings or value of the property sued for dece not exceed 100 times.

In the case of the Courts governed by the Bengal N W P and Assam Civil Courts Act (VII of 1887) the jurisdiction of a District Judge of Subordinate Judge extends subject to the provisions of sect 15 of the Code (which provisions have been held not to affect jurisdiction but to be matter of procedure only (2)) to all original suits for the time being cognizable by Civil Courts. The jurisdiction of a Munist inless extended by notification, is limited to like suits the value of which does not exceed 1000 rupess (3). The Bombay Civil Courts. Act (AIV of 1869) provides for District. Joint Assistant and Subordinate Judges, the latter of whom are of two classes. The jurisdiction of the first class extends to all suits, and of the second to suits and proceedings of which the subject matter does not exceed in amount or value 5000 rupees (4).

The Oudh Civil Courts are governed by Act AIII of 1879 There are four grades of Courts The Judicial Commissioner and District Judge who have appellate jurisdiction and the latter original jurisdiction also and Subordinate Judges and Munsifs whose jurisdiction subject to notification is 10 000

rupces and 1000 rupces respectively (5)

Every suit must be instituted in the Court of the lowest grade competer to try it (6). What prome faces determines the purediction is the claim as subject matter of the claim as estimated by the plaintiff and this determination baving given the jurisdiction the jurisdiction itself continues whatever the event of the suit unless a different principle comes into operation to prevent such a result or to make the proceedings from the first abortive (7).

In rc Shannon 2 N W P 79 82 (1870)
 See notes to s 15 post

⁽³⁾ Act MI of 1857 as 18 19 Under the former but not the present Act the Dastruct Jud₂e could ass ga local limits to the juris diction of suborthinate officers See Dukhuma Chartopadhy a 18 Jabak Chunder Pey 18 C 526 (1891) Similar rules exist under the Madras Civil Courts (Act III of 18"3) as 12 13 except that the limit for a Munsuf is Ps 2,000 A Munsuf has jurisdiction in a surfer money not exceeding the limit charged on

land although the value of the land is greater such land lying with in the local limits of his jurnsdict on Janki Das t Badri Asith 2 A 638 (1889) Bahadur t Nawabjan 3 A 822 (1881) Modhawdun t Pakhal 15 C (1881) Modhawdun t Pakhal 15 C (1881) (1885) but see Krishnama t Srinivasa 4 M 339 (1881)

⁽⁴⁾ Act \II\ of 1869 s 24

⁽a) See s 17 Act \111 of 1879 I ide

⁽⁶⁾ S 15 part

⁽⁷⁾ Lalshman r Babaje 8 B 31, 33 (1883)

The subject-matter and value of a suit is determined by the plaintiff's statement of demand Jurisduction is not affected by the defendant's plen, it tiffs demand and not by the defendant's answer, which only impugns the existence of the demand but does not alter or affect its nature (1) It is the claim therefore and not the defence which is to be looked at for the purpose of determining jurisduction (2)

As regards the mode of valuation, the value need not on general principles be always the same as that for the purpose of levy of court lees Formerly questions frequently arose as to the distinction between the valuation of a suit for the purposes of stamp duty and the valuation of the subject matter of the suit for the purpose of determining the jurisdiction of the Court (3) Since, however, the passing of the Suits Valuation Act of 1887 these questions do not generally arise, for that Act (4) provides that where in suits other than those referred to in the Court Fees Act 1870 s 7, sub s v, vi, in, x, cl (d), court fees are payable ad valurem under the Court Fees Act, 1870, the value as determinable for the computation of court-fees and the value for purposes of jurisdiction shall be the same. This prox ison applies to Appellate Courts as well as to Courts of first instance (5) The effect therefore of the Suits Valuation Act has been to assimilate the value for ourit fees and for jurisdiction and thus to avoid an independent inquiry to determine the jurisdiction of Courts (6) Where, however, the value determin

possession, mesne profits [Mohini Mohun Das v Satis Chandra Roy, 17 C 704, 706 (1890)]. Want ud din : Waliullah (1902), 24 A 381), pre emption IMahabir t Beham Lal, 13 A 320 (1891)], partnership, martgage, set off (Ramuran Mal v Chand Mal, 10 A 587 (1889)], declaratory suits, and suits to set aside alienations by a llinda widow, an matrument in respect of attached property or sale, or suits to enforce registration and suits of no value or undervalued or of a composite character, see notes to Hulm Chand, Civil Procedure Code, pp. 257-270, and O'kmealy's Civil Procedure Code, s 15 As to the stamp in cases of alternative relief Kashmath & Guruda, 15 B 82 (1890) 2 additional Court Fee Chunni Lal : Ajudhi :, 19 A 210 (1896), appeal against decision as to class to which a suit belongs Dada t Nagcah, 23 B 486 (1898), Shiva t Mahto Mahto, 28 C 331 (1901), as to subsidiary relief asked not affecting subject matter, see Hakm Chand, op est 243

(f) See Harriar Prasad Singh : Shyam Lat

Smgh, 10 C 615 (1913), a plaint reported

For insufficient Court fee held that plaintiff

could not value his case differently for the

purpos a of Court fee and Juris betton

⁽¹⁾ Hukm Chand, C P C 252

⁽²⁾ Tag Lall v Har Maram Saugh 10 A G24 (1888) See as to the application of this general principle, Gobind Singh v Kalla, 2 A 778 (1880), Bapuji Raghmath v Kuvarji, 15 E 400 (1804), Chandu v Kombi 9 H 208 (1886), Bahadur v Nawabjan, 3 A 822 (1881), Amrita v Natu, 13 B 480 (1884), Hukan Chand, or cit 24, 252-257

⁽³⁾ See Hukm Chand, Res Jud 309, 310, Dijachand : Hemchand, 4 B 515 (1889), Kirty Churn Mitter : Annath Nath Deb, 8 C 757 (1882), Aukhi Chunder : Moheence

⁽¹⁸⁸⁸⁾

⁽⁴⁾ S 8, Act VII of 1897, and see also Madras Civil Courts Act, s 14, and Hukm Chand, Civil Procedure Code, 267, 268

⁽⁵⁾ Bai Varunda v. Bai Vanegavu, 18 B. 807 (1893), and see Bhagvanfrai v. Meha. 21 B. 40 (1892). Guld-baggi v. Lakshman Singii 18 B. 100 (1893). Brahmai v. Bejonji, 20 B. 25.5 (1815). As of the value tion in particular cases such as account [Navlas] Chand v. Nagendi v. 12 B. (75, (77 (1883)). All pion, administration, partition.

chief reason why the amount which is proved and claimed in a suit does not determine or affect the jurisdiction over it is that the Court has to consider and inquire in the suit, not only as to that amount, but as to the total amount asked for in the plaint, and discussed in the proceedings, the claim for the portion dismissed being adjudicated upon not less than that for the portion decreed. Nor is the other course practicable, as the amount proved cannot be known at the commencement of the snit, and jurisdiction must be fixed before proceedings are commenced and evidence entered upon (1). The pecuniary jurisdiction of a Civil Court on its original or appellate side is ordinarily speaking governed by the value stated by the plaintiff in his plaint, but if a suit having regard to the valuation in the plaint is within the jurisdiction it is not ousted by the Court finding that a decree for a sum exceeding the limits of its pecuniary jurisdiction should be given to the plaintiff (2)

It is a well known principle that the merits of a demand are immaterial as affecting jurisdiction. It is a mistaken conception that jurisdiction depends on facts or the actual existence of matters or things instead of upon the allegations concerning them (3). The question of jurisdiction does not depend upon the truth or falsehood of the claim, but upon its nature, it is determinable at the commencement, not at the conclusion, of the inquiry (4). It has, however, been held in this country that a plaintiff cannot give jurisdiction to or take away jurisdiction from a Court by adding to his claim something to which he was not entitled upon any view of the case, and such unwarrantable addition to his claim must be struck out and the jurisdiction of the Court determined with reference to the rest of his claim (5)

But the cases referred to in the first of the last mentioned decisions appear, it has been pointed out, (6) to proceed upon a misconception of the nature of jurisdiction as stated above, unless they may be justified on the ground that an "exaggerated claim thus hrought for the purpose of getting a trial in a different Court is substantially a fraud upon the law, and must be rejected,

leen applied in other cases where the suit has been bond fle overvalued, the nature of the demand determining jurisdiction Pauldro Iall Gossami & Shaira Churn Labors, 5 (188 (1879), Kondays a Anan, 7 B 448 (1883), Mahalur Singh : Bel wi Lal, 13 A 320 (1891), Mohee Lall t Khett ram Marwary, 25 W R 76 (1876), Damodhar v Trimbal, 10 B 370 (1895) . dist , Lakshman Bhatkar e Babaji Bhatkar, 8 B 31 (1883), Ailmony Singh : Jaga landhu 1 oy, 23 C 536 (1896), Ibrahimji t Belonji, 20 B 205 (1895) As to the application of the rule when plaintiff's demand is coupled with a general prayer for relief see Madho Dis r Pampi 16 A 286 (1894)

⁽¹⁾ Hiskin Cland Civil Procedure Code 250

⁽²⁾ Ma tho Das r I imji I atak, It A 286

⁽¹⁸⁹⁴⁾

⁽³⁾ See Hukm Chand C P C 214

⁽⁴⁾ R & Bolton, I A & P N S 74 per Denman CJ

⁽⁶⁾ Hamadunniss i Ribi + Gopal Chandres Malve 24 C at p 66 (1897), referring to Manda Kumara Bannerjee + Jahan Chandre Rannerjee + B L R 91, A S C (1868) in which it was held that the S C C could not be ousted of its jurisdiction merely 15 asking for an alternative relief to which the Hamtilf was not centrified. Lakshman Bhrt kar + Baboji Bhatkar, S B 31 (1883), Bonomally, Nawn + Campbell, 10 B L P 33 (1872), and distinguishing the case where the claim is not also solved junteralled in that to be dismissed only because the evid neer it manufficient.

⁽⁶⁾ Hukm Chanl op cit 21"

whether it arises from more recklessness or from an artful design to get the adjudication of one Judge instead of that of another, "(1) in principle which may apply when the intention of evading the competency of jurisdiction is certain (2). In practice, however, the establishment of fraud, which should not be presumed, involves considerable difficulties. To every case in which the demand is evidently evaggerated there will be many which will be really doubtful and where the Judge might act according to his own peculiar views in declaring biniself incompetent to take cognizance of a demand beyond the necumary limits of his jurisdiction, as he findly those pressure (3).

The general effect, however, of the Souts Valuation Act is as already stated, to avoid an independent inquiry to determine the jurisdiction of Courts. and this question, in respect of simple overvaluation as distinguished from other additions to the claim.(4) is not so likely to arise as formerly. And in the case of appeals the matter is now regulated by seet. 11 of the Suits Valuation Act Since the passing of that Act it has been held that while it is no doubt a sound rule that Courts should not allow parties to evade the law relating to matters of jurisdiction and that where it is found that a party has intentionally exaggerated his claim in order to bring his suit in a Court which otherwise would not have jurisdiction to try it, before the merits of the claim have been gone into the plaint should be returned to be presented to the proper Court, yet this rule must be taken with qualifications and one important quabfication is that embodied in sect 11 of the Suits Valuation Act, namely that where the suit has been tried on its merits by the first Court, and the overvaluation of the suit is not found to have prejudicially affected the disposal of the suit on the ments, there the objection as to juris diction should not be given effect to A plaintiff who alters the valuation of his suit for the purpose of evading jurisdiction may be punished by having no costs allowed to him. but it does not conduce to promote the ends of justice if an Appellate Court were to set aside a decision which is found to be correct on the merits simply because the value of the suit had been designedly increased or diminished to evade jurisdiction (5)

The proper valuation of the subject matter of a suit determines the

⁽¹⁾ Per West J, Lakshman : Babaji S B 31 (1883) and see Dwarka Das : hame shwar Prosad 17 A 76 (1894)

⁽²⁾ The dictum or portions of it however seems not to have been approved in Noti Pujan v Manjay. 21 M at p 274 (1897) Hamidunnissa Bilit Gopal Chandra, 24 C 661 (1897)

⁽³⁾ Hukm Chand op cit 245, 246 In Koti Pupari e Manjaya 21 M 271 (1897), tho Il C pointed out the distinction between the question whether the plaintiff could recover the whole or only part of the same claimed by him, and the question of the over valuation of the subject matter

⁽⁴⁾ E q a claim for alternative relief as in Nanila Kumar Bannerjee i Isban Chandra

Bannerjee 1 B 1 R 91 A 5 ((1818)

⁽⁷⁾ Hann hummasa Bibi · Copal Chandra Vilvkar 24 C 661 (1897) See Raghunath Chruran Singh · Sharno Korri 31 C 344 (1903) See as to Suta's almation Act, Hukm Chand Res Judenda 420 Eren where the valuation has been arbitrary and no objection to juradetion has been taken, s 11 of that Act will apply Aklemanness Bibi r Valanmed Hatem 31 C 849 (1904), but see also Bodya Nath Adya · Vakhan Lai Adhya, 17 C 689 (1890) The section applies to the revisional jursafiction under s 115, and is enacted, notwithstanding anything in \$99, post

question of essential jurisdiction throughout the suit. The jurisdiction in appeals and execution is determined primarily by the amount or value of the subject-matter of the original suit Appeals from decrees of original Courts when allowed, he "to the Courts authorized to hear appeals" from these Courts (1) Appeals from orders he to the Court to which an appeal hes from a decree (2) In the case of appeals to the Privy Council, the value of the subject matter must be Rs 10,000 and upwards, and the amount or value of the matter in dispute on appeal must not be less than that amount (3) But in the case of all other appeals the valuation of the dispute on appeal is not considered even in determining whether an appeal is to he It was formerly contended that the appeal should be held to be to the Court having jurisdiction over the amount in dispute in the appeal but it is now settled that the value of the original suit, and not of the matter in dispute in the appeal, is the criterion by which to determine appellate jurisdiction. It is thus the money value of the original suits that fixes the jurisdiction of the Courts throughout the subse quent litigation in its several stages, and not the value of what has been left in dispute (4) Not only does the jurisdiction continue throughout the suit but whatever may be the result of the suit in all such proceedings also such as execution, as by the Code are brought within its cognizance as incidental to the suit Jurisdiction is not lost in execution because the interest accrued after decree has raised the amount due above the money limit (5) See generally as to execution sect 38, vost

"Civil nature"-This will exclude all criminal proceedings but the term "envil" cannot be considered as merely the opposite of criminal for there are suits which, though not relating to matters of a criminal are yet not of a civil nature. Thus the explanation which merely declares and enacts the law as it has always been administered by the Court shows that suits as to religious rites or ceremonies, which involve no question of right to property

⁽¹⁾ S 96, post As to the Courts so authorized see Bengal Civil Courts Act (XII of 1887) as 20, 21 Madras Civil Courls Act (III of 1873) s 13 Bombay Civil Courts Act (\IV of 1869) ss 8 17, 26 27. Pumpab Courts Act (NVIII of 1884) ss 39,

⁽²⁾ S 106 post

⁽³⁾ S 110 post (4) Muthusami Pillai : Muthu Chidum 1 ara 7 M H C R 356 (1874) Dooly Chand 1 Nirban Singh 18 W R 202 (1872) Juz Lal v Har Naram Singh 10 A 524 (1888) . Waluber Singh t Behari Lal 13 A 320 (1891), nor conversely can a plaintiff value his appeal at a greater amount than the criginal suit Radha Prasad Singh t Pathan Orah If A 363 (1893) Mesne profits if il man led by the plaint must be admitted ut the calculation of the attivalable value

the measure for determining a plaintiff s right of appeal being the amount for which the defendant has resisted the decree As a natural result however, of the principle in which jurisdiction in appeal is taken interest or costs subsequently accruing cannot be included for the determination of the juris diction Hukm Chand Res Jud 317 310

⁽⁵⁾ Shamray Pandon v Ailon Raman 10 B 200 (1885) Hukm Chand C P C 250 and see as to execution Purshetain t Dhondu 6 B 582 (1800), lut as to a class unders 331 of the former Code an 10 \\1 r 99 of this see Mattainmal : Chinnana 4 M 220 (1831) See the subject of the cen tinuance of juris licti n throughout suit cice aco ared disease I in Hukm Cl in I Civ Ir Cod 216-211

or to an office, are not suits of a civil nature.(1) and as such co-mizable by the Courts, which have also in some cases refused to interfere in matters of a purely social nature. Rights of a civil nature mean such rights as are vested in the citizen and fall within the domain of private and not of public law (2) These rights relate both to property and to the person, and suits may be for the recovery of possession, or damages, or for specific rehef. Wherever a right is recognized by law, a suit will lie to enforce it unless it is barred by any enactment on the principle ubs sus ibs remedium. What are such rights is the subject matter of substantive law and not of procedure, and therefore need not be discussed here (3) The question whether a suit is of a civil nature is not necessarily the same as that whether it is cognizable, as the cognizability depends not only on the nature of the suit, but on the recognition by positive law of the existence of the rights stated and of the right to the redress sought So suits for enforcement of rights relating to caste are suits of a civil nature though they are not always cognizable by the Courts is such In the Bengal Presidency, suits for restoration to easte were made expressly so cognizable by Bengal Reg III of 1793 and have been often taken cognizance of by the Courts Whilst, on the other hand Bombay Reg If of 1827, in giving Civil Courts a cognizance 'generally of all suits and complaints of a civil nature," expressly provided that "no interference on the part of the Court in easte questions is hereby warranted beyond the admission and trial of any suit instituted for the recovery of damages on account of an alleged injury to the easte and character of the plaintiff. arising from some illegal act or unjustifiable conduct of the other party "(4)

⁽¹⁾ See Loko Nath Misra t Dasarath Tewart, 22 C 1072 (1905), Subbaraya Muda Iiart Vedantscharsar, 23 M 23 (1904) Koom Meera Sahib t Mahomed Weera Sahit, 30 M 15 (1906), Krishassami Ayyangar e Sama rum Singmehariar, 30 M 168 (1906), and cayas there eited

⁽²⁾ Kodiyalam t Sudessana, 11 M J 422 See Hukm Chand Civ Pr Code, 57

⁽³⁾ A large number of cases will be found cited in the notes to s 11 of O kinealy s Civ Pr Code, under the following heads -Abusivo Language, Adoption, Account, Agreement, Assam Regulations, Assignment, Bottomry Bond Caste, Compensation, Con tribution, Co sharers, Decrees, Defamation, Embankments, False Imprisonment, False Charge, Ferry, Foreign State, Fraud, Haut, Hereditary Office and Pension, Larnams, Land Registration, Land Revenue, Legal Representation, Mahommedan Law, Mainte nance, Mortgage, Municipality, Office Dig nity , Partition , Party Wall , Partnerships , Penulty, Possession, Pre emption, Privacy, Privilego, Registration, Religious Ceremo mes, Restitution of Conjugal Rights,

Rovenue, Levenue Court Reversioner, altenation . Settlement . Specific Remedy . Stamp, Right to Suc. User, Voluntary Associations Voluntary Payments, Water, use The subject is dealt with in Hulm Chands Civ Pr Code, pp 59-76, where it is more appropriately confined to some rights in regard to suits in which questions have arisen in Courts as to their not being of a civil nature, viz those relating to marriage, caste, casto offices, ritual and offices As to these see post. The same subject is also dealt with in the same Author's book on Res Judicata, pp 243-268 Cases decided on the section subsequently to the editions here referred, are cited in their appropriate places As to the Public Demands Recovery Act, see Ram Tarak Hazra t Wosahebali Khan 6 C W N 246 (1901)

⁽⁴⁾ Hukm Chand C P C 61 63 It has been held thats 21, Reg III of 1827, has no application to suits between Mahommedans Sayad Hashim Sahlu't Huseinsha, 13 B 429 (1888), though in Abdul Kadir v Dharma, 20 B at p 192 (1895), the Court expressed tho

Again, a suit for violation of a right of privacy is not generally allowed because the suit is not iccognized by the general law of India and not because such a suit is not of a civil nature a suit of that character being allowed in Guijarat and various districts of the N W P, where the right is recognized under local custom. In addition to suits relating to caste, reference my be made to certain others in regard to which questions have arisen from time to time. Suits relating to marriage have long been held cognizable by Civil Courts having been made expressly so in the Bengel Presidency by Bengel Reg. III of 1793—such as suits to declare the validity or invalidity or jactifation of marriage, for damages for breach of, though not for specific performance of, marriage, and restitution of conjugal rights.

As already stated, and as appears from the section, suits merely relating to religious rights and ceremones will not be entertained unless they involve a right to property or to an office. The latter may be either of a personal character, such as that of a family priest, or may be a local office. Personal offices are gradually tosing their legal character as such, and the law now appears generally to recognize only local offices—that is offices connected with a certain temple, ghat, or locality which are essentially distinct from personal offices (1)

"Either expressly or impliedly barred "—The words in the former Code, "barred by any enactment for the time being in force" were held to mean expressly barred, and therefore the giving of a concurrent remedy did not but a suit (2). As to whether the matter would now fall within the implied bar, vide post. Enactments affecting the jurisdiction of Courts will be construed so far as possible to avoid the effect of transferring the determination of rights and liabilities from the ordinary Courts to executive officers (3). The jurisdiction of a Civil Court is not excluded unless the cognizance of the entire suit as brought is barred (4). The most important restrictions on the jurisdiction of the ordinary Civil Courts over civil suits are enceted by the Acts relating to the revenue or the rent of the agricultural or other lands assessed with the Government demand. The provisions of these Acts are different for different provinces but they all appear to be based on the principle that matters likely to affect the liability for, or the amount of, the Government Land Revenue.

opinion that the term—caste—in that regulation was not necessarily confined to Hindus-Nor are autic allowed to he in Bombarelating to casto offices when they involve any caste question—See Hukm Chand, op cit 65—In the Madras Presidency the same view is taken of the autonomy of caste as in Bomban See Hukm Chand, op cit 67

⁽t) Mukm Chand, C P C 70-76 The Courts, however, ought not to be modised in the determination of trivial questions of mero digitily and privilege, although connected with an office, Narayan : Aristnat, 10 H 13 237 (1887) In Dun Nath Chickerlutty : Protap († md r Goswan 3 C W N 70 (1899), the Court recognised the right of a

Shebart of the presiding deity of a certain tree, 7 C, 27 C fo (1899), Sayad Nuru blin v Abas Bavasaheb, 14 Bom L R 573 (1912) (suit for Refu and Kadirlaha), see also Madhusudan t Shri Shankamcharya 33 B 278 (1908) Trinabak Gopal t Krishnario 33 B 387 (1909), Chumu Dat v Babu Anadan 32 A 527 (1904)

⁽²⁾ Kushori Mohun Roy Clowdhry Chundra Aath I d, 14 C 641 648 (1887)
(3) So Winter t Att rney General 6
P C 380 (1875)

⁽⁴⁾ Antu : Glulam Mulamma I Klan (A 110 (ISSJ) and see Hukm Cland, C I

⁷⁰

should be adjudicated upon by Revenue Officers, who have better acquaintance with such matters and with a procedure more clastic and summary than that of the ordinary Civil Courts (1) As instances of the particular matters falling within the co mizance of Resenue Courts, and of which the Civil Courts can therefore not take cognizance reference may be made to seets 93, 95, and 241 of the North Western Provinces Bent Act (MI of 1901) . (2) sect 158 of the Punish Land Revenue Act (AVII of 1887), (3) sects 76 and 77 of the Punish Tenancy Act (AM of 1887) (1) sects 4 and 5 of the Bombay Revenue Juris diction Act (\(\sigma\) of 1876) (5). It has however, been recently held by the Bombay High Court that seet 4 (c) of the last named Act is not a har to a suit in which there is a claim arising out of the olleged illegality of proceedings taken for the realization of land revenue (6)

In the Vidras Presidency (7) and in Lower Bengal, the jurisdiction of the Civil Courts in rent and tenancy cases has not, os a general rule been excluded By Act VIII (B C) of 1869 Revenue Courts were abolished over the greater part of Bengal and the trial of rent suits was made over to the ordinary Civil Courts (8) The bar is in some cases due to administrative requirements and practical convenience Thus the Municipal Acts of some of the provinces contain special provisions barring the cognizance of suits by Civil Courts chiefly in matters relating to taxation (9)

Somewhat on a similar principle sect 133 of the Criminal Procedure Codo provides that no order made by a Magistrate under that section "shall be called in question in any Civil Court, 'though this provision has been held not to bar a suit for a declaration of a person's exclusive right to any land which the Magis trate may have declared or assumed to be public highway (10) And it has been held that under this section the fact that a criminal trial has not resulted in a conviction is no bar to a civil suit against the accused (11). In some cases the bar

⁽¹⁾ See Hukm Chand Res Jud 268 et seg . Chy Pr Code 77 et seg where the various Acts referred to in the text are discussed Jamla Singh v Kingsley, 17 C W N 1201 (1913)

⁽²⁾ See cases cited ib [and see also O kinealy a Civ Pr Code, notes to s 111

⁽³⁾ Sec 1b

⁽⁴⁾ Th

⁽⁵⁾ Ib, and notes to a 11 in O kinealy a Civ Pr Code in which also cases relating to the Khoti Settlement Act are also cited Bom Act I of 1889 As to special Acts for the relief of Talundars or Agricul turists see a 9 Sindh Encumbered Estates Act 1881 and the Breach and Laira En cumbered Estates Act 1881

⁽⁶⁾ Gangaram Hatıram Gujar ı Dınkar Ganesh, 37 B 542 (1913), and for Agra-Tenancy Act, see Ram Charitra Rai t Jinsi Al irim 36 A 48 (1913)

^{(7) 5 87,} Mad , Act VIII of 1865 , and

sees 2 Mad Reg VI of 1831 and s 52 Act NI of 1861

⁽⁸⁾ See now Act (Beng) VIII of 1885, sa 144 (2 158 as to suits to settle disputes prior to completion of record of rights see Proylokhyanath Boso : McLeod 28 C 28 (1899) Durga Mohan Gango Padhya t Sukumar Das 17 C W N cclxxii (1913), Lalla Saligram Singh & Mohunt Ramgir, 3 C W N 311

⁽⁹⁾ See Hukm Chand C P C 95 Punjab Municipal Act 1891, ss 101, 262 Madras District Municipalities Act 1884 Cf as regards election petitions. Bhaishankar t Municipal Corporation, Bombay, 31 B 604 (1907)

⁽¹⁰⁾ Chuni Lalla Ram Kishen Sahu 15 C 460 F B (1888) overruling Khodabuksh

Mundal v Monglu Mundal, 14 C 60 (1886) (11) Keshab v Maniriddin (1908), 13 C W N 501

gainst civil junisdiction is merely of a provisional character, as in the case of the Pensions Act of 1871 (I) The Civil Courts are bound to respect an order passed by a Magistrate when he is acting within his jurisdiction, (2) but a suit has been held to be declaring that the order of a Magistrate passed under sect 518, Act X. of 1872, was without jurisdiction, and giving rehef by declaring the plaintiff's right (3) As also one for maintenance of a child notwithstanding the order of a magistrate refusing maintenance (4).

A judgment and decree vitiated by fraud or collusion is a nullity, and a suit will be to set it aside (5). There is no enactment harring the Court's jurisdiction to entertain a suit to set aside, on the ground of fraud, a decree passed by another Court of concurrent jurisdiction (6). While the question whether a decree sought to be executed was obtained by fraud is not within the scope of sect. 47, post, and can only be raised by a separate suit, if, however the decree is not imperched for fraud, but only the execution proceedings thereunder, the question must be rused in those proceedings, and not by separate suit (7). A grant of probate is not in the nature of a summary proceeding to be contested by a regular suit in the Civil Court. The grant must be contested by an application to revoke in the Court of Probate (8). The grant of probate is the decree of a Court which no other Court can set uside except for fraud or want of jurisdiction (9).

The former se tion dealt only with har by special enactment, but there are other cases in which a suit is not allowed to lie, on general principles of liw The amended section includes an implied but In some cases a suit is not allowed as there is no substantive right giving rise to a cause of action by reason of the non recognition of the right, on account of some rule of statutory or common law or of some principle of public policy or morality So a special procedure having been provided in the Criminal Procedure Code in regard to public roads, a suit will not be for obstructing a public road unless the plaintiff has suffered special damage. As regards, however, nuisances, see now sect 91, post Certain suits are harred in the interest of public morality These cases proceed on the ground that a Court ought not to enforce contracts injurious to and against the public good, and not on the ground that the suit is not of a civil nature or there is a defect in the jurisdiction of the Civil Courts over it (10) Again, a suit does not be to recover a voluntury payment because there is no right to recover (11) Where a statute enacts a right or an obligation, and provides a method of

⁽¹⁾ See 68 4, 6, 7, and 9

⁽²⁾ Ledarnath e Rughoonath, 6 N W P 101(1874), Ujalamayı e Chandra, 4 B L R,

¹ B, 21 (1869)
(3) Gopt Mohun Mullicl t Taramons

⁽lowdhram, 5 C 7 (1879) P B

⁽⁴⁾ Ghana Kanta t Gereli, 32 C 179 (1904)

^{(&#}x27;) bee Authors' I vidence Act notes to * 44 cover there ented and in O kine dy s (iv 1'r Code, notes to s 11 sm' roc "Fraul"

⁽⁶⁾ Aundolal Bose t Aistarini Dasset, 30

C 369 (1902) (7) See notes to s 47, post

⁽⁷⁾ See notes to s 47, post (8) Marko t Williams, 2 N W P 268

<sup>(1870)
(9)</sup> Komolochun Dutte Nilruttun Mundle,

⁽⁹⁾ Komolochun Dutte Nilruttun Mundle, 1 C 360 (1878)

⁽¹⁰⁾ See Hukm Chand C P C 103-105, as to the necessity to enforce obligations in a specific manner, see cases cited in O Kincal's

⁽¹¹⁾ But see as E9, 72 Contract Act

onforcing it, that method and not the remedy at Common Law must be followed Where, however, a statute is confirmatory of a pre existing right, the new remedy is presumed as cumulative or alternative unless an Intention to the contrary appears from some other part of the statute (1) The Madras High Court has recognized that principle in disallowing suits brought to enforce registration otherwise than in accordance with the provisions of sect 77 of the Indian Registration Act The Calcutta, Madras. and Allahabad High Courts hold that a suit will not lie to compel the registration of a document after a refusal by the sub registrar to register the same except in accordance with these provisions (2) Again, when by an Act of the Legislature powers are given to any person, for a public purpose, from which an individual may receive an injury if the mode of redressing the injury is pointed out by the Act, the jurisdiction of the ordinary Courts is ousted, and in case of injury the party cannot proceed by ordinary action (3) So, the Code providing a special method of paying the necessary expenses of a witness, the latter connot suo for them (4) Every Court is competent to ward costs in any proceedings, and a separate suit will therefore not lie for their recovery (5)

No har to a suit will be implied, however, from the provision of a summary and special remedy in a special Act for a right existing under common law. Thus a suit for compensation for wrongful seizure of eattle will lie in a Civil Court, the provisions of Act I of 1871 being no but to it (6). A suit may be brought for confirmation of an execution sale which has been set aside by the Court, (7) or, if the execution should have been transferred to the Collector, by the Collector, (8) ordering the sale. So also under the last Code it was held that, notwithstanding sects 318, 319, 328, and 331 of that Code, under which cetton might be token by a purchaser at an execution sale to recover procession of the property purchased, a regular suit might also be brought by

⁽¹⁾ Beckford t Hood, 7 T R 620, Vallance t Palle, 13 Q B D 109 (1884), Ram ayya t Vedachalla, 14 M 441 (1890) Satappa Pilla t Raman Chetti 17 M 1 (1892) and see next note

⁽²⁾ Edun a Mahommed Saddik, 9 C. 160 (1882), Kunhimmu t Viyyathamma 7 M 253 (1884), Bhugwan Singh a Khoda Bukah, 3 A 397 (1881), Abdullah Khan a Janki, 16 A 303 (1894), Venkatasami a Khatayas, 16 M 341 (1893), nor in Bombay in the absence of an agreement to that effect In re Shaik Abdul Aziz, 11 B 6 U, w95 (1887)

⁽³⁾ Governor v. Meredith, 4 T. R. 294, Stevens v. Petcock, 11 Q. B. 731 (1848), West v. Dowman, 14 Ch. D. 111 llukm Chand, C. P. C. 29

⁽⁴⁾ De Saran e Hurrish Chunder Riswas, 5 W R S C. C. Ref e (1866), a Commis sioner to take accounts may sue Gopularat-

namayyar t Bupala Narasımba, 4 M 399

⁽⁶⁾ Mahram Das t Ajudhia 8 A 422 (1886) hadir Balah t Salig Ram, 9 A 474 (1887) Costs incurred in eriminal proceedings may be recovered only as damages for malicious prosecution Mahomed Ali r Bayama, 14 B 100 (1854) Fazal Imam r Pazal, 12 A 165 (1854) And see generally sat to suits for costs Jalam I anja r khoda Jayra 8 B II C R 29 (1871), Ref Case, 3 M II C R 34 (1867) Subbaraya r Vashhilungam 20 M 91 (1854)

⁽⁶⁾ Shuttrugl on Dass r. Hohm. 16 C. 150 (1859). Similarly as to Act. IV. of 1861. Arishna r. Reade, 9 M. 31 (1855). Act. VIII. of 1870, s. 25. Bombay Akbari Act, 1878. Narayan Venhu. r. Sakharian, II. B. 510 (1857). See Hukm Cland, C. P. C. 100

⁽⁷⁾ Azımuddin r Baldeo, 3 A 554 (1681)

⁽⁸⁾ Bande Ribir halla, 9 A 602 (1887)

him for the recovery of the same,(1) the two remedies being concurrent. And notwithstanding the procedure under sect 152, O XX r 6, sect 114, O XLVII 1 1, post, may be available, there is nothing to prevent a suit to rectify a mistake in a decree (2)

Generally, where a decree holder can proceed under the execution sections he cannot hring a regular suit. So where, having obtained a decree for money, A sued to recover the unsatisfied balance thereof from B, alleging that the property of the deceased judgment debtor was in his possession it was held that he should have enforced his decree by execution and sale or hy execution and attachment and appointment of a receiver, and no regular suit would lie (3) A suit does not lie for damages for non compliance with a mandatory injunction to compel the performance of which the plaintiff had his remedy in execution (4) Nor will a suit he for the costs of a receiver which were deducted in execution of a decree for mesne profits from the amount of such mesne profits, masmuch as the objection to such deduction should have been urged in the execution proceedings (5) So, in the case of an ordinary action in ejectment in which a plaintiff gets a decree for possession of the property, if he takes no stops to execute that decree within the time allowed by law, he cannot by a fresh suit, based either on the decree or on his title as it stood at the time that the first suit was brought, evade the law of limitation (6) A person suing on his proprietary title to recover pessession of mortgaged property on the ground that the mertgage had been satisfied, and obtaining in unconditional decree for possession, is in the same position (7) The principle is that once any right has been enforced by a suit in which a decree has been obtained, the decree becomes the embediment of that right, and that right in its inchoato state is merged in this decree (8) the enforcement of which, if not barred by limitation must be by proceedings taken to execute it. As regards suits for redemption, considerable conflict exists In some cases the existence of a prior decree for redemption unexecuted has been held to har a subsequent decree for the same relief. The question has been variously viewed from the standpoint of the general principles referred to and the applicability of sect 11 (formerly sect 13) and sect 47 (formerly seet 214) of the Code It appears to be agreed that in some cases sect 13 would have barred the subsequent suit A Full Bench of the

⁽¹⁾ hashori Mohun Poy v Chunder Nath Pal, 11 C 644 (1887), Sevu t Muttusami 10 M 53 (1886), Sevu Mohun Banea v Bhago ban, O C 602 (1883), Balvant Santaram t Babaji, 8 B 602 (1884), as to symbolical possession, seo Jaggobundu Mitter t Iurna nund, 16 C 630, 1 B (1889), Gessain Dalmar Puri t Bepin Behari Mitter 18 G 520 (1891), Mahado t Janu, F B, 36 B J76 (1912), 14 Bom L R 115

⁽²⁾ J genwar Atta e Ganga Bislam S C W N 174 (1901) But in a recent case, Bland h Su h e Dowlat I cy, 17 C W N 82 (1914) it has been feld that generally

auch a suit is not maintainable, though it

mry be so in particular circumstances
(3) Mirza Mahomed t Widow of Balma

l and 3 I A 24I (1871)
(4) Javatri v J mile, 13 A 98 (1830)

⁽¹⁾ Janatri v I mile, 13 A 98 (1830) (5) Kazeo Mahomed v Lallah Jussodul,

^{1864,} W R 247 (1864) (6) Sita Ram t Madlo Lull, -i A I B 44, atp 60 (1901), Vedapuratti t Vallabla 25 M at pp 327 328 (1901)

⁽⁷⁾ Sita Ram & Mallo Lull supra

⁽⁸⁾ Vedapuratti v Vallalla, 25 M 1 B J00 312 (1901)

Allahabad High Court has held that the nature of redemption decrees makes sect 244 (now 47) mapplicable, and that the operation of the rule of res audicata depends upon the nature of the decree made in the previous stuts in each instance Where a Court has onea adjudicated upon a mortgagor's right to redeem, so many of the issues as bore upon that, and are heard and determined, become res judicata and cannot he re onened, but unless there has been a determination that the mortgager has no right to redeem, there would still remain one other issue in a subsequent suit, which would not be res sudicate Until a mortgagee has applied for an order of sale under sect 93 of the Transfer of Property Act (see now O XXXIV r 8), the plaintiff s right to redeem exists and can be at any time enforced. If therefore a mortgagoi has obtained a decree for redemption, which does not contain a provision foreclosing the right of redemption an default, and has not enforced that decree and has not paid in the decretal amount within time he can subse quently bring a second suit for redemption of the mortgage in respect of which such first decree was obtained (1) On the other hand a Tull Bench af the Madras High Court has held that where a suit for redemption has been instituted and a decree for redemption has been passed therein but not executed a subsequent suit is not maintainable for the redemption of the same martgage The courty of redemption no doubt remains unforeclosed and the rolation of mortgagor and mortgagee continues until an order absolute under sect 93 (see now O XXXIV r 8) is made, and having regard to the cantinuance of the relation of marteneor and mortgagee, earlier decisions of the same High Caurt held that as such jural relation had not been put an ond to a second sut would be The Full Bench, however held that though the right might exist, the remedy was barred by sect 11 (formerly sect 13) of the Code A decree for redemption passed under sect 92 of the Transfer of Praperty Act (see now O XXIV r 7) is a final judgment within the mein ing of sect 11, post, but if the order absolute for foreclosure or sale under sect 93 is the final judgment, and the decrea under sect 92 (see now O XAMV r 7) is interlocutary then if na arder is presed under sect 93, the suit is pending and sect 10 (formerly sect 12) post burs a second trial The fact, therefore, that no order absolute has been made under sect 93 (see now O XXXIV r 8), extinguishing the right to redeem, will not allow of a second suit being brought, though it will entitle the mortgagor to exercise his right of redemption under the decree if he be not burred by himitation hy obtaining a postponement of the day fixed for payment (2) The Bombay High Court has held that a decree for redemption, on the default of the decree holder to pay the money declared to be due within the time fixed by the decree, or, if none he fixed, within the time allowed by law for the execu tion of the decree, operates as a sudement of foreclosure and debars the mortgagor from afterwards bringing a second suit to redeem the same pro perty (3) As regards the Calcutta High Court, the only two reported decisions

⁽¹⁾ S to Ram v Madho Lol 21 A F B 44 (1901), overruling Hav v Razi ud-d n 19 A, 202 (1897)

⁽²⁾ Vedapuratti t Vallablia - ¥ 300

⁽¹⁹⁹¹⁾ F B

⁽³⁾ Gan Savant v Narayan, 7 Il 467 (1883 , Hari I avji v Shapurp, 10 B 461

^{(1856) [}the execution of the first decree was

appear to be in conflict (1) In the under-mentioned case, (2) a second sut was allowed on the ground that the first suit did not in default foreclose the right to redeem, and that the cause of action in the two suits was not the same thus evaluating the doctrine of res pulicata. In, however, a subsequent case (3) it was contended that until an order absolute for sale was mide the right to redeem existed, and that the suit should be regarded as a suit to redeem. In overruling this contention, the Court observed as follows "Even if there is no order absolute, the decree miss directing the sale is in existence, and if the right to redeem be still alive, it cannot be enforced by a separate suit."

When a decice declaring a light to partition has not been given effect to by the parties, proceeding to partition in accordance with it, it is competent to the parties, or any of them, if they still continue to be interested in the joint property, to bring another suit for a declaration of a right to a partition in case their right to partition is called in question at a time when, by leason of limitation or otherwise, they cannot put into effect the decree first obtained. In this respect, suits for declaration of right to partition differ from most other suits (4). In this case there was no decree actually making partition, while in the under mentioned case, (5) in which there was a decree directing partition, it was held that such decree operated as res judicata, and the subsequent suit was bailed.

A second suit will lie if the first suit is for money against Λ , and the second to realize the decree from the property of a stranger thereto (6)

Prima facte an action lies on the judgment of every Court of competent purisdiction unless the right to sue be taken away expressly or by implication (7)

barred, the appellant then attempted to fall hack on his mortgage and the right to redeem. which was not harred, the Privy Council. without deciding whether this could ordi narrly ho done, held that this course was not open to the appellant as it was a new casel, Maloji t Sagaji, 13 B 567 (1888) [Decree for redomption-subsequent suit by mortgageo for sale | See as to these cases I edapuratti t Vallabha, 25 M 300 (1901) See also Chudasama t Ishwargar, 16 B at p 248 (1891) As to execution of decree after three years Narayan t Anandra 16 B 480 (1891), Maruti t Krishna 23 B 592 (1899), as to the necessity to sue having regard to the dectrine of res judicate that the decree covers all rights Vinayak t Dattatraya, 20 B at p 668 (1902)

⁽¹⁾ Vedapuratti e Vallabba, 25 M at p 311 (1902)

⁽²⁾ Roy Dinkur D yal t Sh o Golam Singh, 22 W R 172 (1873), ref. Dhen l Bahadur t Tek Narain, 21 A 2°2, 261 (1879), Sita Ram r Madl o Lal, 21 A at

p 63 (1901)
(3) Swa Pershad Maity v Nando Lal Kar,
18 C 139, 142 (1890), dist, fara Prosad
Roy v Bhobodch Roy, 22 C 931 (1895),
ref, Vedapuratti t Vallabba, 25 M at p
334 (1901)

⁽⁴⁾ Nosentullah t Mujiballah, 13 A 309, 313 (1691) This case, but only in se far as it was a decision on Act AlA of 1873 (N W P Land Rovenuo Act), was overruled by Muhammad Sadiq t Laute Ram, 23 A 291 (1901), Jagin Baban v Bilin Laxman, 14 Bom L R 1198 (1912), s c, 37 B 307 (6) Som Bahanlal t Mursh Hipanthhui 3

Bom L R 91 (1900); distinguished in Jagu Babiji i Balu Laxman, sujra

⁽⁶⁾ Gooroo Das Pyno : Ram Namin Saloo, 11 1 A 59 (1884)

⁽⁷⁾ Berkley t Elderskin, 1 Q B 805, cited in Moonshi Golam Arab t Curreembux, 5 C at p 236 (1879); Mancharam t Bakshi, 6 B 11 C R, A C 231 (1863), Attenuon t

Dovet t Hurry Doss Butt, 7 C 71 75 (1881)

Upon the uniquent arises a logal obligation to discharge it on which an action is maintainal le (1). It is he such an action that the indements of foreign and colonial Courts are supported and enforced and suits on foreign in lements are not infrequent in this country. A smt will lie on a judgment of a Court in a Native State (2) Where an action on a judgment or decree will not give to the plaintiff a hieler or better remeds than he already has there is no advantage in allowing it to le brought, and it would be contrary to the spirit of the Code to do so Where it will give a higher or better remedy the case is different and there are eases in which an action may be the only mode of enforcing a sudement or decree (3) In the case of a domestic sudement ample provisions exist for the execution of the decree not only within the juris diction of the Court hy which it was passed but within any part of the British territories in India And on the principles already adverted to, where provisions have been made in regard to execution and the decree holder can proceed under them he cannot bring a regular smt. In such cases the qualifica tion to the general rule comes into operation the right to sue being taken away by implication

A suit will not lie in a Small Cause Court on a decree of a Subordinate Judge's Court (1) or on a decree of its own (5) as the law makes full provision as to the mode of obtaining satisfaction of such decrees. Nor will a suit lie on a rent decree of the Revenue Court (6) nor in the High Court on a decree of the Small Cause Court (7) otherwise in Bombay in order that the judgmont creditor may have execution against the immovable estate of the debtor (8).

In the under mentioned undefended case (9) under the preceding Code Wilson J held that a suit on a deereo of the High Court would lio in that Court as the decree had remained unsatisfied and it was too late to revive it in the usual way. But this decision has been dissented from by the Bombay High Court (10) A suit has also been held to be on a declaratory decree of which no execution can be taken (11) But a person who has obtained a

F B 18 (1863)

⁽¹⁾ Transit in rem judicatam So where a reference is made to arbitration and an award is given the parties to the reference cannot sue upon the original cause of action Hassan Al v Hoshdar Al; 1890 P R vo 113 cited in Hirkm Chand C P C 101

⁽²⁾ Mayaram v Ravn 24 B 86 (1899) (It cearlier decisions to the contrary were lefore the pressing of Act VII of 1888 which made an addition to a 14 of the former Code corresponding in part with a 13 pc II hallyugam Chetti v Chokalinga Pills 7 M 105 (1883) Sama Rayar v Annamalar Chetti 7 M 104 (1883)

⁽³⁾ Mancharam v Bakshi 6 B H C R 231 235 (1869) per Coucl C J

⁽¹⁾ TL

⁽⁵⁾ Merwann t Ashabai 8 B 1 (1883)

⁽⁶⁾ Anan la Moyat I atel Pabani B L R

⁽⁷⁾ Moonshi Colam Arab v Curreembux 6 C 291 (1879) overruling prior decisions in same Court See Presidency Small Cates Courts Act (XV of 1882)

⁽⁸⁾ Fakırapa t Pandurangapa 6 B ~ (1881) Merwanı ν Ashabaı 8 B at p 1... (1883) but the decree may be transferred to another Co ut for execution in respect of

the immovable property

(9) Attermoney Dossee : Hirry Doss
Det 7 C 74 (1881)

Outt 7 C 74 (1881) (10) Merwauji t Aslabai 8 B 1 13 (1883)

⁽II) Vinayak t Abaji 12 B 446 (1887) Jagar Nath v Balgobind 1 N W P 154 (1869) Sri Kirshim Tata v Singam 4 M 219 (1881) if it is partly declaratory a suit will eon that part Sabhanatha t Lakshimi 7 M 80 (1883), Yusuf Khan t Sirdar Khan

decree establishing his right and entitling him to consequential relief cannot again sue for the same, but can only work out his right and obtain the relief by executing the decree And sect 47, post, expressly prohibits a separate suit for the purpose (1) No suit will be where the decree orders a certain amount to be paid for maintenance at certain intervals, as execution may be taken of such a decree for amounts accruing due under it subsequent to its date (2) A suit has also been held to be in the Civil Court on a decree obtained in the Court of the Agent for Sirdars against the defendant's father, the decree, which was for payment of a sum of money by instalments, living become incapable of execution on the death of the defendant's father, the defendant lumself not being a sirdar (3)

A suit does not lie on a decree of which ovecution is barred by limitation (7) And where a plantiff has obtained a decree, and has by his eventual to the cover the the records which is replicable to the cover to the plantiff has obtained a decree of which the records were not destroyed before a decision on appeal, it being beld that where the records of a case are destroyed, the plaintiff may prove his decree and get the evention of it, but, on his inability to do so, he cannot bring a second suit for the same subject matter (5). A suit, however, should not be allowed, whether the record is destroyed hefore or after the decision of the appeal (6). A suit does not lie on a decree of which execution is barred by limitation (7). And where a plaintiff has obtained a decree, and has by his own neglect lost his right to execute it, he will not be permitted to revert to the position which he held before the institution of the suit and to bring a fresh suit (8).

A dooreo or judgment must be considered valid until reversed or supereded. Therefore, a suit does not lie to recover high money recovered in

7 M 83 (1883) [these two cases dot in Lakshmibai t Madhavrav, 12 B 65 (1887)] Kayeri t Venlamma 14 M 396

(1890) (1) Vedapuratti t Vallabha, 25 M 326

(2) Jouthayee: Thanakapudayen, 4 M H C R 183 (1868), if a decree is not merely ideclaratory a second suit will not he even though it is a yague as to be increable of execution. Venkanna: Artamma, 12 M 183 (1889), and see Aslutosh Bunnerjee i Juhimoni Debra 19 C 139 (1801)

(3) Sakharam Dikshit r Canesh Sathe, 3

B 103 (1870)

(4) Rance Framum : Hurdyal Singh, 1801, W.P. "01

(5) Mist Nazur Ban o t Hossein Ah Mian, 1804 W R 378

(6) See Rance Imamum 1 Hurdyal Singh 7 W R 270 (1866)

(7) Fakimpa i Panluringapa, 6 B 7 (1881) Sinlar Joint W. P 3 9 (1868),

Sanjeo Vajah : Panjyah 4 M H C R 451 (1869), even if the decree be for possession of land Gopt Volum Drs v Throcur; Gupta 1 C L R 251 (1877), Nursunghdoss v Rum roaddeen, 20 W R 412 (1873), Ramjus t Ram Nurun 2 N W P H C R 382 (1870), Colam Hossemi Alla Rakhee, 3 N W P H G R 62 I B (1871), and followed by iloliver; of symbolical possession Nato Doorges Ceclamonee 23 W R 407 (1877) But see Attermoney Dosven t Hurry Das 7 C 74 (1881) and Valvideo t Juni T B, 36 B 377, 14 1 om L P 115

(1912)
(8) Arrold Singh't Sheo Prasid 4 A 481
(1882) In Muhammad t Mannu Lal, 11 A
J86, the Court thought that this principle
as regards mortgages was affected by the
fransferof Property Act but it has been held
that this is not to "Vedapurattiv" Allal ha 2"
M at p 330 (1901), but see also Sida Rain it
Maho Lal 24 A at 1 (6 (1001)

execution of a decree while that decree subsists, (1) and if more is recovered under a decree than is really due, the excess can be recovered back by the judgment debtor only in execution proceedings and not by a separate suit (2). When however, the decree is reversed or superseded the amount recovered under it may be recovered back not only by a summary process, but also by a suit (3). And seet 47 of the Gode heing applicable only to a subsisting decree is not a bar to such a suit (1) the operation of that section coming to an end as soon as the decree is discharged by payment (5). The interest of the money (6) and the mesne profits of the land (7) realized in execution and recovered back can be recovered for the period for which the person entitled was kent out of the money or land.

10 No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim lutigating under the same title where such suit is pending in the same or any other Court in British India having jurisdiction to grant the relief claimed, or in any Court beyond the limits of British India established or continued by the Governor General in Council and having like jurisdiction, or before His Majesty in Council

Explanation—The pendency of a suit in a foreign Court does not preclude the Courts in British India from trying a suit

founded on the same cause of action

"Lis pendens"—"The object of the rule contained in sect 12 (the present section) of the Code is to prevent Courts of concurrent junisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of the same cause of action the same subject matter and the same relief. The policy of the law is to confine the plaintiff to one hitigation, thus obviating the possibility of contridictory verdicts by two or more Courts in respect of "the same relief" (8)

The same learned Judge added It is scarcely necessary to any that the rule contained in sect 12 of the Code of Civil Procedure forms no part of the

⁽¹⁾ Marriot t Hampton " 1 R 209 Saudamini Dasi t Thakomani Debi 3 B L R App 114 (1869)

⁽²⁾ Nahomed Elahes Buksh t Kally Mohun 5 C 589 (1879) Furtab Singh t Beni Ram 2 A 61 (1878) F B

⁽³⁾ Shama Parshad t Hurro Parshad 10 Moo I A 203 (1885) Jogeeh Chunder v Kali Churn 3 C 30 (1877), as to relace given by review, see Waghela t Shaik Masludin 13 B 330 (1888) (4) Narayana v Narayana 13 M 437

⁽¹⁸⁸⁹⁾ Ram Ghulam v Dwarka Pai " A 170 (1884) F B

⁽⁵⁾ Pashbehary v Rakhal Churn 1 C W

N 708 (1897)
(6) Ayyavayyar v Slastram 9 M 506

⁽¹⁸⁸⁶⁾ Jaswant Singh t Dip Singh 7 A 432 (1885)

⁽⁸⁾ Balkishen t Kishan Ial 11 A 148 at

p 155 (1888) per Mahmood J

rule of res judicata though the reason upon which it is based is in some respects similar in principle to the doctrine of res judicata. The distinction between the two rules however, is vast The rule in sect 12 (the present section) relates to matters sub sudice, whilst the rule in sect 13 (now sect 11) relates to matters which have passed into rem judicatam. The one bars only a 'sunt', the other hars both the trial of a 'sunt' and of an 'issue' subject to their respective conditions Those conditions are not all the same in sect 12 (the present section) as they are in sect 13 (now sect 11), and the wording of the two sections as to the distinction is so clear that it is not easy to confound the two rules Now, in sect 12 (the present section), before the plea can operate as a har, the second suit must not only raise the same issue as that in the former suit still pending, but it must be for 'the same rehef'"(1) As to this last now, vide post, " Relief" It may be added that if a plaintiff were not confined to one litigation, but were allowed to conduct a number of parallel litigations at the same time, they would result in as many judgments which, if to the same effect, would be uscless and a cause of unnecessary expense If, on the other hand they were to a different effect all would not admit of execution and it would not be possible to decide which should be executed Moreover, contradictory judgments would tend to discredit the administration of justice. The rule, therefore should be such as to receive application only when the various incidents of the suits are so far identical that they may, and if rightly decided should lead to the same judgment (2) Though the conditions of the two rules relating to his pendens and res judicata are different, the expressions used in enumerating them are generally used in the same sense, and reference therefore may be made to the cases cited in the next section The rule of his pendens not only affects a suit brought while another suit is pending, but also alienations of rights or interests in any property made during the pendency of a suit concerning that property (3)

Stay—The words "Except where a suit has been stayed under sect 20" have been omitted. Sect 20 of the last Code dealt with the power of the Court to stay proceedings, but, apart from this the Court had a general juns diction to stay proceedings on the ground of inconvenience attending the trial of different suits in different Courts at the same time. So the High Court hasstryed a suit instituted before it until after the decree in a suit previously instituted at Cahent observing that the two suits to a very great extent covered the same ground and that it was impossible that they should proceed together, as many inconveniences might arise—amongst others difficulties in connection with the filing of documents and talling of accounts and the possibility of a conflict of decisions, adding that it was necessary to follow the general rule that the plaintiff who first brings his suit claiming an account in respect of any particular transactions has a right to have that

⁽¹⁾ Palkishen r Kislan Ial II A 149 at 1 I'd per Mahmo el I

⁽a) Hukm Cland C 1 C 10 citing 1

⁽³⁾ See Hukm Clan 1 R * Jud 692 where the subject which is not within the slope of the rusent with is fally discussed als slope.

Fransf r of I roperty Act

account taken in the Court in which he has chosen to bring his suit (1) Sect 20 has now been courted

"Proceed with the trial"—This section in the last Code only provided that no suit shall be tried if the same issues were involved in a previously instituted suit in a competent Court. The present Code substitutes the words at the head of the parigraph to explain more clearly the action to be taken by the Court, which is in the nature of a stay of proceedings. The section however is merely intended to secure general convenience. It does not have the institution of a suit and therefore cannot be construed as dispensing with the institution of a suit within the proper time when the law expressly requires such institution (2).

"Suit'—In the under mentioned case (3) the Court without expressing a decided opinion on the point thought that a proceeding in execution being not a suit but only a proceeding in a suit it would be more correct to hold that a proceeding under sect 47 is not a suit within the meaning of this section.

"Matter in issue,"—The matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit. The subject matter in respect of which the rehef is claimed must be the same in the two suits the principle of his pendens having no application if the subject matter of the subsequent suit is not in any sense the subject matter of the previous suit (4). Where the question of title was the same but the issues were different relating to another plot of land and to another period of time the section was held to have no application (5).

"Previously instituted (pending) suit"—Priority in time is the proper guido in determining which suit should be allowed to proceed (6) and in accordance with the general principle that the Court which first acquires jurisdiction should retain it this rule is formulated. The section says 'instituted', that is mere institution of a suit will give priority without any proceedings having been taken thereunder. A suit ceases to be its pendens when it has been withdrawn and the rule has been held not to apply when the former suit has been withdrawn since the institution of the second suit (7). I suit of

⁽¹⁾ Meckjee t hasowjee 4 C I R 282 284 (1879) and as to stay of simultaneous executions see Fakurudd n t Official Trustee 7 C at p 84 (1881)

⁽²⁾ Nemsganda 1 Jareala 22 B 640 64 (1897) 'es also Ramalinga r Raghunatha 20 M 41s (1897) in which the Court while holding that there was no bor to institution printed out that if event institute I would not have been for the same rule! Wahadeo r Carvillar 16 C W > 897 (1912)

⁽³⁾ Venkata Chan Irappa e Venkatarama 22 V 27f (1895)

⁽⁴⁾ Narulish Kinn r Natir Begam, 15

A 109 at p 110 (1892) when the Court said. There is no doubt that if the subject matter of this suit had been sny part of the subject matter of the former a nit the discrement of his penkes would should

⁽⁵⁾ Breecaur Singh t Gunput 8 C L I 113(18-0) nor in Nainappa t Clidamberan

²¹ M 18 22 20 (1897)
(6) Meckjeer hasowjee 4 C L P 252, 253 (1879) in which case lowever the southwas stated not on the ground of his produce.

but general convenience
(7) Hukm Chand C. P (103, citing
Rush r Froet 49 Iowa 183 (Amer.)

course, comes to an end when a decree is passed in it. It is not, however, material whether the suit is pending as an original suit or an appeal. A pending appeal will bar the trial of a subsequent suit (1). The mere applying however for, or obtaining, leave to appeal to the Privy Council cannot of itself amount to the pending of an appeal till such appeal is actually filed, for it may happen that the parties who obtain such leave may never appeal at all against such decree or order (2). It has been held that the appeal is not "to be deemed to relate to the entry of the judgment appealed from so as to defeat the plaintiff action properly brought intermediate the judgment and appeal" (3). In a recent case where there had heen a decree for maintenance, followed two years later by a decree for the sale of the property charged by it, but three more years elapsed before the appheation for execution it was held that owing to this delay the doctrine of lis penders did not apply for the sale had not been during the active prosecution of a contentious suit or proceeding (4)

"Relief"-The last Code enacted that not merely must the matter in issue be the same, but the previous suit must claim the same relief. The cause of action is essentially different from the relief claimed. While the identity, or oven similarity of the relief claimed is not material for the rule of res audicata the identity of the rehef was held essential to the application of the rule of lis pendens So the section was held not to apply where, though the issue may be the same as that in the other suit the relief was not the same (5) And it has been held not to apply to suits between principals and agents for accounts (6) Where the plaintiff in the first instance sucd the defendant for cancellation of a mutni lease and for mesne profits, and then brought a second suit against the defendant to recover arrears of rent for the same period it was held that seet 12 of the last Code did not apply, as it could not be said that the former suit was for the same relief as that claimed in the second suit (7). So again suits for the same dues in respect of different years are not for the same reluf If a suit for a demand for one year should bur the trial of a suit for the same demand for a subsequent year the prolongation of the eather hightion might result in barring the later suit by lapse of the limitation period (9) If the

⁽¹⁾ In Raja Rans_eiti Bhagabutti, 7 C W W 220, 721 (1900), Bissessur Singh i Gun put Singh, 8 C L. P 113 111 (1850) the former suits were pending in appeal but no of jection was taken to the application of the rule on this ground. And see next case

⁽²⁾ Namappa : Che lumbaram, 21 M 18

⁽⁷⁾ Hukm Chand (P C 108 etting letter) kinesbury 77 N Y If I (Amer) where the auth r also points out that cases which have (with regard to the rule of targeties as affecting alternative) leid an appeal to les a continuation of the original and direct from the case of that rule of direct from the one under consider

⁽⁴⁾ Bhops Mahadev Paral & Cangalas,

³⁷ B 621 (1913)
(5) Rundings : Raghinaths 20 M 118, at p 420 (1897), Balkishen + Kishan Isl II A at p 155 (1888) In the last cases however the cause of action was different

⁽⁶⁾ Chandra v. Pramatho, 15 C W N 930 (1911)

⁽⁷⁾ Raja Rans_kit t Bhagabutty, 7 C W N 720 722 (1900) See also Troylokhy; nath Bose t Macleod, 28 C 28, 34 (1900) Bilkishen t Kislan Lal 11 A 118 (1888) in which also it was held that then was no

id nitty in the relief
(5) Balkishen t Kishan Lal, 11 A 148,
175 (1888) So also there is, of course no
har where the matter complained of has

subsequent suit is however for a part of the relief claimed in the first suit its trial was held to be barred by that of the first suit (1) It will however be observed that this section omits the words formerly appearing "for the same relief' This was stated to have been done because the Select Committee were of opinion that the application of the provision should depend not upon the mere prayer of the parties but upon the matter in issue Probably in a large number of cases where the matter in issue is the same the relief deriving as a consequence therefrom will be or should be the same. But however this may be the section apparently substitutes as a test the identity of the matter in issue irrespective of the relief sought upon the proof of the ficts alleged in sneh issue

"Same parties -Not only must the persons be the same but they must be suing or sued in the same capacity. Where the same person sues in different capacities it is the same as if there were different persons (2) The section has been amended to show that the litigation must be under the same title

"Jurisdiction -The Court must have had jurisdiction to grant relief in the provious suit. So in the under mentioned ease (3) the Court observed It is clear that in this case the proceedings pending before the Revenue Officer were not for the same relief (that is for ejectment of the defendants and for mesne profits) as was sought in the present suit nor had the Revenue Officer jurisdiction to grant such relief

Foreign Court -Referring to this explanation the Court observed (4) "That it seems to follow as a necessary consequence that the existence of a decree in a foreign Court is no bar to the execution of a decree of a Court in British India even though the cause of action in both suits be the ame

11 No Court shall try any suit or issue in which the matter is directly and substantially in issue has been Res 1 d cata directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim highing under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court

Txplanation I -The expression former suit st all denote

arisen a nee the institution of the other suite B seessur S ngh + Gunt at S ngl S C In I 113 (1550)

P gby 4 Bro Ch 60 Gage r Stafforl 1 1 es 5r 544

⁽¹⁾ See \ azullal | hl sti r Naz r Begart 1" A 100 supra Covind e Jij lai 36 B 189 (1911) a.c. 14 Rom L P 9

^(*) Never West n 3 Atk " Law r

⁽³⁾ Travially vanish likes r Maclead 28 C 25 at p 31 (1 00)

⁽⁴⁾ Inlured fren r Of cal Trustee 7 (8" (18 1) per Morris J

a suit which has been decided prior to the suit in question, whether or not it was instituted prior thereto

Explanation II—For the purposes of this section, the competence of a Court shall be determined irrespective of any provision as to a right of appeal from the decision of such Court.

Explanation III —The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other

Explanation IV—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit

Explanation V—Any nehef claimed in the plaint, which is not expressly gianted by the decree, shall, for the purposes of this section, be deemed to have been refused

Explanation VI—Where persons litigate bonû fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating

12 Where a plaintiff is precluded by rules from instituting a further suit in respect of any particular eause of action he shall not be entitled to institute a suit in respect of such cause of action in any Count to which this Code applies

13 A foreign judgment shall be conclusive as to any matter when foreign judg thereby directly adjudicated upon between the ment not conclusive same parties or between parties under whom they or any of them claim litigating under the same till, except—

(a) where it has not been pronounced by a Court of competent

jurisdiction,

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(b) where it has not been given on the merits of the case,

(c) where it appears on the face of the proceedings to be founded on an incorrect view of international law or a refusal to recognize the law of British India in cases in which such law is applicable,

(d) where the proceedings in which the judgment was obtained are opposed to natural justice,

(e) where it has been obtained by final,

(f) where it sustains a claim founded on a breach of any

Tiw in force in British India

14. The Court shall presume, upon the production of any is presumption as to document purporting to be a certified copy of a extraordinary foreign judgment, that such judgment has pronounced by a Court of competent jurisdiction, unless the contrary appears on the record, but such presumption may be displaced by proving want of jurisdiction

Res indicate generally considered -These sections embody the doctime of res judicata, which, though it has sometimes been treated in English law as a branch of the doctrine of estoppel, is yet essentially distinct from it Estoppel, which is dealt with by sect 115 of the Evidence Act. proceeds upon the equitable principle of altered situation, whilst the doctrine of res sudicata proceeds on the principle that there should be a determination to litigation, and that a defendant should not in respect of the same matter be herassed by several suits. Estoppel is a part of the law of evidence whilst res audicata belongs to the province of procedure strictly so called (1) Perhaps the shortest way to describe the difference between the two is to say that whilst the plea of res judicata probibits the Court from entering into an inquiry at all as to a matter already adjudicated upon an estoppel probibits a party after the moury has already been entered upon from proving anything which would contradict his own previous declarations or acts to the prejudice of snother party who, relying upon those declarations or acts altered his position. In other words res sudicata probibits an inquiry in limine whilst an estoppel is only a piece of evidence (2)

The English doctrine of res judicata was adopted in this country before the promulgation of the first Code of 1859. As the Judicial Committee observed (3) upon the statement of the rule in the Duchess of Kingston's case, there is nothing technical or peculiar to the law of England in the rule as so stated. It was recognized by the civil law and was consistent with sect 2 of the Code of 1859. Though, however consistent with it, sect 2 of that Code was not identical with and fell considerably short of it (4). It only provided for bar by judgment, and did not deal with the remaining portion of the rule relating to the bar of the trial of an issue by judgment on that issue which has sometimes been called bar by verdict. The gist of this latter rule is that an actual decision on any matter directly in issue in a suit is conclusive of that issue in every subsequent suit brought on any cause and for any purpose or object. Notwithstanding this defect in the rule the Courts acture.

change of law before the final decree, so Lakshim Bibi Kujrani v Atal Bihary Aldar, 40 C 534 (1913)

⁽¹⁾ Res judicate precludes a man from acowing the same thing in successive Inigetions while catoppel prevents his saying one thing at one time and the opposite at another Cassmally c currinthop, 36 B 214 (1011) Bhaissanker v Vorari, 36 B 234 (1011), Balesshwar Bagarti a Bhagarath Das 7 C 701 (1908), Bhagarath Das 7 Bal shwar Bagarti Al (1/1912) Forca 6 where no cotopp I when then has been a

⁽²⁾ Sitaram t Amir Begum, 5 A 332 (1880) per Vahmood J

⁽³⁾ In Khugowlie Singh r Hussein Bux, 7 B 1 R 673 (1871)

⁽⁴⁾ co Hulm Chand, I es Jud 7, where the subject of the above statement is more fully treated.

on general principles, recognized the conclusiveness of judgments as to issues also, the principle of res judicata, whether specially enacted or not, being an essential part of the law of procedure in all countries (1) Other difficulties also arcse with reference to the meaning to be attached to the words "cause of action," in sect 2 of the Code of 1859 This section was therefore very considerably modified in the Code of 1877, res judicate being made applicable to issues, and the identity of the cause of action being replaced by that of matter in issue. The effect of this was to provide for an estoppel against defendants the words "suit or issue" being effective to estop a defendant from defence as well as a plaintiff from attack (2). Another material alteration made was the express extension of the doctrine of res judicata with certain limitations to foreign judgments, the limitations heing enacted by sect 14 (3)

In the rule of res judicata, as enacted in 1877, only two alterations were, pilor to the present Code, made which were to a great extent of a verbal oharacter One of such alterations was to make that clear which had been previously decided namely, that the competency of jurisdiction in regard to the Court trying the former suit was as to the subsequent suit also. The scotion even in its final form under the last Code was not complete or exhaustive of the effect of res judicata, (4) which, as a principle, exists independently of the Statute enacting it (5) It did not, for instance, deal with judgments in rem, nor with that of parties represented by, though not claiming under, the parties to the former suit (6) In fact, as observed by Sir Whitley Stokes the question of res judicata is a subject of which the importance in a country inhabited by a litigious population is only equalled by the difficulty of dealing with it clearly, concisely, and accurately in a legislative ennet ment (7) The same remarks apply to the present Code (8) In the Bill as first drafted an attempt was made to clahorately and exhaustively formulate the rule This arrangement was simplified by the Select Committee which con The framers of the present draft considered that even this sidered that draft modified attempt to make a complete statement of the rule of res judicala was

⁽I) Jamaitunnissa t Lutfunissa 7 A 615

⁽²⁾ Rung Rav t Sidhi Mabomed 6 B 484 (1892)

⁽³⁾ I ide post, p 143

⁽⁴⁾ Ram Lall t Chhabnath 12 A 578 (1890), Padayachi t Vetheilinga 15 M 119

<sup>(1891)
(5)</sup> In Sataram v. Amir Begum S. V. 331
(1886) Mahmood J., sail. In interpreting, the language of that section we cannot have the fundamental principles of the rad town in this vection gives express in missing of the express word if the state is trade these principles, and is Balkel in the latel II. A 137 (1882). In III letture II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and II. Sail and III. Sail and I

would be bound by the decision of a point in a first suit treated by the Court in appeal as irrelevant for that case though not formally set awide. Any does the ection expressly provide that a Court which has no jurisdiction finally to it cide a question should follow a decision of a Court which had ecclusive juris liction to decide it. But the rules laid down in the Duch set of Kingston acres, and did clim 1 it the Liny Council to be apply

calle, me t such a case

(6) Munclibor t Vill (bloy, 6 B 715
(1882) Se lowever, as to domestic judg
nents i rem n II of the lydence Act

^{(7) 2 11 15} In han Ce 1 + 3 3

⁽s) I an an urtl I i S retary of State f r fi ha LAN I J 100 (till) we have the (the set in deep tever all cost of cat pally in [i])

words "directly and substantially. The diaft lill contained the following extlauntion . Where served serves are put an arme and tried or I deer led in at 1 and and the decision of each of each result somes as material to the distinct of the suit earl such serve shall be deered to law been directly or loud startially in some in This I rilaration it was suggested should be added to make it clear that where in a former case several points have been involved, the finding on each of which is independently sufficient to dispose of the easy each of such findings is res judicate. It adopted the decision of the Calcutta High Court in Pears Mohun Mulerice t Amlier Churn Bandig idhaa (2) It has however been omitted

The bar is absolute against all parties, the test of res judicata being mutuality (3) Where it exists the original cause of action is gone, and can only he restored by getting rid of the res judicate (1). Therefore in such case a decree holder must obtain satisfaction of his decree by execution, and not by another suit, which cannot be brought either on the original cause of action, or, save in special cases on the decree in which that cause has become merged The object of the Legislature has been to present continued litigation on the

(1886), Gnanambao e Parvathi, 15 M 477

⁽¹⁾ See Cursandas Natha r Lalkavahu, 19 B 571 (1895) , Lalla Sh o Churn : Ram nan lar Diby, 22 C 8 (1831)

^{(2) 24} C 909 (1897) (J) Surrendernath ; Brojonath, L. C 356

^{(1832),} Jamaitunaissa t Lutfunnissa, 7 A (1) Lockyer i Terryman, L R 2 App. Cas 528

^{619 (1585)}

same grounds, and this would obviously be defeated by allowing a decree holder to abstain from putting his decree in force, and proceed again on the same cause as before (1) A plea of res judicata must be based on the grounds of the decision actually stated in the judgment (2) If a judgment be improperly obtained, so that it never ought to have been signed, when set aside it ought to be treated as never having existed So judgment obtained against a dead man cannot operate as res judicata in a subsequent suit (3)

"Gourt."—The term, in so far as it is used in connection with the subse quent suit, means a Court governed by the Code From the provisions of sect 14 it is shown that the operation of the section is not confined to decrees passed by British Indian Courts (4) The word "Court," therefore as used in connection with the previous suit, includes a foreign Court, and the Court of competent jurisdiction, which is referred to in the first paragraph, includes a foreign competent Court,(5) the recognition of a foreign judgment as res judicata being a position of the positive law of British India (6) Upon an issue whether the defendant in possession of ataluga had lost title by inheritance thereto by reason of having been validly adopted out of his own family held that an awaid to that effect of a committee of taluqdars was not a decision by a "Court" within the meaning of this section (7)

"Try."—This word, which means the formal method of examining and adjudicating on a metter in dispute, shows that the rule in question has nothing to do with the admissibility of a judgment in evidence and which judgmont may be admissible under sects 10-44 of the Evidence Act, even where it does not fulfil the requirements of this section (8). There is a conflict as to whether the doctrine of res judicate applies only to a trial by a Court of original jurisdiction, or also to a disposal by an appellate Court. The Calcutta High Court has, in the under mentioned case,(9) held in effect that a trial by an original Court only is contemplated and that the section has no application to the disposal of an appeal, and that when there is no res judicate at the time of the trial of the original suit the appellate Court is bound to decide the appeal on the ments. The contrary view, however, is taken by the Allahabad (10) and Madras (11) High Courts, which have held that the rule contained

⁽¹⁾ Gan Savant t Narayan Dhond, 7 B 469 (1883)

^{469 (1883)} (2) Jalasutram : Bommadevara, 29 M 42

<sup>(1905)
(3)</sup> Hall Noor Mahomed t Macked, 9

Bom L R 274 (1907)
(4) Prithesingji t Umedsingji, 6 B I R

^{98 102 (1903)} (5) Balul hat t Narharl hat, 13 B 224

⁽¹⁸⁸⁸⁾ (f) 1 cle po t pp 142 144

⁽⁷⁾ Har Shankar Partab Sugh e Lad I aghuraj Sugh 34 I A 125 (1907), 29 A. 51), 11 C W N 811 9 Rom I 13 757, 17 M Lad 351, 4 A Lad 407, 6 C Lad 13

⁽⁸⁾ See Hukm Chand, Civ P Code, III and see Benn Madho v Indar Sahar, 32 A 67 (1909)

⁽⁹⁾ Abdul Majid t Jew Naram Mihto, 16 C 233 (1888) But see Chandri t

¹⁶ C 233 (1888) But see Chandra t Pramatho, 15 C W N 930 (1911) (10) Balkishen t Kishan Kal, 11 A

^{118 (1888),} Chajju t Shew Sahai, 10 A 123 (1887) In the first case a decision of the High Court in a Buil for rent for 1292 1 was hell to be resignate the in a score lappeal presented pror to that decisi it in a suit for

rent for 1293 P

(11) Gurur gann ah t. Venkatakrishnama,

²¹ V 350 (1901)

in this section is not limited to the Courts of first instance but applies equally to the procedure of the first and second appellate Courts by reason of sects 107 (formerl) sect 582) and 108 (formerly sect 587) respectively, and, indeed, even to miscellaneous proceedings by reason of sect 139 (formerly sect 647); and that the doctrine, so far as it relates to probabiling the retrial of an issue, nust refer, not to the date of the commencement of the hitgation, but to the time when the Judge is called upon to decide the issue. The Panjah Chief Court appear to have taken the same view (1) Similarly when there were cross appeals in a suit a decision in one appeal was held to be respudicate in the other, though as the suit was the same, this section could not apply (2). The correct view is that the date, not of institution but of decision, determines the application of the principle of res sudecide. See Evolantion I

Sunt —It would hardly be necessary to say, unless the contrary had been maintuned, that criminal proceedings are not a sunt, (3) and therefore no finding of a Criminal Court can be res judicata in a civil sunt, both the parties to and character of the two proceedings being entirely different Similarly it has often been held that the proceedings in the Criminal Court are not in general evidence in the Civil Court and that a Civil Court is not hound to adopt the view taken by the Criminal Court as to the oral or documentary evidence (4). The term "sunt" has not heen defined (5) At the same time it has been said that seet 647 (now seet, 141) shows that the law does not necessarily consider every proceeding in which there are parties, evidence, argument, and decision, to he is sunt, there herag proceedings other than suits and appeals (6). Proceedings therefore under the insolvency sections of the Panjah Laws Act have been held not to be a suit (7). Nor are proceedings under the Land Acquisition Act, the object and nature of which differ considerably from an ordinarily civil suit, a suit (8). Nor is an annolication to amend eleral or authentical or seculential

- Nur Muhammad t Jamnu (1830) P R
 No 158 Cited in Hukm Chand, Res Jud
 p 26
- (2) Ram Lal t Chhal Nath, 12 A 578 (1890)
- (3) Ram Lal v Tula Ram, 4 A 97 (1881) Gholam Husen v Mahomrd Ahan (1877), P R No 50 In the first case cated, the lower appellate Court held that as the Criminal Court had decided that the delendant had abducted the plantiff s daughter, the question whether he had or had not done so was res judicate a judgment which was reversed on appeal to the High Court See also Doorga Das t Doorga Chima, 6 W R, Civ Ref., 26 and Keshab v Vsuruddin, 13 C W N 501 (1908), in which it was
- held that an acquittal is no bar to a civil suit (4) See cases cited in O kinealy & Civil Procedure Code, notes to 8 13, and Hukm

- Chand C P C 123
- (5) See notes to s 2, ante
- (6) In the matter of Chirangi Mut (1884), P R No 445
- (7) lh Seo In re Victoria (1894) 2 Q B 387
- (8) Nobodeep Chunder & Brojendra Lal Ray TC 406(1881), Mahadevit Neclaman, 20 M 200 (1896) The decision in Rain Chunder Singh & Madho Kumari, 12 C 434 (1885), in the against this 1900, as in that case the former suit was not a proceeding on a reference under any section of the Act, but a suit instituted by the plaintiff independently of the Act ho appeal here to the Phry Council from a High Court decision on a ppeal under this Act, for such a decision is an ultimate arbitation Special Officer Sal sette Building Sites v Dossabhai Bezonji, 73 B 50 (1912)

errors in a decree, a suit,(1) nor is an application for review (2) Miscellaneous civil proceedings will be a suit when they are treated as a suit by the Legisla ture (3) In a proceeding upon an application for probate, the only question to he determined is whether the will is true or not. It is not the province of the Court to determine any question of title with reference to the property covered by the will (4) In the last mentioned case the Court further observed "And it is noteworthy that a proceeding under the Probate and Administration Act is not a suit properly so called, but takes the form of a suit according to the provisions of the Civil Procedure Code (see sect 83) That being so, we do not see how the judgment of the Allahabad High Court could be regarded as con cluding the plaintiff as to the title to the estate either under sect 13 of the Civil Procedure Code or under the general principles of res judicata" But in a recent Full Bench decision of the Bombay High Court where in a contentious proceeding for Prohate a will had been held not proved and Prohate refused, and the widow then brought a suit for recovery of the property of the deceased from the defendants who held it as executors under that will, it was held that since contentious proceedings for Prohate must take the form (as nearly as possible) of a suit they constitute a suit within the meaning of this section and therefore the Probate judgment operated as res judicata (5) In considering upon the question of competency whether the word "suit 'should he construed as inoluding an appeal, it is held that the powers of the Court in which the suit was instituted must be looked at, and not those of the Court by which the suit was decided on appeal (6) The draft Bill made the section applicable to a suit "or other proceeding, " but this suggestion has not been adopted As to this, the Special Committee in their report say, "The Committee recognized that a proceeding does not come within the language of that section but they think it better not to deal with this point in express terms for the reason that the applicability of the doctrine of res judicata to certain proceedings is not open to doubt, and they foresee that any express reference to proceedings in a crystallised definition might only lead to difficulties (L. R. 11 I A 37, 1 L R 29 C 707)"

As regards the question of the identity of the suit it has been held that where separate causes of action were joined in one suit, the suit as regards each

⁽¹⁾ Langat Singh : Janki Koer, 39 C 265 (1911), Langat : Janaki, 14 C L J 431 (1911)

⁽²⁾ Srish Chandra Pal Chowdry t Triguna Prasid Pal Chowdry, 40 C 541 (1913), following Gulab Kocr t Badshah Bahadur, 10 C I, J 120 (1909)

⁽³⁾ Harsahai t Maharaj Sin_oh, 2 A 291 (1879) Syul Imam t Haraii Chunder, 14 B J B 108 (1875), Smith t Secretary of State 2 C 340 (1878) Acta Milia t Durga Chura 27 C 146 (1898)

⁽⁴⁾ Arun Moxi Dist e M I u les Nath Walteler 20 C 888 845 (1842) As to the Su car of the are det ree Mancharam e

Kaldas, 19 B 821 (1894), and see as to Probate proceedings, Kurrutulain t Nuzbut and Doula 33 C 116, 127 (1995), and see Lalit y Radharaman, 13 C L J 567, 552 (1911), 15 C W N 1021 distinguishing Pannandan t Sheoparvan, 11 C L J 623 (1916)

⁽⁵⁾ Kaljanchand Lal hand t Sitalr L 33 B 300 F B (1913) Cf Ramanl Deli + Kumud Bandhu 14 C W N 93 (1910) Jud_ments refusing 1 rol ato are as much fud ments in ren as those granting if

⁽C) Mal il la a Sursan pp. 30 B 220 (1991)

⁽¹⁷⁰

cause of action was a separate suit. So if a suit for the recovery of one bond has been dismissed, on the ground that the bond was not repaid, the decision would be res judicata so far as the claim for that bond is concerned in a subsequent suit brought for the recovery of that and other bonds on the ground of the same renavment (1)

As regards appeals, vide ante, p 35, note to seet 2, sub voc , "Decree"

It was sometimes held, before 1892, and was enacted in that year hy an addition to sect 617 (now sect 141), that execution proceedings are not miscellancous proceedings but proceedings in auts. But though the word "suit" includes all proceedings in execution of the deeree massed in the suit, the section does not apply where the proceedings, both earlier and subsequent, are in the same aut For the section requires that the matter should have been in issue in another separate suit, and each separate amplication for execution of a decree in a suit is not a separate suit (2) But though in such a case this section will not apply, a prior decision in the same suit may have hinding force, depending not upon this section but upon general principles of law, otherwise there would be no end to literation. So in the last mentioned case which was reversed on anneal to the Privy Council, the latter held that though the matter decided was not decided in a former suit but in a proceeding, of which the application in which the orders reversed by the High Court were made was merely a continuation, yet it was as hinding upon the parties and those claiming under them as an interlocutory judgment in a suit is hinding upon the parties in every proceeding in that auit, or as a final judgment in a suit is hinding upon them in carrying the judgment into execution. It could not, in abort, he held that because the prior order was made in the same and, what it decided remained open to contest afterwards between the parties, although if it had been made in another aut it would have been final under the former sect 13 (3) As a fact. the bar in such cases is due to the principle which has been designated the "judgment of the case," (4) the principle which is distinct from res judicata but which in the absence of any specific name has admetimes been spoken of as res judicata as falling within the literal signification of that expression, under which a decision in a prior stage of the same civil suit or proceeding operates as a bar to a fresh decision on the same point in the subsequent stages of the same suit or proceeding (5) Thus it has been held that though an application

Sheoraj t Kashmath, 7 A 252 (1884)
 Rup Kuari t Ramkirpal Skukul, 3 A

⁽²⁾ Rup Kuarı t Ramkırpal Skukul, 3 A 141, 142, 143, F B (1880)

⁽³⁾ S C in appeal, 6 A 269 (1883) Sco Mungal Pershad Dichit i Grija Kant Lahiri, S C 51 (1881) In Behari Lal i Majid Ali (1897) A W N 29, the Court observed that

is 13 of the Code, of course in terms, does not apply to a case of this kind, but as has been pointed out by their Lordships of the Privy Council in the cuse of Ram Airpal i Ruphuari the principle of res publicata applies to jecent parties raising a second time in the same suit, or in the same execution proceed

ings an assue which in that suit or in the execution proceedings in the suit, had been previously determined As however, is pointed out, gost, the principle is really a different one from res judicata, though some times spoken of by that name See Gulab hower, Badshah Bahadar, 13 C W N 1197 (1999)

⁽⁴⁾ Hukm Chand, C P C 116

⁽⁵⁾ See Ram Narain r Parmeswar Narain, 25 C 39 (1897) [decision refusing an appliea tion to file an appeal, application to another Drisson Bench barred], Secretary of State r Vadia Pillai, 17 M 193 (1893) [remand.

for amendment of a decree (under sect 152) is not a suit within the meaning of these sections, yet (when it has been disposed of) a subsequent application will be barred upon general principles of Law (1) Res judicata, on the other hand, applies to cases in which the decision was made or the point decided arose, in another suit or in proceedings taken in execution of a decree in another suit Where there is a trial of a suit, and a point has been decided in an execution proceeding in a former suit, or vice versa, then the rule of res judicata may apply (2) It is, however, to he noted, that it has been said (3) that it is only certain descrip tions of orders passed in the course of the execution of a decree that have operation by way of res judicata, and not every order passed in execution There will in some cases not he res judicata, as all its conditions may not have been fulfilled (4) Res judicata will not apply when the decree, with regard to which a question auses, is really different from that with reference to which it had arisen before,

appeal after], Ballabh Shanker v Narun Singh, J A 173 (1880) forder by appellate Court on application for execution] In this country the principle has been most usually acted upon in execution proceedings, tide onle, and see Bant Ram : Nanhu Mal, II I A 181 (1884) . Bandey Karım v Romesli Chunder, 9 t 65 (1882), Tuttch Naram v Chandrabali, 20 C 551 (1892), Budan t Ramchandra, 11 B 539 (1887), Chathappan v Pyder, 15 M 103 (1891), Venkatanarasımlah e Papam mili, 19 M 51 (1895), Sher Singli v Doya Ram, 13 A 564 (1891), Basudev Narain Singh t Seelogy Singh, 14 C 640 (1887). Hafizuddin v Abdul Aziz, 20 (* 755 (1893) , hishau Sahai : Aladad Khan, 14 A 64 (1891), Jogendre Bhuttacharya : Hirany : Kumar 2 C L 7 499 (1904), Nabi Muham mad : Junia, 27 A 148 (1904); Hukm Chand, C P C 117-119, and post, p 149; Gulab Koer t Badshah Bahadur. 13 C W N 1197 (1909)

(1) Langat t Janahi 14 C L J 481

(2) In Manjunath & Venkatesh, 6 B 51, 60, tt (1881), the Court considered that the A H C in Rujkuari i Ramkirpal 3 A 141 (1850) had put too narrow a construction on the word 'suit' in excluding execution proce dange In Dinkar Batlal e Shirdhar, 14 B 206, 209 (1959) Scott, J., earl "Moreover the Previous Proceeding was not an independent suit, but a proceed ing in execute u, and although a decision in as his proceeding is builting in subsequent i meredings in the asme aut, it is a matter if dult whether they affect clama in mel pen lent suits. The learned full, I we

over, stated that it was under the circumstances not necessary to examine that question Jardine, J, appears to have held that an order in execution proceedings in one suit could not be res judicata in another suit, though the decision in the case turned upon another point There can, however, it is submitted, be no room for contention after the amendment of s 647 in 1892, with respect to execution proceedings, and that there will be res judicata provided the con ditions of that rule have been fulfilled, which may often be not the case having regard to the nature of the order passed in execution proceedings in the former suit See cases in following notes

(3) Gourmani : Jagut Chandra Audhikari, 17 C 67, 63 (1889)

(4) So in Abedeonissa t Ameeroonissa, 1 I A 66 (1876), the Court in the prior suit was held incompetent to try the particular 138uo, in Dinkar e Hari, 14 B 206 (1889). the subject matter was held not to be the sume and that the conclusiveness given to s 283 of the last Code exists only as regards the particular property in dispute So also the decisions in Courmani : Jagut Chandra, 17 C 57 (1859) . Ram Lal : Agrain 12 A 53J (1890), Sherk Budan e Ram Chandra, II B 537 (1887) turned on the point decided not having been adjudicated upon in the former execution proceedings, the objection in the Calcutta case having been raised by the judgment del tor not in lus character as such un ler the decree but in a different character See Ashfag r Grant P C, 33 A 20L 271 (1911) An last part

as the matter in issue in the two cases will be different. So a decree directing periodical payments has for its purpose been derined to be a separate decree in regard to each of such payments (1). And a decree confirmed in appeal has also been deemed to be different from what it was before the confirmation, and a dismissal of an application for the execution of the original decree has been held to be no bar to an application for execution of the appellate decree (2).

"Issue"—The principle of res judicata applies both to the trial of suits and the trial of issues. A suit ends in a dismissal or a decree in whole or in part An issue ends in a finding, and the rule contained in the section enacts that not only is a suit which has once been tried and determined not again maintainable, but an issue which has once been directly and substantially raised and decided earnot be hitgated a second time. The principle upon which the rule is based applying equally to issues as to suits (3).

The first clause of the section is not well constructed. It would be clearer if it run, "No Court shall try any issue which, or any suit in which, the matter directly and substantially in issue has been," etc (1). The trial of a substantially in issue in it (i.ide ante, first paragraph). An issue is said to arise "when a proposition of law or fact, which a plaintiff must allege in order to show a right to sue, is affirmed by the one party and denied by the other. And see Explanations III, and IV (2).

There is nothing in the Code to restrict the application of the rule of respudicate to issues of fact as distinct from issues of law. In the original draft Bill it was proposed to affirm the view that a pire finding of law might operate as resjudicate, but to limit the operation of the principle to adjudications on the ments, with a view to excluding, for instance, dismissals on a pre-liminary question of jurisdiction. Apparently it was considered that this was a matter which should be left to the Courts to determine. It has been said that a point of law can never be resjudicata (6). But it is submitted that the rule thus broadly stated is not sound. It is difficult, however, to reconcile the decisions on the point.

The principle of res judicata does not depend for its application upon the question whether the decision which is to be used as a bar was a right decision or a wrong decision in law or in facts and it is immaterial whether the decree set up as a bar was rightly or wrongly passed in law or in fact (7). It is obvious that if this were not so there would be no findity, for in all cases the

L J 217 (1904)

Kuppu Ammal t Sammatha Ayyar 18
 482 (1894)

⁽²⁾ Sakhal Chand v Velchand, 18 B 203 (1873), Muhammad Sulaiman t Muhammad Yar Khan 11 A 267 (1888) See Harkant Sen t Biraj Mohan Roy 23 C 876 (1896), Nanchand v Vithu, 19 B 258 (1894)

⁽³⁾ Jamaitunnissa t Lutfunnissa, 7 A 615 (1885), Tirbhuwan t Rameshar, 28 A 727, 740 (1996) See Hukm (hand Res Judicala.

^{7, 14,} and ante

⁽⁴⁾ Hukm Cland C P (112

⁽⁵⁾ O \IV Tr 1 2 nost

⁽⁶⁾ Chamanlal : Bapubhat 22 B 669 (1897)

⁽⁷⁾ Behari Lal t Maid Ali, 24 A 138 (1901), Sham Lal t Ghasita, 23 A 459, 460 (1901), Phundo r Jangi Nath, 15 A 327 (1893), see Nathu Ram r Kalyan Das, 1 A.

previous decision might be challenged for error. The force of res judicata attaching to a decision by a Court on an issue of law will not be affected, even if the decision is subsequently disapproved by a Full Bench of the High Court to which that Court is subordinate (1) Where the question is one not purely of law, but of mixed law and fact, there will be res audicata. In such case the law has been applied to a particular state of facts, and if these facts come again in issue in another suit, the judgment on these facts, whether it rightly or wrongly applies the law, is res judicata (2) So where in a previous suit a particular stipulation, contained in a particular kabuliat, had been held to be valid as between the parties, it was held not open to the Court subsequently to try the issue, whether that particular stipulation was valid or not, the question being a inixed question of law and fact and whether the previous decision was or was not erroneous (3) It has been recently held that though where the question is one of law the judgment is res judicata where the parties seek to litigate again on the same cause of action, yet where the dispute relates to matters which had formed a subsidiary consideration in the former suit, though the causes of action in the suits may be different, the application of this principle is limited to matters distinctly put in issue and determined in the former suit and to questions of fact or mixed questions of fact and law (4) The Madras High Court has held that a Court is precluded from inquity into the soundness of the law of this previous decision in respect of the precise subject matter or immediate purpose of that suit, but that provided the decision in the latter suit does not in any way question the correctness of the former decree of in any way affect its operation, an orroncous decision on a question of law in a previous suit is no bar (5) The operation of a decree as res judicata, so far at any rate as the subject matter of a direct adjudication contained in the decree is concerned, can in no way be affected, in the absence of fraud or collusion, by the fact that the suit was the result of a mistake of law, or that the decree proceeded on such mistake The remedy, if any, in such a case can only be by way of review, and not by separate suit for relief on the ground of mistake (6)

As regards a question of pure law, it has been said that anomalous

119 (1410)

⁽¹⁾ Court Koer t Audh Koer 10 C 1087 (1884) [dist in Alimunnessa t Shama Charan Ras, 32 C 749 (1905)], a c,9 C W N 406. Namappa Chetti t Chedambaran Chetti 21

M 18, 25 (1897) (2) Pu Churn Ghose t Kumud Meban Datta 1 (W N (87 (1897) The head in te d es not correctly represent the decision, in whi hao judgment is given as to what would lappen in the case of an issue of pure law See post and Bishn'i Priva t. Bleslu Sundari. 29 (319 322 323 (1900)

⁽³⁾ Bhishnu Frees r Bhalu Sin lari 28 C 318 (1900)

⁽⁴⁾ Ball Nath r I a lmanun 1 16 C W N C21 (1912) Actors v Kamini H C I J 401 (1909), Purns i 1 suk 13 C L J

⁽⁵⁾ Mangalathammal: Narayanswam: 30 W 461 (1907) Copu a Sami Royar, 28 M 517 (1905), Venlu : Mahalinga, 11 M 393, 195, 396 (1989) following Parthasarathi Avvangara Chinna Krishna, 5 M 301 (1882) latter case dist in Clathappan t Pydel, 15 VI 403 (1891) as at was the same decree which was under execution though property attrehed was different, and also in hos vanna i Doosy, 29 M 225 (1905) Vising a Raming 3 Bom L R 470 (1901). s c, 26 B 25 (1901), I alton, J, ref rred to ther cond cas with approval 1 at the mile ment of Chandavarkar, I , proceeded in the ground that the peint in issue la l not been

reviously decid d (f) haven Animala Sastre Rami r. 26 M

^{104, 101 (1002)}

results might arise if an erroneous decision on a pure question of law in a previous suit is held to operate as res nudicata in a subsequent suit relating to a different subject matter, for an errogeous decision might have the effect of altering the law applicable as between the parties. Though the language of this section may perhaps make it apply to such a ease, it is very doubtful whether it was intended to have such application (1) It has been submitted that the facts decided in the first suit cannot be disputed, and for the nurnose of the conclusiveness of those facts, but no further, the law applied must be accented Thus if a decree in a suit to declare a mortgage invalid proceed upon the constitutionality of a statute the parties afterwards cannot deny the validity of the statute in question, when the mortgages attempts to foreclose. It could hardly be true that they could not raise the question again in a suit moon a different subject matter (2) A previous construction of law between the parties it has been held (3) ought not to be followed after that law has been replaced by another So a decision upon a point of limitation given when either Act XIV of 1859 or Act IX of 1871 was in force, and which was subsequently held to be erroneous, was also held not to be res judicate in a suit which was brought when the present Limitation Act was in force (4) In a recent case in the Calcutta High Court where after the preliminary decree in a mortgage and before the final decree the Chota Nagpur Tenancy Act was extended to the district in which the property was situate it was held that the sale was forludden by that Act and the judgment debter was not estended from bringing this to the notice of the Court (5)

The matter directly and substantially in issue in the second suit or issue must be the same matter which was directly and substantially in issue in a former suit—The former judgment is conclusive only upon the same matter (6). Where causes of action are different the principle

Hunter : Stewart | De G I & J 109 Cregory t Molesworth 3 Athyns 626 Srimut Raja Mootoo Vijaya t Katama Natchiar 11 M I A 50, 10 W R. P C 1 (1866) Lingonlie Singh t Hossein Bux Man 7 B L R C-3 15 W R . P C . 30 (1871) [see as to this latter cas Hard Sunker Mookerico e Mooktara Latro 15 B L R 238 240 (1875)], Umatura Del 1 t Krishna Kamini Dasi, 2 B L R 102 10 W R 426 (1868) [confirmed by P C . 11 B L R 158, 18 W R 163 (1872), followed in Brom Lall Roy t | Kheter Nath Mitter, 12 W R 55 (1869), Sib Shunkur Neoghy t Huro Soondureo Coopta, 13 W R 200 (1870), Dadsar Bibeo r Sakir Burkundaz. 15 W R 168 (1871), Thomas M Pigou e Syed Vohamad Aboo Syed, 3 C L R 253 (1878), Dinomoya Debia Chowdhrain v Anungo Moys, 4 C. L P 599 (1879)1. Sooriomoneo Davee v Suddanund Moha patter, 12 B L, R 304, 20 W R 377

⁽¹⁾ Rai Churn Ghoso (Luiud Mohan Dutta, I C W N 637, 690 (1897) per Runer jee, J and see remarks of same learned Judge in Bishnu Paya (Rhalu Suodari 2) (* 318 322 323 (1900), but see per Berman J, in Waman (Hari 31 B 128 137 (1906) (2) Bigelow, Istoppel 100 an I see Hukin Chand, Res Jud 29 32

⁽³⁾ Chaman Lal t Bapubhar 22 B 669 (1897)

⁽⁴⁾ Ib , butsee Namappa v Chidambaran 21 M 18 at p 25 (1897), in which it was said that a change in the law or different inter pretation of it cannot operate to reopen matters which had previously become res pudicate

⁽⁵⁾ Lakshmi Bibi Kujrani e Atal Bihary Aldar, 40 C 534 (1913)

⁽⁶⁾ See Duche's of Lingston's case, 2 Sm L C, 9th ed, 612, Outram'r Morewood 3 Last, 346, Barrs: Jackson 1 1 & C 585, Henlerson t Henderson, 3 Hare, 115,

does not apply (1) But where they are substantially the same the principle applies, even though their forms or the frames of the rehefs are different (2) It is not necessary to show that the subject-matter of the former suit was the same as that of the subsequent suit, but that the question, the trial of which is sought to he harred, was directly and substantially in issue in the former suit (3) No precise rule of general applicability can be laid down for the solution of the question whether the same matter was directly and substantially in issue in the previous suit (4) The question whether an issue has substantially heen raised and decided is a matter of fact to be determined upon the circumstances of

(1873), Krishna Behary Roy v Bunwari Lall Roy, 1 C 144, 25 W R 1, L R 2 I A 253 (1876), and in the High Court, 19 W R 63, Niamut Khan t Phadu Buldia, 6 C 819, 7 C L R 227 (1880) [butsee Run Bahadur Singh v Lucho Kocr 11 C 301 (1884), Doorga Pershad Singh v Doorga Konwari 4 C 190, L R 5 I A 149 (1878), and before the High Court 20 W R 154], (1873) Field, Ev 237, Casporsa, Estoppel, 379 401

Haji Noor Mahomed v Maclcod, 9
 Bom L R 274 (1907)

(2) Naganada v Krishnamutri, 34 W 97 (1910)

(3) Setanath t Basudeb 2 C L J 540 (1900), as to the necessity for the point having been in issue in the former suit see Malhi Kunwar t Imam iid din 27 A 59, 61

(1904)(4) Tield, Ev 237 the Code of Civil Procedure of 1859 enacted thus ' The Civil Courts shall not take cognizance of any suit brought on a cause of action which shall have been heard and determined by a Court of competent jurisdiction, in a former suit In tween the same parties or between parties under whom they claim " (Act VIII of 1859 s 2) The meaning of the term "cause of action' bas been the subject of difference of opinion in India as well as in England [Allhusen t Malgarejo, L R 8 Q B 340 Cherry + Thompson I R 7 Q B 573 Jackson : Spittlls L R 5 (P 542 Dur ham e Spence, L R 6 Fx 46, Yaughen Wildon I R 10 C P IS, D Sours t (oles, 3 M H C R 284 (1868) Harplan Das e Bhagnan Das 7 B L R 102 109 (1871), Balson Mohan Lal Bhasa Gya r Lachman Lat 5 B L R C63 C74 C75 (1870), 14 W P 73, Chand r Coomst Mundal r Manar Khanum, H B I R 431, 442, John Joll e Hard e Naram 9

C 105 (1882), Muhammad Abdul Kadır, v The East Indian Railway Company, I M 375 (1878), Salima Bibi v Sheikh Muham mad, 18 A 131 (1895), see Field, Ev 203 n] "It was no doubt with a view to clucidating the subject that the Legislature, in eracting Act A of 1877, discarded the term 'cause of action ' The question chiefly to be considered 19 whether the matter decided in the previous suit was in substance part of the cause of action in the second suit, and the matter cannot be said to have been determined in the previous suit, unless it was put in issuo and directly determined (aspersz, op cil 328 fand see Rajah of Pittapur : Sri Rajah Row Bucht Sittaya Garu L R 12 I A 10 20 (1884)) The term cause of action is not used in the present section It, however, occurs in some other sections-20 O II re 2 4, 3, 6 The term "right to sue has been substituted in some sections-O AMI rr 1-3 The expression cause of action' has been Irequently construed by the Privy Council [Soorjomonee Dayee t Suddamund Mehapatter 12 B L R 315 (1873) Krishna Behan Roy : Brojeswari Chowdhranes, L. L. 2 I A 285 (1875), Rajah of Pittapur : Sri Rajah Rou supra Rajah of Pittapur t Sri Rajah Venkata Mahipati Surya L. R. 12 I A 119 (1855). Moonshet Buzloor Ruheem t Shumsoonissa Begum, 11 M 1 A C05 (1867) Amanat Bil et Imdad Husain, L P 15 I A III (1889) Mussamut Chand Kont * Purtab Singh L R 15 I 1 157, 178 (1988) see Han Hasam Haraban , Man charam halrandas 3 B 137 (1878), Srelbar kmayak e Narayan kalad Bakap H B H R 224 (1874) (aspersz, 323 325) As to the meaning of the phrase same right to sue see Panchod Morar i Peranji I luly, 20 B 92 (1891)

cuch particular case (1) The rule is that where a final decree is couched in general terms, the extent to which it ought to be regarded as res sudregta can only be determined by ascertaining what were the real matters of controversy in the cause (2) The leading principles of res audicate were thus enunciated by Sir William de Grev in the Duchess of Kingston's case (3) "From the variety of cases relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true. first that the judgment of a Court of concurrent invisduction directly upon the point is as a plea, a har or as evidence. conclusive, between the same parties, upon the same matter, directly in question in another Court . secondly, that the judgment of a Court of exclusive jurisdiction, directly upon the point, is, in like manner, conclusive upon the same matter, between the same parties coming incidentally in question in another Court, for a different purpose But neither the judgment of a concurrent or exclusive jurisdiction is evidence of any matter which came collaterally in question, though within their jurisdiction, nor of any matter incidentally cognizable, nor of any matter to be inferred by argument from the judgment "(4) Provided the immediate subject of the decision be not withdrawn from its operation so as to defeat the direct object of the decision, the parties may litigate matters incidentally or collaterally in issue between them for any other nurpose as to which they may come in question. The test applicable is whether the question decided in the previous suit was in substance part of the cause of action, or whether it was only ancillary to the main cause (5) The cases upon this branch of the rule of res indicate may be divided into two classes (6) (a) The class of cases in which it has been held that the metter directly and substantially in issue in the second suit or in an issue in such second suit, was, not directly and substantially, but colliterally or incidentally,

(I) Girdhar Manordas t Dayabhat Kala bhat 8 B 174 180 (1882), per West, J

(2) Amriteswari Debi e Secretary ef State for India in Council, 21 C 501 (1897)

(3) Sm. L. C., 9th, ed., 812 (the doctrino laid down in this cive is applicable to cases tried under the Civil Procedure (oil. Abugowlee Sing t. Hossein Bux Khin, 7 B. J. R., P. C., 673 (1871)). The section is not a pix time reproduction of the rul. in this c. sc. whattver may have been the inten ion of the Legislature, and the Court's duly is to 10 true the section as it stunds. Pixth Singh v. Umad Sing 6 B. L. R. 98, 103 (1987), and in Cokal Mandar e Pudiamund Singh, 20 C. 707 (1992). The Pray Court il pointed out 8 13 goes beyond the law lail down in the Duches of Kingstons Cass.

(4) In . Barrs r Jackson, I Y & C 585, R r Hutchings L R 6 Q 1 D 300 391 The rule, as laid down in the first two cases, has been frequently affirmed by the Indian Courts in the terms of Sir W. de Grey 8 judgment in The Duchess of Kingston a case | Mu-samut 1 day : Mussamut Bechun, 8 W R 175 (1867), Kanhya Lalla Radha Churn, B L R, Sup Vol., 662 (1867). Malama I hundra Chuckerbutty t Pajkumar Chucker bulty, 1 B L R, 1 € , 1 (1868) , Chunder Coomar Mundul t Numer Khanum 11 B f. R 431 444 (1873) tork 1 Indib Chandra Nandi 2 B 1 R O C 48 (18(8)) and in those of the judgment of Knight Brace V C. in Barrs r Jackson (Ooma Churn Dutt e Bekwith 5 W R At 1 3 (1866) Modb o I'm Dev i B ydonath Doss, 9 W P 542 (1868), Goores Churn Sinar e Brija Nath Dhur 21 W R 111 (1575)]

(5) Doorga Persad Singh e Doorga Konwari L. R. 5 I. A. 149, supra. Barrs i Jackson, I Y. & C. 585. I un Pahadur Singh e Lucho Kozz, II C. 391 (1881). Casperez.

(f) InH, Lv 293 :

in issue in the previous suit, (1) and (b) that class of cases in which the decision turned upon the identity of the matter, the matter in issue in the second suit, or in an issue in such suit being held (a) to be,(2) or (b) notion

(1) Shib Nath Chatterjee v Nuboo Kishen Chatterice, 21 W R 189 (1874) ["it may be that in that judgment there is a finding which may have some bearing upon that issue, or his judgment may contain abserva tions applicable to such an issue, but he did not directly determine it Any npinion which be may bave incidentally expressed cannot be considered a finding upon the issue so as to make his judgment in the former suit a determination of the cause of action in the mesent suit," per Couch, CJl, Modhoo Ram Dey v Boydonath Doss, 9 W R 592 (1868). Mussamut Edun v Mussamut Bechun, 8 W R 175 (1867), Mobima Chandra Chuckerbutty v Rajkumar Chuckerbutty, 1 B L R , A C , 1 (1868) , Raghu Ram Biswas t Ram Chandra Dobay, B L R, Sup Vol., 34 (1863), W R, F B, 127, Chunder Coomar Mundul v Munnee Kba nnm, 11 B L R 434 (1873), Run Bahadur Smgh : Lucho Koer, 11 C 301 (1884) , L R 12 I A 23, Nundo Lall Bhuttachargee v Ridhoo Mookhy Debec, 13 C 17 (1880), Thakur Magundeo v Thakur Mahadeo Singh, 18 C 647 (1891), Anusayabar a Shakaram Pandurang, 7 B 464 (1883), Jamaitumissa 1 Lutiumisa, 7 A 606 (1885), Bulak Tewari Kausil Misr, 4 A 491 (1882); Moni Roy t Mussemut Rajbuusce Koer, 25 W R 393 (1876), Doorga Ram Paul t Kally Krislo l'aul, JC L R 516 (1878), Jurdine Skinner & Co t Dwarks Nath Chuckerbutty, 14 W I: 112 (1871), Gangaraju i Kondireddi swam, 17 M 106 (1893) [the electron of a question of titl by a Revenue Court is merely medental, and no I ar to a fresh suit on title in a Civil Court, see also Ashrafun mses v Ali Ahmad, 26 A 601 (1903) Rami Kishori v Raja Ram 26 A 168 (1903)]. Stillari Ban ri e t Kluti h Chun Ira Rai Baladoor, 24 C 50 (1547), Nitsa Aunda Sarkar c Bam Narum Das 6 C W N 66 (1901) [fitle-quation elerated in rent auit?

(2) Pahlwan Sugha, Peal Smeh, I.A. 55 (1881). Narram Sugha, Phulman Sugha, I. A. 65 (1881). Wilver B., and Nort Khan, 5.A. 511 (1883). J. et al Sugha, Swittin, H.

C L R 483 (1882), Rakhal Doss Singh : Sremutty Heera Moteo Dossee, 22 W R 282 (1874), Hurry Behari Bhugat v Porgun Ahir, 19 C 656 (1890). Bakshi v Nizamuddi, 20 C 505 (1892) [followed in Balaram Mondul v Kartick Chandra Roy Chowdhun, 4 C W N 165 (1899)]. Nobe Doorga Dossee v Foyzhux Chowdhry, 1 C 202 (1875), 24 W R 403. Mohima Chunder Mozoomdar t Asradha Dassia, 15 B L R 251 n (1874), Mohesh Chunder Bundopadhya : Joylussen Mookerjee, 11 B L R 218 n (1874), Cook v Jadab Chandra Nandi, 2 B L R. O C. 48 (1868), Muthumadera Nail i Senatta Mu thumdeva Naik, 7 M H C R 160 (1872), Radhia : Beni, 1 A 560 (1878), The Rajah of Pittapur v Sri Rajah Row Buchi Sittaya Garu, L R 12 I A 16 (1884), Abdoolla Khan t Sree Kunto Pershad Hajrah, 15 W R 252 (1871) [set off burred], Bussun Lall Shookul & Chundeo Dass, 4 C 686 (1879), Gopal Chandra Roy t Nobin Chandra Bhandari, 3 B L R App 31 (1869), Sheory Rai v Kashi Nath, 7 A .47 (1884), Dovrav Krishna : Halambhai, I B 87 (1870) decision as to the validity or otherwise of a document, where the question has been ure perly in 1-suo and determined, is binding upon the parties or other representatives in subsequent hightion [Simut Rajah Mootoo Vijaya i Katama Natchiai, 10 W R. P. t . 1 . Gunga Ram Sadhookhan : Panch Cource, 25 W R 366 (1876), Kally Persad Sem # Mobesh Chunder, 1 Hay, 430 (1862) . Mir I ursund ther Massemut Juffree, 5 N W P 115 (1573), Dhumh : Ram Lal, 7 N W P 119 (1870)], Arun whale e Pancha nulam, 5 M 315 (1555) , Krishna Lehari Roy r Brojeswam Chowdrame L. R 2 I A 283. 1 (111 (187 .) Nuffur Chunder Paul Chiwdhry r Tuclee Moonee Dabee, 9 W R 300 (15(5) Bussun Lall Short ul : Chandee Dass, 14 (86 (1879) Telehambers / Ashoo tesh Dhur 7 (1 R 305 (1850) Samarawari Chetti e Shammuga Chetti, 5 M 17 (1881). Rajah of Pittapur r Buchi Sittaven 8 W 219 (1881) | L. R. 12 J. A. 16. Venists in Appa Laur Leda Venkayamma 10 M 15 (1851). Ram Chunler Singh :

be,(1) the same matter which was directly and substantially in issue in the first suit. This section does not enact that no property comprised in a suit which is dismissed shall be the subject of further literation between the

Madho Kumari, 12 C 481 (1884). L. R 12 I A 188 . Aishnu Chintaman e Balan Bin Rachun, 12 B 3.2 (1887). Radhamadhuh Holdary Monohur Mukeru, 15 C 756 (1888). L. R 15 1 A 97, Trilokl Nath Singh t Pertah Narain Smah 15 C 808 (1889) . L. R. 15 I A 113 . Kamını Debi t Asutosli Mir Leru, 16 C 103 (1888), L R 15 I A 139. Ananta Balacharya t Damodhar Makund. 13 B 25 (1888) . Balkishan t Aishan Lal. 11 1 148 (1888) . Gop; Nath Chobev t Bhugust Pershad, 10 C 697 (1884), see Chhaganlal t Bapu Bhar, 5 B 68 (1890). Dulahh Vahune Bansidharrai, 0 B 111 (1881), Dakhvane Deben t Dolegobind Chowdry, 21 C 430 (1893). Guruvayya : \udayama, 18 \u26 (1894) Jau order under s 258 of the Cay Pr Codo is appealable under a 241, no ser arate but hes, since the question is res sudicate. between the parties]. Ray Churn Ghose t Kumud Mohan Dutt Chowdhury, 2 C W N 297, 299 (1898) , s c . 25 C 571 , Namappa Chetty : Chidamharan Chetti, 21 M 18 (1897), Krishnan Nambiar i Kannan, 21 M 8 (1897) , Chundeo Prasad : Mohendro Singh. 23 A 5, 12 (1900), Fazlar Rahman Chow dhry : Raj Chunder Sen, 6 C W N 234 (1000), distinguishing Ismail Ariff t Mahomed Gous, 20 C 834 Ram baran t Chatar Singh, 23 A 465 (1901) [suit for per petual injunction, trevious suit for same reheff, Panga : Nunnil utti, 24 M 275 (1900), Chandi Prasad t Maharata Mohendra Smch. 24 A 112 (1901) . Pampal Smch v. Ram Prasad, 27 A 37 (1901), Sitanath : Basudeb, 2 C L J 540 (1900), Nadar Mal t Raunal Husain 29 A 608 (1907), s e 1 A L. J 665, Maganlal t Lalchand, 9 Bom L R 259 (1907), Mariamnissa Bibi t Joynab Bibi, 33 C 1101 (1906), dissented from in Zaharia t Debia 33 A 51, F B (1910), see also Anant Dis t Udai Bhan, 35 A 187 (1913), and Dakhin Din t Syed Alı, 33 A 151 (1910), Fradokya Mohmi v Kali Prosanna Chose, 11 C W N J80, 383 (1907) Of Chandra t Pramatho, 15 C W N 930 (1911)

(1) Ram Chunder Chowdhry t Kasbeo Mo hun, 21 W R 57 (1871), Mom Roy t Musst Rajbunsco kooer, 25 W R 393 (1876) , Ivali Arislina Tagore : The Secretary of State for India in Council, 16 C, 173 (1888). L. P. 15 I A 186 More Abaux Narayan Dhondhhat Pitre, 11 B 355 (1886), Poy Dinkur Doyal t Shee Golah Smeh 92 W R 179 (1871) Sami Achari e Somasundram Achari, 6 M 119 (1852), see also Periandi e Angappa, 7 VL 423 (1883) . Karnthasami e Juganatha, 8 M 478 (188a) . per contra. Can Swant Bal basaut : Narasan Dhond Sasant, 7 B 467 (1883) . Malon t Sagah, 13 B 567 (1888) . Anrudh Singh e Sheo Prasad, 1 A 181 (1882), and see hirty Chunder Mitter 1 Anath Nath Dev 10 C 97 (1883) . 13 C L R 21.), Sridbar Umayal i Narasan Valud Baban 11 B H C R 221 (1871), Girdhar Manordas e Davabhai Kalabhai, 8 B 171 (1882). Ado Ramchandra t Govind Ballal. 10 B 24 (1885) , Dataram t Ram Kristo, 9 W R 591 (1868), Ladir Buksh e Golam Alt Gomashtah, 9 W R 90 (1868), Lheda roomssa Bibeo t Boodheo Bibee, 13 W R 317 (1870). Sudduruddin thried e Bani Madhub Roy Chowdhry, 16 C 145 (1887) Baboo Goeroodas Poy : Bahoo Huronath Rov. 7 W R 423 (1867). More Balkrichna Mulo t Shek Saheh Valud Budruddin Kamble 5 B H C R. A C. 199 (1868). Baboo Mohan Lal Bahay (syal r Lachman Lal, 5 B L R 863 (1870), Ramanugea Narain & Mahasundur Kunwar 12 B L R 433 (15"3), Amar Zama t Nathu Mal, 8 A 396 (1886). Ro. hoonath Mundul : Juggut Bundhoo Bose, 7 A 214 (1881) 8 t L 1 393 Ekrani Mundul Holodhur Pal 3 C 271 (1878) Goree Mohun Mozoomdar t Hills 3 C 789 (1878) , Sadu : Baiza, 4 B 37 (1878) . Lukshman Dada Naik t Ramchandra Dada Nail, 5 B 48 (1880), Konerray & Gurray, 5 B 589 (1881), Kashinath Morsheth t Ram chandra Gopinath, 7 B 408 (1883), Muttu Chetta t Muttan Chetti, 1 M. 296 (1879). Ananda Raman Vathiar v Paliyil Vittil Nanu Navar, 5 M. 9 (1882) [but see Gonal Das t Gopinath Sircar, 12 C L R 38 (1682)]. Patan Part Hanuman Das. 5 4 118 (1882) . Ahmad Hossein Khan : Nihal ud din Khan. 9 C 915 (1883) . L. P 10 I A 15 . 13 C L

pairies (1) And an estoppel may be binding, notwithstanding that the sut which raises it relates to a different property (2). The mere fact that a claim has been included in a previous suit, without its having been directly and substantially put in issue and decided, does not, upon the dismissal of that suit, preclude a subsequent suit upon it (3). But, on the other hand, the mere fact that an issue was not framed, will not prevent the operation of the rule of res judicata, provided that in substance the matter has been heard and deter nimed (4). A decision may be by implication (5). The fact that the reasoning upon which the former judgment was based is equally applicable to the second suit, does not give the former judgment the force of res judicata in the second case (6). But a matter in issue may be one of law as well as of fact, and where a recurring hability is the subject of a claim, a previous judgment,

R 330, Gobind Chunder Addva & Afzal Rabbam, 9 C 426 (1882), 12 C L R 29, Amanat Bibi t Imdad Hossein, 15 C 800 (1888), L R 15 I A 106, Fatmabai v Aishabai, 13 B 242 (1888), Chinnasami t Hariharabadra, 16 M. 380 (1893). Nal Madhub Sirkar : Brojo Nath Singha, 21 C 230 (1893). The Zamindar of Pittapuram t The Proprietors of the Mutta of Kolanka, 2 M 23 (1878), L R 5 I A 200, 3 C L R 360 . Vallabh Dhula t Rama, 9 B H. C R 65 (1872), Gobind Mobun Chuckerbutty : Sheriff, 7 C 169 (1881), Roghoonath Mundul t Jugat Bundhoo Bose, 7 C 214, Luckmaram Mitter 2 Khettra Pal Singh Roy, 11 B L R 146 (1873). Ishr Dat e Har Narain Lal, 3 1 334 (1880), Umrao Lal : Ikhari Singh, 3 A 297 (1880). Fatmabai

lari 21 C 784 (1894), 21 I V 81, M Madhub Sirear e Brojo Nath Singha 21 C 230 (1893) [rent surt], (distinguist et Mana Mahaymed e Dhani Wahammed, 17 C L J 71 (1912)), keshaylal Cirdharla

Umesh Chunder Dev v Sharbessur Chunder 5 C W N lxx, 304 (1901). Venkatarama Avvar t Venkata Subrahmaian, 24 M 27. 29 (1900), Dondh Bahadur Rait Tek Narain Ras. 21 A. 251 (1899) [dismissal of suit for redemption does not operate as a decree for foreclosure], Sita Ram : Madhu I al, 21 A 44 (1901) [redemption subsequent suit for, not barred], Nakta Ram v Chiranji Lal, 32 A 215 (1910), contra, Vedapuratti : Vallable Valuy, Ram. 25 M 300 (1901). Vecrana Pillat : Muthukumar Asarg, 27 M 102 (1903), Bhikabhai e Rai Bliuri, 27 B 418 (1903) See as to suits for rederantion notes to a 9, ante, Maharam Beni Pershad Koeri v Raj Kumar Chowby, 6 C W N 589 (1902), Balaram t Kartick 4 C W N 161 (1899), Joindra Mohun Tagore t Shumbhu Chunder, 1 C W N 13 (1697) [previous decision in suit for rent], Abdul Mand : Boida Nath Dhur, 6 C W N 311 (1991), Balbhaddar Nath : Ram Lal, 20 1 501 (1901), Mana Yakrama : Copalan Nair, 30 M 203 (1906), Mahomed Ibrahim e Sheikh Hamja, 35 B 507 (1911)

(1) Jagathit Singh i Sarabhit Singh 19 (159 172 (1891), 1 1t 18 1 A at 1 176 (-) Rajah of Pittapur i Sri Pajah Row

Buchi Sittaya Garu, L. R. 12 1 A 16 (1884) (3) Jagatht Singha Baral jit Singh, 19 C 15), L. R. 18 1 A 165 (1991), Ram Charan Buhardur i Leazullin, 10 (857 (1884)

(1) Sorgemence Diver a Sud-lanund M hapatter, 12 B L. R 304 (1873) (*) Paldwan Singha Maharajah Molechur

Buksh Singh, 12 B 14 R 301 (1872) (t) Clan h I ra vl i Maharaja Mahendra 13 V o (1900)

di missing the suit upon fin lines which fall short of come to the very root of the title upon which the claim rests cannot exercte as res indicate but if such trevious in lement does negative the title itself, the illustiff cannot reassitate the same question of title has sume to of tain relief for a subsequent item of the obligation (1). The abantaff cannot re against the same question of hal dits upon the pure and sample mer lent that the sal sect matter of the latter and is courablically distinct from the subject-matter of the previous suit (2) or that the suits related to different years (3) A decree which has been made without intro liction cannot work an estopped by judgment (4) Upon the question as to what may be looked to in order to see what has been in issue in a previous suit and what has been actually decided the rule to be cathered from the case law is (5) that although the decree in a former suit operates as res sudicata, the decree is to be construed with reference to the pleadings (6) sudement (7) and the record (9) in order to see what was in issue, and that even the acts of the parties immediately after the decree are very important to fix the meaning of indefinite terms in it (9). One of the criteria of the identity of two suits in considering a plea of res sudicate as to moure whether the same

- (1) Sham Lal r filants, 23 A 479 (1901), Dirga Prasud e Sm Sachilals, P C 10 (W. 603 (1911) (out for maintenance on a Britispitm, a c, 14 lb m L, R 477)
- on a Brillipalm, s. c., 14 16 m. L. R. 177)

 (2) Chan h Prass I. c. Maharaja Mahen Ira
 Sinch 21 A 112 110 (1901)
- (2) Dwarka Dasir Akhay Singh, 30 1 476 (1908)
- (4) Kalka Persal (Kanhaya Singh 7 N
 - (5) See Caspersz, 380
- (6) Gurkeo Singh r Chandrikah 5 C. L. J.
 (611 (1967). Lachman Singh r Mohun 2 Y.
 497 (1879). Robinton r Dulip Singh L. R.
 11 Ch. D 78 S13. Inre May L. R. 25 Ch.
 226. Voustons v Marque of Slige, L. R. 29
 Ch. D. 448, 455. Edum : Bechun 8 W. R.
 176. Jagatpt Singh e Sarabjit Singh 19 C.
 159. 172. L. R. 18 I. Y. 165 175 (1891)
- (7) Gurdeo Singli i Chandinkah sujru, kah krishna Tagore v Secretary of Stato for India in Council 16 C 173, 192, 193, L R 15 I A 186 (1888) [followed in Sraja Rao Lakkimi kantayammi v Sri Raja Inganti Raja Gopal Rao, 2 C W N 337 (1898), s c., 21 M 344], Magnirami i Medhi Hossain khan 31 C 95 (1903), Houston v Marquis of Sigo, sujru In re Bank of Hindustan China, and Japan L R 9 Ch App 25, Dondh Bahadur Rai v Tel Narain Rai 21 A 251, 258 (1899) Ram Dayal i Madan Mohan Lull, 21 A 425, 430 (1899), Magbul Patima i Laita Prasad, 20 A 527 (1898), Pdun i Bechun, supra
- The matter conclusively administed mean in a suit sales saries is generally to be sought only Is a company n of the plaint with the julgment, per Phear, J I, Lachman Sinch e Mohan supra Jagatut Singh e Sarbaut Single supro. Mahaden t. Vasu leo. 5 H. I. It 737, 740 (1903) , but if a decree is specific and at sariance with the judgment, the state ment in the decree is to prevail. Indarut Presid (Richha Rai, 15 A 3 (1892), and see Avala e Luppu 8 M 77 (1881), Anusu vabat 1 Salbaram Pandurang, 7 B 464 (1853), though there may be eases where this is otherwise See Ram Chunder 1 kondo. 22 A 412 (1900), Ghelabhai e Bai Javer 16 Hom. L. R. 1142 (1912), a c, 37 B 172
- (8) Lachman Singh t Mohan supra [M to the decree itself, where it is ambiguous or imprefect as to any essential particular, it may be read with the judgment and record per Stuart C.J] but see abto the distinction between judgment and decree, ib 509 file, and Jamantunssa J. Luffunssa, 7 A 606 (1855) As to the interpretation of the decree by examination of the record see Amntawar. Debt is Secretary of State for India in Council 24 C. 504, 519 (1897), omnust look at the contentions of the parties Dondh Bahadur Rai i Fek Naram Rai, 21 A 261, 258 (1899)
- (9) Secretary of State for India in Council 1 Durubhoy Singh L. R. 19 1 A. 69, 74 (1892)

evidence would support them both (1) "At one time the test applied to discover whether a finding was incidental or not was the fact of its being embodied in, or excluded from, the decree, and many cases appear to have been expressly decided upon this ground Two propositions however, appear to be well settled (a) that the decree itself is not the test of what is or is not res rudicata, but that the question in each case is, What did the Court really decide? Res judicata, in other words, is matter of substance, (2) (b) that where the decree of a Court is not based upon a finding, but is in spite of it (3) such a finding cannot work an estoppel"(4) A finding in a judgment to operate as res judicata, the Court being a Court of jurisdiction competent to try the subsequent suit, must be material and necessary to support the precise and particular ground or grounds on which the decree, or some operative part of it, was made, otherwise the finding must be considered either as superseded by the decree or as entirely immaterial or as no more than moderatal and subsidiary to the main question in the suit, although in the latter case the finding may have been necessary to the decision of the suit A matter cannot be said to be "directly and substantially in issue," unless and until it is or becomes material for the decision of the suit to find as to it (5) There is no such thing as constructive estempel. The question is not whether the previous judgment was right, but whether it finally decided the matter in issue (6) The fact that the reasoning upon which a former judg ment was based was equally applieable to the second case has been held (7) not to give the former judgment the force of res judicata in the second case The rejection of applications to set aside an ex parte decree under O IX 1 13 (formerly sect 108), post and sale in execution thereof under O XXI r 89 (formerly sect 311) post, relate only to specific matters in that suit, and is therefore no but to a fresh suit to set aside the decree on the ground that the whole suit was fraudulent (8) The finding of a Criminal Court is not of course, res sudicata in a civil action and no fact found or proved in a Criminal Court is on that account to be taken to be proved in a Civil Court (inde ante, "Suit')

Explanation I -See note ante on word "Try "

Explanation II -See note post, on competency of jurishetion

Explanation III—This I x planation provides that the matter must, in the former suit have been alleged by one party, and either denied or admitted expressly or impliedly, by the other (9). In order to constitute the bar of res

⁽¹⁾ Hunter a Stewart 1 lb 6 l C I 108, per Lord Westlart LC

⁽a) 1 de arte 1 110

⁽³⁾ Numbo Lall Blattacharper + It H Mookla Del - 13 (- 17 (188) - Hakur Ma

infor Hakir Malalas 1 180 (47) (1 ii) Larlatta r Mail a in c a

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^(*) Slife Charan I all e Raglin Nath 17

⁽t) Lars tou Crr Narlad's Cir at A

^{0 (18 1)}

⁽⁷⁾ Clark Francis Materiles 23 A 5 (1900)

⁽⁸⁾ Magnita Nath Malata e fransil 1 a (4 W N + 3 (1 × 2) (lap × 1) e Infra (a z 13 (W N + 3 (1 × 2))

^{() 1 () 111}

judicata, it is not sufficient merely that an issue on the same point should have been raised in the former suit, although that issue may have been incidentally decided, but it must appear that the matter referred to was alleged by one party, and either denied, or admitted expressly or imphedly, by the other,(1) and the issue must further have been a maternal one (2). Matter not put in question by the parties, and not necessary to the adjudication of the subject—matter of the suit, is immaterial, and any observation of the Court thereupon is obter dictum, which can have no effect in any other litigation (3). The rule of English law, that where the allegation on record is uncertain there is no resignated as also the rule embodied in this section. "If a thing be not directly and precisely alleged, it shall be no estoppel." That rule is reproduced in this explanation (4) Matter alleged in the written statements of the parties may in subsequent proceedings be relevant as an admission, but it will not operate as an estoppel, unless, being admitted or demed, and found in favour of the person alleging it, it forms the basis of judicial decision (5)

Explanation IV —This Explanation deals with matters constructively in isomer suit, (6) projiding that any matter which might and ought to have been made ground of defence or attack in a former suit, shall be deemed to have been a matter directly and substantially in issue in such suit (7) In

115), both of which decisions were largely relied upon before the enactment of the Code of 1877 And even since the enactment of the Fxplangtion now to be considered, the cases have been far from uniform ' (Caspers). op cit 402, 403, and see Broughton, 46-56). The principle embedded in the above Explana tion in 1877 had already been asserted and acted upon by the Judicial Committee (Srimut Rajah Mootto: Katama Natchier, 11 M. I A 50, 73 10 W R . P C . 1 (1866) . Woomatara Dobi t Unnopoorna Dasseo, 11 B L R 158. Mahamad Gaus v Rajbux, 15 Rom L R 266 (1912), s c, 37 R 224, 18 W R 163 (1872), see Dinobundhoo Choudhry t Kristomonee Dossee 2 C 152 F B (1876) in which the effect of the latter decision is discussed) and by the Courts in India (see cases cated in Caspersy, op cit 406-416) before the Code of 1877 In the following cases the Fxplanation has been considered or acted upon Mutta Chetta r Mattan Chetts, 4 M 296 (1879), Gursoblat Ahrr : Ramdut Singh, 5 C 923 925 (1880), 6 C L R 537, Naram Dutt v Bhaire Bukhspal 3 A 189 (1880) Sultan Ahmad r Maula Bakhsh, 4 A 21 (1851), Nirman Singh : Phulman Singh, 4 1 65 (1881), Chenvirappa e Puttappa, 11 R 708 (1897); Shee Ratan Singh r Shee Sahar Mer, 6 A 358 (1891), Harr Naram Brahme : Ganpatray Dail, 7 B 272

⁽¹⁾ Shama Churn Chatterjeo v Prosunno Coomar Santiharee, 5 C J. R 251 (1879), seo Wilatti Regum t Nur Ishan, 5 A 514 (1883), Shoo Ratan Sing t Sheovahai Mier, 6 A 355 (1881)

⁽²⁾ Dahoo Munder t Goopeo Nund Jha, 2 W R 79 (1865)

⁽³⁾ Tield, E. 270 "If the Court decide a point put in question by the parties, but not necessary to the adjudication of the subject matter of the suit, will such decision be binding? It may be said that the point was not directly and substantially in issue, certainly it was not material." See on the point the authorities eited, 2 Smith L C, 7th ed ib n, as to findings on immaterial matters, see Jamiaturissa t Latinnissa 7 A 606 (1885)

⁽⁴⁾ Vishnu v Ramling 26 B 25 (1901)

^{(5) 1}b See Boileau t Ruthin, 2 Freh ,

⁽⁶⁾ Hari Narayan Brahme t Camptarav Dan, 7 R 272 (1883)

⁽⁷⁾ I vpl IV "Consulerable difference of opinion has prevailed in India as to the application of the principle contained in this Frilanation which, no doubt, was enacted with the purpose of reconcling the apparently conflicting views expressed in Hunter: Sweart (4 De G F & J 168) and Henterson 1 Henderson 3 Hare,

other words, neither party can decline to meet an issue tendered by the other, and then maintain that it has not become res judicata. The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings. But the plaintiff is under no obligation to tender issues not necessary to support his cause of action, nor is the defendant required to meet issues not tendered by the plaintiff (1). The principle has been applied to applications for execution where the point might have been, but was not raised in the suit (2). A litigant cannot reopen a case on materials which might

(1883), Churn Manjee : Ishan Chunder Dhur, 9 C I. R 474 (1881), Allunnt : Kunjusha, 7 M. 264 (1883), Kandunnt : Katisama, 19 M. 251 (1885), Thandavan : Vallisama, 15 U. 336 (1892), Valojt : Sagajt, 13 B 567 (1881), Hasan Alt : Siraj Husan, 16 A 252 (1894), Dham Ram Shaha : Bhagurath Shaha, 22 C 692 (1895), Imam Khan : Ayub Khan, 19 A 517 (1897), Peary Mohun Mookerjee : Ambica Churn Bandapadhya, 24 C 900 (1897), Dost Muhammad Khan : Said Begam, 20 A 81 (1897), Sri Gopal

(1904)], Jamadar Singh e Scrazudden, 35 C 979 (1908), Pulandar Singh : Juala Singh, 20 A 516 (1898), Ram Chand : Durga Pershad, 26 A 61 (1903), Magarsaman Naichar e Sundareswara Ayyar, 21 M. 278 287 (1898), Purushottam : Atmaram Janurdan, 23 B 597 (1899) [partition suit], Kutti Ali t Chindan 23 M 629 (1900) [sout for land based on title-previous suit as lessor] The Explanation has also been applied by the Judicial Committee in two cases Mahabir Pershad Singh t Maenagh ten, 16 C CS2 , L. R 1C I A 10", 113, 114 (1889), Kameswar Pershad t Rajkumara Puttun Koer, 20 C 79 L. R 19 I \ 331. 238 (1892), foll in Shyama Charan Banerjee t Mrinmana Jana 31 C 59 (1902), God dappa t Tirkaj pa 25 B 189 (1900) [di « from in Ramaswani Assar i Vithinitha Ayyar 26 M 760 (1902) whi h last case was f llowe I in Firikaikat r lla rutlivil _9 V 1 ["3 (1")")] Rancavsa G unlari i Nanjaria Jao 21 M 401 (1991) Kaclu : Lakel manson; 25 B 11" (1900) | buth M (hundan 23 M (2) (1 vii) Jenarak : Dattatrays 4 B 1 P 402 (1902) s c 2 Blood Subject of the Latti Super Library

827, 830 (1902), s e, G C W N 889 [foll, Gopal Lal : Banarasi 31 C 428 (1904), s c 8 C W N 385, distinguished in Ajudhia Pande t Inayat Ullah, 35 A 111 (1912), Shyama Charan Bannerje i Mrinmayi Debi, 31 C 79 (1902)], the plaintiff must have had an opportunity of recovering that which he seeks to recover in the second action Bhilahai : Bai Bhuri, 5 B L R 396 (1903), in Ledar Mal Marwari e Dewen Bishen Persad, 8 C W N 609 (1903) the Privy Council refused to entertain an objection taken for the first time on appeal that the appellant ought to have enforced his rights in a previous suit, Deputy Commissioner of Lheri r Khanvan Singh, 34 I A 72, 12 C W N 474 (1007), s c, 4 A. I J 232, 29 A 331, 9 Bom L R 691, Satya hadt Behara : Harabati, 34 C 223 (1907), Rukhminibai i Venkatesh, 31 B 527 (1907), 9 Bom L. R 958, Jagan Nath t Balkishan, 4 C L J 675 (1907), Sellappa Chettyar : Velavutha Teran 30 VI 498, 17 VI L J 433 (1907), Zinat un nissa t Rayan 27 A 142 (1904), Mahomed Ibrahim t Sheikli Hamja 35 B 507 (1911), Dhanapala 1 \nantha Chetti, 24 \L J 418 (1913), Mahomed Ibraham Hussain Khan t Ambika Pershad Singh, P. C., 39 C 527 (1912). Bayyan Naidu r Suryanarayana 37 M 70 P B (1914), Jama br Singh : Scrazud lin, 35 C 979 (1908) Inl as to execution pro cedines Naravana Pattar i Gopala Krishina 25 M 35, (1901), Viyathen t Seels Kanta 1" M 1 1 311 (1907) [effect ef non appearance when not co short as to reli f claime Il

(1) Freeman Jul 441, cited to Hukm Chand Pes Jul 17

(2) Residen Press la fattin fam =" 1 feet to (100) other words, neither party can decline to meet an issue tendered by the other and then maintain that it has not become res judicata. The plaintiff must support all the issues necessary to maintain his cause of action. The defendant must bring forward all the defences which he has to the cause of action asserted in the plaintiff's pleadings. But the plaintiff is under no obligation to tender issues not necessary to support his cause of action nor is the defendant required to meet issues not tendered by the plaintiff (1). The principle has been applied to applications for execution where the point might have been, but was not raised in the surt (2). A litigant cannot re-open a case on materials which might

(1883), Churn Manicer Ishan Chunder Dhur, 9 C. L. B 474 (I-SI), Mkanni e Kunjusha, 7 M. 204 (1883), Aundunni r. Katismins. 9 M. 251 (1886), Thandavan e Valliamina, 15 W. 330 (1832), Malon r Sagar 13 B. 507 (1881) Hasan Alic Siraj Husam, 10 A. 252 (1544), Dham Ram Shaha e Bhagarith Shifts, 22 C (12 (18%) Imam Khan r Nub khin 19 1 317 (1897) Peur Mobin Mookerjee (Ambies Churn Bai dapadhi) 21 (000 (INT), Dost Muharmad Khan 1 Said B. gain, 20 1 St (1807), Sri Gopal · Parth Smah 20 1 110 (15 17), F B, s.c. m appeal, 24 1 123 (1902) [foll in Gopal Lall I beniras Perchad Chowdhry, 31 C. 4.5 (1901)], Jamadar Singh i Screading 35 C. 973 (1 8)4), Pulan in Singh : Jwala Singh, 20 A 510 (1535). Ram Chand : Dura i Probed, and al (1904), Megrama Nucker & Sundan swars Avear, 21 M. 2"s 285 (ISB), Parashottsm (I mardan, 23 B. o 17 (1811) [partition sml] Kutti Mr c. Chindan _3 V 621 (180) [smt for land based on tail - provides suit to hearl. The lastrain has all been applied by the Juli oil Committee in two cales Mahabar Nashad Stach r. Martach ten, 18 C, 682 , L. R. R. L. I. A. 107 113 114 (1881). Kameswar Pershal e Rajkunara Ruttun k xr, 20 C 7) L R D I 1 331, 248 (1842). I'll in Sheama Charan beaerice · Mrimmaya Devi 31 (7) (1302) toud daypa e lirkaj pa 2 e lk 184 (1800) (loss from in harranam teams. Inthusths layer and I Tool (IAL) who hase an was fill well on Hinkarkat to Hi surfield . it is the med [[the l) fel If the Young to have 24 M 4 H (1991) Kalla · Lakshi vising a VR Hard with Ke S M i timban "tMishilam Vi wake Dimitiata 4 R I K 402 (184) - 40 Bil Smead Paternet (BIL)

\$27, \$30 (1902), s. c., 6 C. W \ \$59 [foll, Gopal Lal : Banarasi, 31 C. 425 (1904), s. c. 5 C. W A 350, distinguished in Andhia Pande r Inayat Ullah, 35 A. 111 (1912). Shvama Charan Bannerje r Mrinmayi Debi, 31 C 79 (1902)], the plaintiff mut have had an opportunity of recovering that which he seeks to recover in the second action Bhikabu r Bai Bhuri 5 B L R 390 (1903). in Kedar Val Varwari : Dewan Bi ben Reed 5 (W V 609 (1903) the Privy Council refused to entertain an objection taken for the first time on appeal that the appellant ought to have enfor a l his rights in a previou mit Deputy Commissioner of Aheri r Ahanyan singh 34 I A 2, 12 C W Y 474 (190") 2 c, 4 L L J 232, 29 A. 331, 9 Bom. L. R 591 Satya badi Behara r Harabati 34 C. 223 (1907). Rukhminibar r Venkatesh, 31 B 527 (1907), 9 Bon L. R. 905 , Jazan \athr Balka Lao, 4 C L J 655 (1907), Sellappa Chettvar r Velavatha Teran 30 W. 495, 1" W. L. J. 133 (1907) Zinat un missa r Rayan 27 1. 142 (1401) Mahomed Brahim r Shilkh Harma To It 40" (1911) Dhanapala r Inantha Coutte 24 M. L. J. 418 (1913). Mahora Al Ibrahua Hassain Khan r Ambika Porshal Smith P (39 C. 527 (1912). bassan Nuluir Surrararayana 37 M. W I R (1714) Jameler and r Seraraddin, To C Fillank Arl as to execute a pracedir. Virginia Pattar r Gopala Arichna 28 W 355 (1941), Atjathen r Necla Karta, 17 M L J 311 (1 07) [calest of real partice when notice of reast al falur ll (I) Francis Jul 411, circl is Hula

(2) haster Proval r. Infland am .7 L.

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est explain

only incidental and not a matter directly and substantially in issue in the suit. The addition, however, has apparently been considered unnecessary. It has been held that if the effect of a decision in a suit is necessarily inconsistent with a defence which ought to have been missed (but was not raised) that defence must under this section be deemed to have been finally decided against the defendant who ought to have raised it (1)

Explanation V .- According to the provisions of this Explanation, and rchef claimed in the plaint, which is not expressly granted by the decree, shall, for the purpose of the section, be deemed to have been refused (2) The legal effect of this Explanation is that of treating the omission to grant the rehef asked for in the plaint as equivalent to an express refusal, and the claim thereto in a fresh suit as res judicala (3) This Explanation refers to relief applied fer, which the Court is bound to grant with reference to the matters directly and substantially in issue (4) The words "relief claimed" apply only to something which forms part of the "claim" strictly so called, that is, something which the plaintiff may claim as of right, something included in his cause of action and which if he establishes his cause of action the Court has no discretion to refuse They do not include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise oven if the cause of action is fully established (5) Even if the suit as regards the relief claimed has been wrongly dismissed, the plaintiff cannot sue again for the same relief (6) The Pxplanation does not apply where the Court is silent on a head of rehef only claimed as ancillary to the main rehef, and which hy implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted (7) A decree cannot be superseded by the mere omission of the Court executing the decree to pass orders ou a claim made under it (8)

The former suit must have been a suit between the same parties or between parties under whom they or any of them claim, litigating under the same title—This is an application of the principle contained

(4) Thyria Kandi Ummbatha e Thyria

⁽¹⁾ Mahini t Anil Bandhu 13 C W N 513 (1909)

⁽²⁾ Lxpl. IV Sce Jiban Das Oswal : Durga Pershad Adhikari, 21 C 2.2 (1893), Dham Ram Saha t Bhagirath Saha, 21 C (92 (1895), Kachu i Lakshman Sing 25 B 115 (1990), s c, 2 B L R 781

⁽³⁾ Rambhadra r Jagannatha, 14 M 328 (1890), see Mon Mohun Sirkar r The Secretary cf State for India in Council, 17 C, 963 (1893), foll, in Ram Dayal r Madan Mohan Lal, 21 A 425 (1899), F B, Bhibra r Staram, 10 B 532 (1834), Ilayar I adins man I s ngh 12 C, 118 (1903) where mesne profits claimed in second sunt were for period sul equent to 1 rat au

A and Cheria Kunhammed, 4 W 308 (1881) (6) Ram Dayul Madan Mohan Lal, 21 A 425, 433 (1890), F B [claim for mean profits accruing due after institution of former suit] See as to taking money, decree in mortgage, and not safe for suits to safe the safe Shehi.

See as to taking money, decree in mortgage, and not asking for relief by sale, Shebu Bers t Chandra Mohan Jana, 33 C. 813 (1906) foll, in Piari Lal r Nand Rain, 31 3 19 (1905)

⁽⁶⁾ Sukh Lal v Blakla, 1 \ 187, 190 (1888)

⁽⁷⁾ Fatmabair Ashabai, 12B 454 (1888), s. c., in appeal, 13 B 242 (1888)

⁽⁵⁾ Nityanunda Gantayet i Gajapati Vasudeva Deva, 24 M 681 (1901)

he is bound to bring before the Court all grounds of attack available to him with reference to the title which is made the ground of action (1) The question what is a different title is one of great practical difficulty, and must be decided upon the circumstances of each case separately (2) All that this Explanation enjoins is that every ground which could and ought to have been urged in support of the claim actually made in the suit, shall be deemed to have been adjudicated upon therein, whether it was actually urged or not (3) This Explanation applies only to cases in which the plaintiff, having on a former occasion sued for certain rehef on the strength of one title, afterwards claims the same rehef on the ground of another title, of which he might have availed himself in the former snit It does not apply to cases where the subject matters of the two suits are different, (4) nor to cases where no rehef was asked for or granted as against the particular person in the former suit though he was a party to it (5) The word "might" presupposes that the claim to be barred must be within the knowledge of the person during the first suit (6) It was proposed to add to this Explanation the words "and to have been heard and finally decided so far as the subject matter of the former suit was concerned and no further," which was stated to be intended to meet such eases as rent suits, in which, unless the question of title is expressly raised, such question is

Altunni e Kunjusha, 7 M 264 (1883).
 Pitapur Raja v Sureya Rau, 8 M 520 (1885). Mahomed Reasat Ali v Hasim Banu, 21 C 157 (1893). A L J 26 27

(2) See Girdhar Manordas v Dayabhat Kalabhai, 8 B 180 (1882), per West, J , Kameswar Pershad v Ruskumari Ruttun Note, L. R. 19 I A 238 (1892). Caspersz, 108, Laslice Lishoro Roy Chowdhry v Aristo Chunder Sandyal Chowdhry, 22 W R 464 (1874), Woomatara Debia v Unnopoorna Dassee, 11 B L R 158 (1872), Denobund lioo Chowilliry v Kristomoneo Dossee, 2 C 152, 169 (1876) The Calcutta High Court have held that a party to a suit is bound to assert all his titles [Denobundhoo Chowdhry a case, supra, per cur Garth CJ, diss, foll ni Bheela Lall e Bhuggoi Lall 3 C 23 (1877), dist in Radhausth (undu t Land Martiano Bank 6 (55) (1850)], but this view has been discented from by the Madras Iligh Court [lhyda Kandi Ummatho t Hayda Kan li Cheria Kunhamed, 1 M 308 (1881), Sadaya Pillat t Chimii 2 M 352 (1573), so sho m Mahabat High Curt Babu Laj i Jahn Persa I, 2 A 592 (1878), Shoo Ratan Singh r Shoo Sahui Misr, 6 A 178 (1881)] and by the Bond by High Court [Kenn ray v Gurras, 7 B 583 (1881) so I histo Shankur Patit Ranchandrara ST H C R A C STGE Later also

(3) Ramaswami Ayyar t Vythinatla Ayyar, 20 M 760 (1902)

(1) Sarkum Abu Torab Abdul Walieb t Rabaman Baksh, 24 C 83 (1896), it ferred to in Kodash Mondul t Baroda Sun lari Dasi, 24 C 714 (1897)

(5) Ramdas t Vazzr Saheb, 25 B 589 (1991), a c., 3B L R 179, Sy d Mahout Ambaka Pershad, 39 C 527 (1912), 15 C W > 505, 14 Bon I R 250, 24 W I f to 8, 15 C L I III, foll in cyall r: Bhagwanta, 11 V 599 (1912) (2011).

(6) Man khar r Virchan I,) Bom 1 | 1 10_0 (1,07), Masslaman a r Thirnvergs Iam 31 M 185 (1808)

Shridar Vinayak v Narayan Vulad Babap, II B H C R 224 (1874), and Hapi Hasani Urahim v Mancharam Kadiandas 2 B 187 (1878), in which latter case West J suggests rule which will reconcile the decisions and the more recent decision Guiddappa t Tirkappa, 25 B 189 (1999), s c, 2 Bom L R 372, in which Jenkins, CJ, 1001085 the provious decisions and accepts the view of the vection talon by the Calcutta Full Bench, casel, see Caspersz, 198-41b, in which the question is discussed, and Naro Huri t Anpurna bai, 11 B 160 (1886) In Balbuthar Nath: Ram Ful I J I J 2-8 (1994) the title was held not to be the same

only incidental and not a matter directly and substantially in issue in the suit. The addition, however, has apparently been considered unincessory. It has been held that if the effect of a decision in a suit is necessarily inconsistent with a defence which ought to have been rused (but was not raised) that defence must under this section be deemed to have been finally decided against the defendant who ought to have rused it (1)

Explanation V - According to the provisions of this Lxplanation, any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purpo c of the section, be deemed to have been refused (2) The legal effect of this Lyntingtion is that of treating the omission to grant the relief asked for in the plaint as equivalent to an express refusal, and the claim thereto in a fresh suit as res judicata (3) This Lxi lanation refers to relief applied for, which the Court is bound to grant with reference to the matters directly and substantially in issue (i) The words "relief claimed" apply only to semething which forms part of the "claim" strictly so called, that is, something which the plaintiff may claim as of right, something included in his cause of action and which if he establishes his cause of action the Court has no discretion to refuse. They do not include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court and which the Court may refuse in the overcise of its discretion on grounds of general expediency or otherwise even if the cause of action is fully established (5). Even if the suit as regards the relief claimed has been wrongly dismissed, the plaintiff cannot sue again for the same relief (6) The Paplanation does not apply where the Court is silent on a head of relief only claimed as ancillary to the main relief, and which by implication is rather granted than refused. It only applies where the Court is silent on an independent head of relief claimed and duly controverted (7) A decree cannot be superseded by the mere omission of the Court executing the decree to pass orders on a claim made under it (8)

The former suit must have been a suit between the same parties or between parties under whom they or any of them claim, litigating under the same title—This 19 an application of the principle contained

⁽¹⁾ Maham : And Bandhu 13 C W N 513 (1909)

⁽²⁾ Expl. IV Sec Jiban Day Oswal v Durga Pershad Adhikari, 21 C 2o2 (1893) Dham Ram Saha v Bhagirath Saba, 21 C 692 (1895), kachu v Lakshman Sing. 25 B 115 (1990), s c, 2 B L R 781

⁽³⁾ Rambhadra v Jagannatha, 14 M 328 (1890), see Won Mohun Sukar v The Serre tary of State for India in Council 17 C 968 (1893), foll in Ram Dayal v Madan Wohan Lal, 21 A 425 (1890), F B N, Bibbra v Staram, 19 B 572 (1891), Hays v Padma nand Single, 32 C 118 (1903) where mesme profits claimed in second suit were for period subsequent to first suit

⁽⁴⁾ Thyda Kandi Ummbatha t Thyda Kandi Cheria Kunhammed 4 M 308 (1881)

⁽⁶⁾ Ram Dayal v Vadam Mohan Lal 21 v 425, 433 (1899), F B [claim for meano profits accruing due after institution of former suit] See as to taking money decree in mortgage, and not asking for refiel by sale, Shebu Bera v Chandra Mohan Jana 33 C 819 (1996) foll. in Pari Lal v Nand Ram, 31 A 19 (1998)

⁽⁶⁾ Sukh Lal 1 Blakla 4 1 187, 190 (1888)

⁽⁷⁾ Fatmabar v Arshabar, 12 B 454 (1888),

s c, m appeal 13 B 242 (1888)
(8) Astyanunda Gantayet v Calapati

Vasudeva Deva, 24 M (81 (1901)

in the maxim, res inter alsos acta altern nocere non debit, what is transacted between one set of persons ought not to injure or affect another person Judgments and decrees only bind parties and privies (1) A person who is no party to a decree is not bound by it (2) "Parties," in the larger legal sense, are all persons having a right to control the proceedings, to make defeuce, to adduce and cross-examine witnesses, and to appeal from the decision, if an appeal lies, and it may be added, those who assume such The only extension given to this rule by Indian Courts is that a decree against a benamidar binds also the beneficial owner, in which case the parties are the same in fact though not in name (3) If the verdict were not required to be between the same parties, a man night be bound by a decision who had not the liberty to cross examine, and it is contrary to natural justice that a man should be sugged by a determination that he or those under whom he claims were not at liberty to controvert (4) Except in the case of judg ments in rem,(5) and judgments relating to matters of a public nature,(6) which are governed by a different principle, no person is bound by a decision unless he or those under whom he claims were parties to the proceedings in which it was given (7) But it is reasonable that the same set of persons, or persons claiming under them, should be bound by previous proceedings con cerning the same matter. There is no bardship in holding that a man shall be bound by that which would have bound those under whom he clams quoad the subject matter of the claim, for he who feels the advantage, ought also to feel the burden (que sentit commodum, sentire debet et onus) and uo man cau, save in certain cases excepted by the Statute law and the law merchant, transfer to another a better right than he himself possesses (8) Persons other than the parties to a suit have been divided (9) into three classes, with reference to their position as affected by the judgment -

(a) Persons who claim under the parties to the former suit, or in the language

of English law, privies to those parties (10)

(1) Mohant Das t Nil Komul Dewan, 4 co

comes prayy of agother. (1) by succeeding to the position of that other as regards the sub ject of the estoppel, eg, an assignee or grantce. (2) by holding in subordination to that other, e.g., the case of a landlord and The ground of privity is property not personal relation. To make a man privy to an action he must have ac juired an interest in the subject matter of the action either by inheritance, succession, or purchase from a narty subsequently to the action or he must hold property subordinately linus an assigneers not estopped by a judgment against the assignor obtained after the assignment Bigelow on 1 stoppel 5th ed 142 144 person is said to claim under another whin he derives his title through that other by assignment or otherwise. Similar Lal i Chintar Vid _3 1 1, 3 (1906) A prints exists latured an execute a crediter and a

C W N 283 (1899) In Gool Khan 1 Totar Gorla, I C W N 63 (1899), the judgment was not inter partes (2) Srishnan 1 Chadayan Sutti Haji 17 W

⁽²⁾ Srishnan i Chadayan Sutti Haji 17 W 17, 20 (1892), Gool Ishan i Tetar Gosla I

C W N. 63 (1899)

⁽³⁾ Mohunt Das t Nil Komul Dewan, 1 C W N 283 (1899)

⁽¹⁾ Buller, N. P. 233 - Luld 1 v - 97 Guijn Lall i 1 atteh Lall 6 C - 171, 183 (1880)

⁽⁵⁾ Scor II, Dudence let

^{(6) 5} o x 12, 1b

^{(7) (}cupu Lall e Fatteli Lill, supra

⁽s) Lall 1 v 307, 30%

⁽⁹⁾ In thme Ibhoy Hald hoy r Aull of hoy Cassual hoy, G. B. 703, 700 (1882) per Lath m. J.

⁽¹⁰⁾ but law of et pel ere person be

(1) Persons who, though not claiming under the parties to the former mit, wen represented by them therein (1). Such are parsons interested in the case of a testater or interact, in relation to the executor or administrator, shareholders in a company, and in links, members of a joint and individed family in relation to a member who has sufficiently represented their interests in a former suit (3).

(c) Stringers, who are neither prives to nor represented by the parties to the former suit

The ceneral rule is that in the di ence of fried,(1) in idjudication is banding upon the parties to a said of persons chaning under or represented by them, but upon the gonly. It must boshown that the party in the former suit represented the interest claimed in the latter out. A party represents all interests owned by him at the time of the action or subordinate to his, though belonging A decision readest him will bind interests required by him subsoquently, and all subordinate interests represented by him when over acquired (5) The nature and object of the former suit must be regarded in order to a certain who was really and substantially the little int (6). When once it is made clear that the self same right and tatle is substantially in usue in two suits the price of form in which either suit was brought, or the fact that the plantiff in the one case was the defendant in the other is ministerial (7) And the fact that there are other parties introduced in the sub equent hit ation does not after the case the coppel sub-ists between the parties who were parties to the former hit, ition (8) But there is no res judicula where the subsequent decision is not between the parties or those claming under them (9) The decision in a suit by one of two zemindars issuest the other is to the right to the profit rental of a

jurchaser at a Court salt. Arishnabhuj att. Devit Vikrama Devu 18 M. 13 (1831). Vato whether deered by jurandar is evilence when superior landlord sues for rect. see Malaram t. Astrock. 16 2.0 × 161 (1668). An auction jurchaser of an entire estate at a sale fr. arrears of revinee, is not the successor of the defaulting projector. Ann't Proshad Hajaris t. Odd. Jamer 8 C. W. 100 (1904). A prior purchaser of fand is not estopped as being jrivy in estate by a judgment. Against the vendor in a suit begun after the jurchase. Abdul t. Minkhait, J. B. 207 (1911).

⁽¹⁾ S 11 of the Code does not however an express terms mention representatives or the case of persons represented by but not chaining through the parties to the former suit As to representative suit against sect of worshippers see Sadagoja Charar r Rama Rao, 30 M 185 (1907), 11 C W N 585 17 M L. J. 240, 9 Bom I R 663

⁽²⁾ Under 7 Wm. 1V and 1 Vict c 75

⁽J) See Jogen bro: Funn bro 14 Moo 1 A

⁽⁴⁾ See 8 11 Authors Lyidence Act
(3) See Supplying a Contatramana 13 M

<sup>155 (1910)

(6)</sup> Lamendar of Pritaj uram t The Projectors of the Mutta of Kolani a T R 5 J A

^{206 2} M = 3 3 C L R 255 (1878) see also Ram Chunder Poddar t Hari Das Sen 3 C 463 (66 (1882) (7) Gobind Chunder Coondoo t 1 truck

Chunder Bose, J. C. 145, 1 B (1877) Sec. Shadal Khan v. Anın ullah Khan, i. 1, J.2 (1881)

(8) Moladin v. Muhammad Ibrahim, I. M.

H C R 245 (1803), Gopal Das v Goj nath brkar, 12 C L R 33 (1882) That is provided the rehef sought in both the suits is the same Dwarkanath Roy v Ram Chand Aich, _r C 128 (1899)

⁽J) Lamindar of Pittal uram t The Proprietors of the Mutta of Kolanka, supra

baziar was held by the Privy Council not to be res judicata in a subsequent suit for possession of a share of the baziar, in which suit all the parties, plaintiff, and defendants, claimed under the plaintiff in the former suit. Such a plai, however, might well be a defence to a hostile claim by persons asserting a title under the defendant zemindar in the former suit, against the claiming under the plaintiff zemindar in that suit (1). A decision of a mitterial issue in a suit against one who is the representative of an estate, bars a suit by the true owner on the same issue (2). And a representative of the person is bound by a decree against the person whom he represents, but it is essential that there should be an adjudication as to the fact that he is representative (3). A verdet against a man suing in one capacity will not estop him when he sues in another distinct capacity, and, in fact, is a different person (4). The principle of res judicate has no application in a dispute between parties all of whom claim under the person in whose favour the decision in the provious suit was given (5).

Hindu widow—A decree fanly and properly obtained against a Hindu widow, relating to her husband's estite, hinds the roversionary heirs, the whole estate being for the time vested in her, absolutely for some purposes, though in some respects for a qualified interest (6). It was held under the Limitation Act of 1859, that when the widow as plaintiff sues to recover the husband's estate, held adversely to her by the defendant, a decree against her would bind the roversioner and that adverse possession, which would bir her right of suit, if sho were alive, on the ground of limitation, would equally but that of the roversioner (7). But under Article 111 of the present Act, it has been decided that a roversioner who succeeds to immove able property has twelve years to hring his suit for possession from the time when his estate falls into

Dand Husen, 35 A, 210 (1913)

⁽¹⁾ Asghar Reza Khan t Mahomed Mehdi Hossem Khan, 30 C 550 (1903)

⁽²⁾ Shiyahingaya i Nagahingaya, 1 B 27

⁽³⁾ h may Latt r Sashi Bhuson biswas, 6 C 777, S.C. L. R. 117 (1881), see Courmon Disker, Jugut Chundra Vudhakari, 17 C 57 (1883). Where one of the parties to south this, and no steps are tiken to revive the suit, and the suit abates or is dismissed, no fix h suit on be brought. This was not so maker 'et' VHI of 1883, which contained no similar provision. An ther suit should be 100ght. Bepin Leh ri Bundoj thys to go Nath Workshop alloy, S C 337 (1882).

⁽i) Bibajirao e I uxi rindas, 5 Bom L. R 52 (1993) , Harjov in e Mulji, 34 B 116 (1993)

⁽a) Sycl V our c Sycl Mah med, 7 C W 2-182 (1993)

⁽⁶⁾ Kara & Natel or & Stimut Tapili Meete of M. I. A. 30 (6) I (1863) , No. in ler Club or Choose Secutty Kamin of Desect

¹¹ M I 1 241, 267 (1867). Brahmomove Dissect Kristo Mehun Mookerjee, 2 C 223 (1570), Nobin Chunder Chuckerbutty: Guru Persad Do s, B L R, Sup Vol., 1005, J W R 505 (1868), Nand Kumar : Radha Luan, 1 1 252 (1876) . Sant Kumar : Dec Saran, S L 305 (1886), Sachit t Budhu t huor, 8 A 123 (1886), Adi Deo Naram Smah Dukharan Singh, 5 A 582 (1883), Harr Nath Chattergeo & Mothur Mohun Goswami, 21 C 5 (1833) , _0 f 1. 183 [the rule in the Shivagunga caso (9 Moo I A 533), to the effect that an adverse decree against a Hindu widow binds those claiming in succession, applies equally to the case of the daughter). Iribhan in San lar Kuae i Sri Nacain Singh. .0 1 311 (1538), Lachad Naram : Ram Chan Ira, 1 1 L. J 117 (1907), Behart Lal

⁽⁷⁾ Nobin Chun ler Chuckerbutty : Guru Per (1 Dos.) B. L. R. Sur Vol. 1003 (1803), s. c., J. W. R. 505., Annitolal Boson, I spinechanta Mitter, 15 B. L. R. 19 (1875)

appellant having been a party to a former suit, in which the respondent obtained a decree for possession of the estate in question as mother and heiress of the last proprietor, is barred by such decree from afterwards accovering possession, on the ground that the respondent is not such heiress. Although such decree barred the appellant from setting up in this suit a family custom for the purpose of showing that he was entitled to possession during the life of the respondent, he is not thereby debarred from showing that upon her death, if he survives, he will be entitled, under such custom, to succeed her, and therefore to have a certain deed executed by her declared illegal and in-operative after her death (1)

Benamidar.—Where the parties are parties in fact, although not in name, is in the case of a person who buys an estate for himself, but has it conveyed bename in the name of another, a decree properly obtained by or against the benaundure is binding upon the real owner, the presumption being that the benamidar instituted the suit with his authority and consent (2)

Co-defendants —Where it was broadly contended that there would be no ies judicata, as between eo defendants, it was held that such contention was incorrect. Section 11 does not preclude the decisions upon any issue from operating as res judicata, merely hecause the issue is ruised as between co defendants, if the matter was directly and substantially in issue in a former suit, and the other necessary conditions are satisfied. The words "between the same parties" in this section, quality not only the words "between the same parties" in this section, quality not only the words "former suit int the whole expression "in issue in a former suit." Therefore an issue hat ed and decided as between co-defendants in a former suit may be resjudicated in a subsequent suit, in which they are urringed as plaintiff and defendant (3). When the same parties were contending in the former suit, in fact though not in form, as where they were co-defendants on the record, but their interests were different, and there was an issue between them which was decided, its decision is a bir to a second suit or defence a using the same issue between them, which is the term of plaintiff and defend in (4). The

⁽I) Ickait Door, i Persad Singh i Tek ium Dior, i Konwari, L. R. of A. 143 (1878), 4

C 1.00, 3 C L, R 31
(2) Molumt Days Aid Konnul Dewan 1 C
W N 283(1830), Cop (N tith Che bey t Bhu
own Preshad, 10 C 837 (1881), Khub Chand
v Narun Singh, 3 V 812 (1881), Shangarri
kri huan, 15 M 2 7 (1882), See Bluwabal
Singh C Maharaja Rajendri Pratap Sabay,
B L, R, 1 R 321 (1870), Pr soun C comm
Chow they t K stich thun 1 7 1 d Chow thry,
B L, B, 1 B 7 3 (1877), and, on the cut
I ii c di Nexa Moi stil real owner, as to
iii aking hum pathy 15 the sout, see Sil mathi
Saha r Nib n Chun kri 10, 5 C L, B 102
(1879), Mel Strii a Bilac t Hum Churn
B c, 10 W R, 220 (18 s), Naleo Prosonno
B c, 10 W R, 220 (18 s), Naleo Prosonno
B c, 10 W R, 220 (18 s), Naleo Prosonno

Bose v Dinonath Bose Mullick, IJ W R 431

^{(1873), 11} B. D. R. 56
(3) Mangaram v. Sjed Md. Hossen Khin
S.C. W. V. 30 (1903), s. c., 31 C. 95, Kan
diyil Cheriye v. Zamorin of Calicut, 2.) M.
715 (1903), Xusuf Salub v. Durgi, 30 M.
417 (1907).

⁽⁴⁾ Ramehan Ira Nirayani Cherry in Mahadev, 11 B. 216 (1880), Ahmed Ah i Najal McKhan, 18 V bo (1852), Shivlid Khima Ammudlah Khan I V. 2 (1881) [Geo Bhirgand Singh i Fij Kairr, 8 V il (1853)], Shakhi Khorabi Hica ina Naleo Latma, 18 A. t. (1815), Chamby i Lori Junesuy, 2 Sch. V. Lef. 650], Cettenhama Farlol Shewalury, 3 Harr, 627 [Geo Kevani Crast et al., 18, 6 th. D. 2, and Leapede.

e de Barelle a proprieta de la Celegia del Arrelle de La Lagraga de Servica de productivo de de Africa. a men and the car are against the after the place of the adjultable at s. I be accommunicated between the conference of the parties declared the conference of and only of other lists that he are effect to any, if one is not the account. of interest detection and inferior state and analysis entitle of the end resista out the account of the operation of West Agreements and deposit without the recovery and a state of the first art and it to consider a resident the all the energies are for a the first the total and the constituted affected expect to relieve to a state of the contest of reality and the Adverted by putition is not like a ferrent signer of the definity of special property. which is all and to richt out and mathematical files and at declaration of the rights of para a presented to the respect of a population recognition and such a donier, when they the drawn up as in five at ideach chareholder or set of Carefeller and radiotics of area? Assembled of a partition do see is expect that the tree joins was as a ment the flambill (1) and between ein de less laute, (4) per 13 c rinifetquente med euce i

Joint contractors and joint wrongdoers. A polyment obtained against one or in real coveral pant entractors or port wrongdoers operate, as a bar to a record tent against any of the old reads. For there is but one

509]. In Imperiorary a Grandan I Comany, 2 C. 125 (1982). Venhaya a Norsamina, II. II. 204 (1982). Venhaya a Norsamina, II. II. 204 (1982). Graya c. Unitar Ningh, 22 A. 596 (1982). See Inclaima to Marsayaa, I.S.M. 164 (1984). One of the definition may appeal against the decree as letween Limedt and the other definition. Natura, Narayanam, 18 B. 520 (1983).

(1) Ramchaulta Narayan r. Narayan Mahades, 11 R. 216 (1880), se,es thellowed in Bapu r Bharaid, 22 H 245 (1896)]. Ralbmin e Dhondo, 56 B 207 (1911) , 11 Born, L. H. 128, Sarola Praval c. Kadash Balana, 17 C W N 125 (1912). Alemad Alte Najalisi Khan, sujen, see Juma bingli c. Kamar un masa, 3 A 152 (1880), Bhagwant Singh v Tel Kuar, 5 4, 91 (15%), but scoalso Brojo Behart Mitter r Kedar Nath Mozumdar, 12 C 580, F. B (1896) (dissented from in Chandu r Kunhamed, 11 M 227 (1891) . 15 M. 261 (1892)] . Surrender Nath Pal Chowdhry e. Broja Nath Pal Chowdhry, 13 C 352, F B. (1886) [followed and applied in Gobind Chunder Numly v Sri Gobind Chowdhry, 24 C 330 (1896)], Balambhat e. Narayanbhat, 25 B 74 (1900); and remarks and cases cited in Caspersz, 371, 372; Bajambhat v. Narayanbhat, 25 B. 74 (1900) , s. c., 2 B L. R. 511 [such previous judgment is not res judicata when the plaintiff in the rabe pend and was cally a B in and pathy so the last carly. Bay Naria re Nabellari Bay 7 C. W. N. chave 72 (1991). Melaminad Ken Howthin e Vinwaniathany at, 26 M. 37 (1992). Balwaitiao e Narayander, 3 Bon, L. R. 95 (1993). Chapias e University, 22 A 380 (1994). Baymaine e Khoblavi, 5 C. W. N. 721 (1991). Baymaine factor (1897); toutlooningle e Chan Irikah Singh, 3 C. L. J. 613 (1997) and (1997).

(4) Sheikh Khoctslad Rossen v. Nubbea Fatina, 3 C 551 (1887), but see Brkmat Ab

Wah un masa, 12 A, 506, 508 (1899).
 (3) Som e Murchi, 3 Born L, R, 94 (1900).
 Seo notes to sa. 10, 11, oute, Mahadeo t.
 Vasudeo, 5 Born L, R. 737 (1903).

(4) Dost Mahammad Khan * Said Begam, 20 A. 81 (1897). Saroda Prasad c. Kailash Bashini, 17 C. W. N. 128 (1912).

(5) King t Hoare, 13 M. & W. 491; Bransmead e. Harrison, L. R. 7 C. P. 517; Kendall e. Hamilton, L. R. 1 App. Cas. 504; Hamilton, L. R. 1 App. Cas. 504; Hamilton et. Schoffeld, L. R. 1 Q. B. 453 (1891); see Cambelort v Chapman, L. R. 19 Q. B. D. 229. This rulo has been applied and adopted in India as a matter of principle; see Nathu. Lill Chowdhry e. Shoukes Lall, 10 B. L. R. 200 (1872) [dissenting from Barunath Roy Chowdhry e. Chuder Schlur Mohapater, 1 W. R. 50 (1850)]; Hemendro Coomar Mullick

cause of action for the injured party in the case of either a joint contract or a joint toit, and that cause of action is exhausted and satisfied by a judg ment being obtained by the plaintiff against all or any of the joint contractors or joint wrongdoers whom he chooses to sue (1) But the rule is otherwise where there is a joint and several hability, a decree against one of several joint and several promisors without satisfaction will not bar a second suit (2) And in the under-mentioned case a decision in a suit against a banian was held not to be rescudicate in a suit for the same money against a manager, the liability not being joint but being based on distinct contracts (3) Conversely, where a plaintiff has failed in a suit against one of several joint debtors, a judgment recovered by one of such debtors cannot be pleaded as a defence to a subsequent action against the other joint debtors in respect of the same cause, unless the plea shows that the indgment was recovered on a ground which operated as a discharge of all (4) It has however, been more recently held by the Allahabad High Court that the effect of sect 43 of the Contract Act heing to exclude the light of a joint contractor to be sued along with his co contractors, the lule laid down in King v Hoare, and Kendall v Hamilton supra is no longer applicable to eases arising in India at all events in the Moinssil since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors (5)

Father of joint Hindu family—Where the Hindu son in a joint family becomes entitled by reason of his birth and in his own right a right which he can enforce against his father he does not claim anded him within the meaning of this section (6). Therefore the dismissal of a suit for redemption of a mortgage of joint family property brought by the father in a joint Hindu family alone was held not a bar to a subsequent suit for redemption by the sons, massimuch as their title was not through their father, but was separate and independent (7). The question whether a Hindu father in a particular suit, in which he alone of the family is a particular stitle in the head one of the family is a particular stitle in the father of the case. Held therefore, under the circumstances of the case, that an erroneous decree in yet ment obtained against a Hindu father we not restricted as subsequent.

t Rajondro Lail Moonshee, J. C. Jod (1878), Garusami Chetti t. Samuri Chuma Mannar Cheti, v. M. J. (1881). Chockahing Modali t. Subbaraya Mitali S. M. 133 (1882), Lukim das Khimji t. Purshotam Harti to B. "Oo (1882), ex. Oobin Chandra Roy t. Maganstra Dasaya, 10 C. 921–93 (1881), Dharam Singhi t. Angan Lail, al. L. J01 (1893). A frash as izament in respect of a tort subsequent to the tort originally sued upon will not come within the scope of the first judgment as a to bar the first assignment Govin t. Jujian, H. Benn. L. R. 9 (1911), J. B. 189.

⁽¹⁾ Hemendro Coomar Mullick v Rajendro Lall Moonskee, sur ra

⁽²⁾ Dhunput Singhi Sham Soonder Mitter, 5 C 291 (1879) T.C. L. R. 401, as to the administration of assets of a deceased or bankrupt partner see Broughton, 81, 82

⁽³⁾ Lawk at Calcutta I and hing and Slip 1 mg Co "C (1-" (1881)

⁽⁴⁾ Philips: Ward, 211 & C 717

⁽a) Mahammad A l iri i Radhe Ram Singh, 2 L 307 (1500)

⁽⁶⁾ Sundar Laf e Chintar Val, 20 A 1 (1996)

^{(7) 15}

suit by the son for recovery of the bolding (1) An auction purchaser of the right of a Hindu father in joint property cannot raise the plet that a mort, age was made without legal necessity as long as there is still time for the sons to challenge the purchase (2). The obligation of a Hindu son to pay his father's debt is not an obligation which he had incurred jointly with his father, and the cruditor's cause of ection against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only. A judgment recovered, against his father only, does not therefore bar a sint against the son (3). Where the plaintiff had such the defendant's father for a declaration of his right to a share of property, which he claimed as ancestral property governed by Mitaksharalaw, and had obtained a decree, the defendant's father's place of a custom of prinogeniture being rejected, it was held in a subsequent suit by the plaintiff for partition of the property that the defendant (who had not been a party to the former sint) was harred from pleading a custom of prinogeniture (4).

Manager of same —The manager of a joint Hindu family sung or the first such acts in representative capacity. He can execute decrees on behalf of the joint family and receive payments and give receipts which will be biading on it (3). Where, therefore, the interest of a joint and undivided family heing in issue, one member of the family prosecuted or defended a suit, such a decree may afterwards he considered as hinding upon all the members of the family, their interest being sufficiently represented in the suit, (6) and the presumption heing that he is acting for the family, unless it were made out that he acted and professed to act for hunself alone (7). In defining, however, the relation of the managing member to the joint family and estate we are brought into contact with a relationship which has no counterpart in English law, neither the term partner nor principal, nor agent, nor even co parcener will strictly apply (8)

Karnavan — The karnavan er managug memher of a Malahar taruad (Amily) is in a similar position to a Hindu father under the Mitakshara law And a decree against him may in some cases bind the members (9) It was,

- (i) Sri Raja Varadaraya v Sankara Ven katadri, 17 M. L. J. 197 (1907) For Hindu father's power to bind his descendants by a compromise, see Ram Kuber Pando i Ram Dasi, 35 A, 428 (1913)
- (2) Bakshi Ram v Liladhara, 35 A 353 (1913), distinguishing Muhammad Musamil
- ullah t Mithu Lal, 33 A 783 (1911)
 (3) Dharam Singh v Angan Lal 21 1 301
 (1899)
- (4) Kalı Charan ı Sheo Buksh 16 C W N 783 (1912)
- (5) Acchaibar Singh t Ram Saruf Sahu, following Hart Lat t Munman Kunwar, 34 A 549 (1912), distinguishing Ganga Dayal t Mani Ram, 31 A. 156 (1909)
 - (6) Jogendro Deb Roykut : Funindro Deb

- Roykut, 14 M I A 376, 11 B L R 214, 17 W R 104 (1871), see Gan Savant Bal Savant v Narayan Dhand Savant 7 B 467 (1883) Narayan Gop Habbu t Pandurang Ganu 5 B 685 (1881), Ahub Chand t Narant Singh 3 A 812 (1881), Caspersé,
- Narant Singh 3 A 812 (1881), Caspersz, 358, 359, Hukm Chand, 211 (7) Gan Savan Bal Savant & Marayan
- Dhond Savant, supra (8) Muhammed Askari t Radha Ram
- Smgh, 22 A 317 (1900)
 (9) See Vasudevan : Aarayanan, 6 M 121
- (1882). Varanakot Narayan Namburi t Varanakot Narayan Namburi, 2 M. 323 (1880) [in which a description is given of the position, powers, and responsibilities of the karnavan]. Thengu t Chimmu, 7 M. 413

however, later held by a Full Bench reviewing the preceding cases that a decree in a suit in which the karnatan of a nambudra illom or marumakkatayam tarwad is, in his representative capacity, joined as a defendant, and which he honestly defends, is biuding upon the other members of the family not actually made parties (1)

Shebait —Where a shehait has incurred debts in the service of an idol, for the benefit and preservation of its property, his position is analogous to that of a manager for an infant heir,(2) and decrees properly obtained against him in respect of debts so incurred are hinding upon succeeding shebaits. For if such debts and the judgments founded upon them were not held to be thus binding on successors, the consequence would be that no shehait would he able to obtain assistance in times of need (3)

Managers Guardians—In the case cited below,(4) the decision of a Forest Settlement Officer, upon an inquiry held under the Boundary Act of 1860, at which inquiry the plaintiff, then a minor, was represented by a manager of his estate appointed under sect 8 of Regulation V of 1804, was held to be res judicata in a suit to recover the land. A manager of an estate, who has obtained a certificate under Act XL of 1858, is the guardian of infant co preprietors, and represents them fully in suits for money advanced in reference to the estate (5). The fact that the plauntiff, a minor, had through his guardian actively intervened in proceedings to set aside a sale of property in which he and his father were jointly interested as members of a Mitakshara family, was held to be no bar to a suit to recover the property the purchaser having at the sale acquired the interest of the father only (6)

Minor—To maintain the plan of res judicate it must appear that the person whose interest it is sought to bind was in some way a party to the suit An intention that a suit should be for the benefit of a minor is insufficient. The minor must be properly represented in it (7). A decree passed against

^{(1881),} Haji v Atharaman, 7 M. 513 (1883), Kombit Lakshun, 5 M. 201 (1881). Ittiachan t Vilappan, 8 M. 181 I. B. (1885), Sri Devi t Kelu Lradi, 10 M. 79 (1886), Shan karami Kesavan, 15 M. 6 (1891), Kanaoppun Nambiar t. Ukkaram Nambiar, 17 M. 211

⁽I) Vasudevin i Sankaran 20 M. 129 (ISJ0)

⁽²⁾ See Hunooman Persaud Panday t Mussamut Babooco Munraj Koonweree, 6 M 1 A. 333, 423 (1856)

⁽³⁾ Prayumb Numari Dabja (Golab Chand Baboo, L. B. 2.1 V. 115, 152 (1875), sec. 20 W. R. 8d, for this case in the lower Court, Jugart Chandr Scinic Kishwanund, 2 8d Eq. 129 (1814), Kasa mun I Marin Da dy (Numagh Doar Byrance, I Marsh, 185 (1883), Malazance Stiffers user Daltas

Mothooranath Acharjo, 13 M I A 270, 273 (1869), Iulisidas Mahanta i Bojoy Kishoro Shome 6 C W N 178 (1901) As to suits relating to multis, see Babajirro i Luman das 5 Bom L R 932 (1993) s c, 28 B 215

⁽⁴⁾ Kamaraja e The Secretury of State for In ha II VI 309 (1886)

⁽⁵⁾ Doorg a Persad r Kasho Pershad Single, L. R 9 I 1 27 (1883)

⁽⁶⁾ The Collector of Monghyr r Hardai Naram Shahu 5 C 125 (1879), as to the position of a Hindu son in a yout Mitakshari family see Ramnarun : Bisheshar Prish d Io V 111, 113 (1838), Mussamut Nanoni Babuasin r Modun Mohun, L. R 13 Ind. App 1 (1855), Broughton, 63-72

^{(7]} Chaudri Ahma I Buksh i Sch Raghu bar Daval 28 A I (1905), 32 I A 223

an infant properly represented is binding upon him like a decree passed against an adult, but it is open to the infant to impeach such decree by a separate suit in cases where his guardian has been guilty of fraud or negligence in allowing the decree to he passed against him (1) It is only where fraud or negligence is proved on the part of the guardian of a minor that the right to bring a suit to set aside a previous decision can be claimed by a minor or his administrator, where no fraud or negligence is proved a previous decision will operate as a bar (2)

Mortgagor -The acts of a mortgagor prior to the mortgage bind his mortgagee , (3) but his acts subsequent to the mortgage do not . so that a suit by the mortgagor subsequent to his mortgage, and not brought at the instance or with the concurrence of the mortgagee, does not bind the latter (4) The proprietor of an estate cannot be said to represent the whole estate after he has mortgaged it (5) A decree obtained by the mortgagees against the original mortgagors, the vendors of the appellants, was held to be no evidence against the appellants, purchasers of the interests of the mortgagors, if they were no parties to that decree, and if the transfer to them was before the institution of the suit in which that decree was passed, and the purchasers were in no way bound by the result of that suit (6) Where a mortgagor obtained a decree for redemption, which was not executed. and subsequently sold the equity of redemption to the plaintiff, who sued the mortgagee for redemption, it was held that the suit was not barred by the former decree as the relation of mortgagor and mortgagee had not been terminated, and the right to redeem was inseparable from the relation as long as it existed (7)

Lessor and Lessee —A lessee claims under his lessor, but a lessor does not claim under his lessee, so that a decision in a suit by the lessee to eject a stranger does not har a suit by the lesser against the same person with the same object (8) So also decrees obtained against the registered tenants of a

⁽¹⁾ Cursandas Natha v Ladkavahu, 19 B 571, at p 570 (1895), and see Lalla Sheo Churn Lal z Ramnandan Dobey, 22 C 8 (1894)

⁽²⁾ Hanmantapa t Jivabai, 24 B 547 (1900)

Deb. 9 C 265 (1882)

⁽⁵⁾ Soshi Bhusun Guha v Gogan Chunder Shaha, 22 C. 364 (1894), Seshappaya t Venkatsamana, 33 M. 459 (1910)

⁽⁶⁾ Basudeh Sire t Brojo Mohan Jana 7 C W N 54 (1902)

⁽⁷⁾ Karuthasamı v Jalanatha, S M 478. (1883), seo Samı Acharı Somasandram, 6 M 119 (1882), Roy Dinkur Doyal v Shew Golam Singh, 22 W R 172 (1874), but seo cantra, Anrudh Singh t Sheo Prasad, 4 A 481 (1882); Gan Savant v Narayan Dhand Savant, 7 B 467 (1883), as to the effect of abatement, seo Nistarian Debi v. Brojo Nath Moolongathya, 10 C L. R. 229 (1882)

⁽⁶⁾ Rambrohmo Chuckerbutti t. Bunsi Kurmokur, 11 C L. R 122 (1882), Brojo Behari Mitter r. Keder Nath Mozumdar, 12 C. 550 (1886)

tenure were held madmissible in evidence against the real owner of the tenue, who was not a party to the suits obtained, and who did not claim through the parties against whom the decrees were passed (1) And a suit by a lessor against a rawat to set aside a pottali is not barred by the fact that the pottali has been declared genuine in a suit by the plaintiff's ticcadar against the same defendant (2) Where two porsons each claim title to land in the possession of a tenant, and one of them sues the tenant for rent in a competent Court, and the other intervenes and claims title, and the issue is confested and finally decided that the tenant should pay his rent to one of them, the title cannot be contested in a subsequent suit between the two claimants (3) A decree obtained in a previous suit for rent by an maradar does not operate against the tenant as res judicata on the question whether the relation of land lord and tenant exist in a subsequent suit for rent brought by the superior landlord (4) As to suits for the recovery of cesses (5) and rents, see cases also below (6) On dismissal of a suit for rent on denial of relationship of landlord and tenaut, the plaintiff may suo again for ejectment, (7) though where the tenant sets up his own title to the land, the decision on the issue of title may be res judicata (8)

Partition -The right to enforce it is a legal incident of a joint tenancy, and as long as such tenancy subsists so long may any of the joint tenants apply to Court for partition (9)

Different titles -The words "litigating under the same title" do not refer to the identity of the ground of action, but mean that the question must have been raised and decided in the same right that is to say in the right of the parties to the second suit and not in the right of any other person. Thus if one is made defendant in an official capacity the judgment will not bind him personally, and sice tersa. A plaintiff sung as next heir to his uncle was held not barred by a decision against his father, masinuch as he claimed under a title not derived from his father (10) A suit against an elder brother for maintenanco was held not to be barred by a previous order made upon other grounds dismissing a claim for maintenance against the father. The adjudication in the previous suit was not between the brothers, but between the plaintiff

⁽¹⁾ Ram Naram Rat t Ram Coomar Chunder Poddar, 11 C 502 (1885)

⁽²⁾ Shaikh Walnd Alt e Nauth Tooraho,

²⁴ W R 128 (1575) (3) Goland Chunder Koonda : Taruck

Chun fra B sc 3 C 115 (1877) (4) Bolaram Mon hil r Kartick Chunder

Rev (howdhuri, 1 C W N 101 (189)) (5) Picketta e Rameswar Maha, 28 (109

^(1.890)

⁽d) Hurry Behari Bhazat e Purgun Mir. 19 C. 651 (1850). Bukshi e Nizamu H. 20 C. A. (15 C), Mil Madhub Sarkar v Brojo hath higher 21 C. 23 (1533), Meliaraje I tir Ira M. han Fan rea. Shural hu Chun ler

Bhuttacharice 4 C W N 43 (1897), Baloram Mondul : Kartick Chunder Roy Chowdhurs,

IC W N 101 (1899) (7) Khater Mistri t Sadruddi Khan, 34 C

J22 (1907)

⁽⁸⁾ Sahadeb Dhalt t Ram Rudra Haldar, 10 C W N 620 (1900)

⁽⁹⁾ Bedieshar Das t Ram Prasad, 28 A 627 (1906), and see Madon Mohun Mondul s Barkanta Nath Mondul, 10 C W N 833 (1900) . Monsharam r Ganesh, 17 C. W N

^{21 (1912)} (10) Ruder Sarato Singh t Rup Kutr, 1 V

^{731 (1675)}

and his father, and was based upon a different sort of claim (1). A suit by persons representing the public is not barred by a decision in a previous suit by the same plaintiff in their individual and private capacity (2). In a previous suit by the same plaintiff in their individual and private capacity (2). In a previous suit in which plaintiff had been a party it had been attempted to assert plaintiff it title to a piece of land occupied by the defendants by proving that they held the same by surtue of an alleged specific lease. The Court had held that no such lease had been executed. Plaintiff now claimed the land as belonging to bis devision, and since to recover it on the strength of his title, he also set up the allege I leave once more. Held that though the question of the validity of the clase was resignificate, plaintiff was at liberty to sue also on the strength of bis title, independently of the lease and he was not estopped from so sung by the fact that the former suit had been based upon the lease alone (3). A claim on a Lanam is a claim arising ex contractu, while a claim on title against a trespasser is founded on text (1).

Miscellaneous -The purchaser of land at a sale by the Government for the recovery of arrears of revenue under the sale laws buys free of encumbrances, and is therefore not bound by the decision in a suit brought by or against the former owner (5) It has been beld in Madras that a priest of a temple as the representative of a former priest, is bound by a decree in a suit brought by the latter to establish his right to damages for the invasion of his rights as priest (6) The co sharer of an estate cannot be hound by a decision in a suit for rent brought by another co sharer against a tennat (7) Where all the coaditions prescribed by sect 11 exist the fact that in the first suit the defendant was an execution creditor and in the second he is a purchaser at an execution sale makes no difference as to the second suit being res audicata A privity exists between an execution creditor and a purchaser at a Court salo, the latter representing the former in so far as he had a right to bring the property to sale in execution of his decree (8) As to a suit by the larnam of a mitta (9) by one claiming as the dharmakarta of a decasthanam, (10) and by one of five trustees in whom the uraima right over a decasan was vested . (11) see the cases noted below A judgment against one bolder of service tatan lands is res judicata as regards a succeeding holder (12) A purchaser of land cannot be estopped by a judgment in a suit against his vendors commenced after the purchase (13)

 ⁽¹⁾ Mmad Hossem Khan t Nihaluddin
 Khan 9 C 945 948 (1883)
 (2) I akshmandas t Jugalkishere 22 B

^{216 (1896) *} Jugaikishere 22 1

⁽³⁾ Zamorin of Calicut : Varayanan Mussad 22 M 323 (1899)

⁽⁴⁾ Parambath v Puthengathl 28 V 496 (1905)

<sup>(1905)
(5)</sup> Naram Chunder Chowdl ry τ Tayler
3 C L R 151 (1878)

⁽⁶⁾ Archakam Sriniyasa Dikshatulu t Udyagry \tantba Charlu 3 M. H C R 349 (1800)

⁽⁷⁾ Suronder Nath Pal Chowdhry v Brojo Nath Pal Chowdhry 13 C 3.2, 3.6 (1886) (8) Krishnabhupati Devu v Vikrama Devu, 18 M 13 (1894)

⁽⁹⁾ Venkayya v Suramma 12 M. 235 (1889) see Baban v Nana 1 B 535 (1876)

⁽¹⁸⁸⁹⁾ sco Baban v Nana 1 B 535 (1876) (10) Ramalingam i Thirugnana, 12 M 312

⁽¹¹⁾ Madhavan : Keshavan, 11 M 191 (1887)

⁽¹²⁾ Radhabatt Anantrav, 19 B 198 (1885)
(13) Joy Chandra Banerjee t Sreenath
Chatteree, 32 C 3.7 (1904)

Explanation VI -This Explanation provides that where persons higher bona fide in respect of a public or private light claimed in common for them selves and others, all persons interested in such right shall, for the purpose of the section, be deemed to claim under the persons so litigating (I) It has heen held that the Courts should be careful in their application of this Explana tion, which should not be applied to any case which does not come within its very wording, (2) and that it only applies to cases where several different persons claim an easement or other right under one common title, as for instance, where the inhabitants of a village claim by custom a right of pasturage over the same tract of land, or to take water from the same spring or well (3) And, therefore, it does not apply to a prescriptive right claimed by an individual in respect of his own house and premises (4) This Explana tion does not refer to the case of a defendant at all but only to the case of a plaintiff (5) But it is not in terms so limited. One party having a right in common with others is not at liberty or authorized to sue in his own name to establish the right of the others except by their authority. This Explanation must therefore be read with the provisions of rule 3, post, and the principles to he found in that rule (6) A right to relief can be said to he claimed "in common" only as between parties who would be benefited by such rehef if granted, and who have such an interest in the relief claimed that they could join as eo plaintiffs (7) The inclusion of public rights in the amended Explanation is to give due offect to suits relating to public nuisances, as to which see the new sect 91, post

The Court which decided such former suit must have been a Court of jurisdiction competent to try such subsequent suit or the suit in which such issue is subsequently raised—In order to make an idjudication by one Court final and conclusive in another Court, the first Court must have been possessed of a jurisdiction (3) sufficient to try the matter

(1) 1 xpl VI

(2) Ram Naram t Bisheshar Prisad, 10

\ 111, 112 (1888), per Edge, CJ (3) Kalishunker Doss : Gopal Chunder Dutt, 6 C. 19 (1880), as to suits involving claims for land, se Madhavan i Aishavan, 11 M 191 (1887), Kunnatharillath Vasu levan Nambudri i Narry man \ mal u hi, 6 W 121 (1852). Varansket Nu system Nambul e Varanakot Narayanan Numl nl, 2 M 128 (1500), see as let suits that the telephones Hazir Gazir t Senam fac Des c il t 11 (1880), Ram Nartin t Hah shurli istl 10 1 411 (1555), and as lad crees as unet harnavars, Stille str. hela lich 10 M. i (1550), Hayacharriathil h rill tin s henstumb as Labelmi Mara, a M 201 (1881), and Maharenee of Leger, and as to as a fri casin falate as the priests fa Mah I ber fa light a li

t Kunhamed, 11 M 324 (1891), referred to in Latchaman : Saravayya, 15 M 164 (1894) Is to representative suit against sect of nor-dippers, see Sulfagoja Chariar t Raina Rao 10 M 185 (1997)

(1) Lakhamahankar t Vishuuram 24, B 77, S (1811), Kalishunker Doss t Gopal Chun ler Dutt, 8 C, 11 (1880)

(5) Kunnathurillath Vasudevan Nambudri i Navay vinn Vandu Iri 6 M 121, 120-127 (1884), j. r. linn s. J., Laximehankar i Vishum in, 143, f. L. 731 (1881)

(0) Hanskella Muniaj pa, 8 M 496, 490 (1883); Jufass al a remarks in Varanaket Nu y mon Verilaria Varinaket Narayania Na il mi, 2 M 4,8 3 2 (1880). Sri Devia kell Trade 10 M 7) ≈ (1880).

(7) sonn lata i Rulan lauvelu, 28 M 157 (1 ant)

(a) led the second last are of parts

subject is fully discussed. Slabo Raut e Bahan Baut, 55 C. 3.3 (1 68) (1) See Geinja Chettiar r. Salhajathy Mudahar, 21 M. 65 (1 65) (2) Hari Das Acharje Choudhury a

diction, see n traiters J. arte in which the

(2) Hars Das Acharye Chowdhury t Baroda Kishore Acharjee Chowdhury 4 C. W. S 67 (1832), and see Lakshinishankar t Vishnuram, 24 B 77, 85 (1832), and as to

(1.04), Makesh Prasad i Ranjor Singh, 27
A. 163 (1994), and as to talul dars settlement officer Mahubhai i bursang 30 B 220 (1995)
(3) Jaimangal i Bed Saran, 33 A 193 (1911)

subsequent suit non trial le hy rent Court, Ashraf un russa t Ah Ahmad, "6 A 601

(4) Laht v Radharaman 13 C 1 J 547 (1911), 15 C, W N 1021 (5) L R 91 A 197, 203, 204 (1882), 9 C 43) 12 C L R 520 See Sheikh Hassu v Rau khumar Singh 16 A 183 (1894), Cokul Mandar e Pulmanand Singh 6 C. W. N. N. S. P. (102) folk in Goriti Kunwar i culti 25 x 138 (1302) (0) 8 W. R. 175 (1817). He rul in this case, which is fully affirmed by the Privs

consent in the first first in the Press Council in the decision above cited and in Rui Bahadur Singh i Tucho Koer 11 C. 701. 1 R 12 I A 27 (1881) followed in Bharasa Lal Choudhry i Sarat Chunder

Dass 23 C. 115 (1896) has been followed and app fied and dare-garded not other cases, which will be found cited in Caspersz op cit 32, 32 ct evg and see Hukin Chand, op cit 0, 283, 31, Bababbat t Anharbhat 13 B 224 (1888), Ganapati c Chathu 12 M 227 (1889), Ythlunga Padayachi t Yth

Nudall, 15 M. 111 (1891)
(7) See Steld's Lv. 298 299, and as to
the Courts in particular of the Bengal Presidency, see Fiell's Introduction to the Bengal
Regulations, Ch. IV

lowest grade competent to try it For instance in Bengal, by the Bengal Civil Court Act, No VI of 1871, the purisdiction of a Munsif extends only to original suits in which the amount or value of the subject matter in dispute does not exceed Rs 1000 The qualifications of a Munsi and the authority of his judgment would not be the same as those of a District or of a Subordinate Judge, who have jurisdiction in civil suits without any limit of amount. In their Lordships' opinion, it would not be proper that the decision of a Munsif upon (for instance) the validity of a will or of an adoption in a suit for a small portion of the property affected by it should be conclusive in a suit before a District Judge or in the High Court for property of a large amount, the title to which might depend upon the will or the adoption Other similar cases are mentioned in the judgment of the Chief Justice It is true that there is an appeal from the Munsif's decision, but that upon the facts would be to the District Court, and not to the High Court And that the decision should be conclusive would be still more improper as regards many other of the various Courts in India, the qualifications of whose Judges differ greatly By taking concurrent juris diction to mean concurrent as regards the pecuniary limit as well as the subject matter, this evil or inconvenience is avoided, and although it may be desirable to put an end to litigation the inefficiency of many of the Indian Courts makes it advisable not to be too stringent in preventing a higgait from proving the truth of his case"(1) And the Council, in a later portion of the judgment, say, 'that by Court of competent jurisdiction, Act X of 1877 means a Court which has jurisdiction over the matter in the subsequent suit in which the decision is used as conclusive or in other words, a Court of concurrent jurisdiction ' The rule may be stated to be that the judgment in the proviously decided suit must have been delivered either by a Court of exclusive or of concurrent jurisdiction upon a matter falling within such juris diction, and where the jurisdiction is concurrent the Court which adjudicated on the previously decided suit must have been such a Court as would have heen competent to adjudicate upon the later suit. The question of whether any particular judgment is passed in the exercise of exclusive or concurrent or limited juri diction must depend upon the terms of the law upon which the judg ment relies for its authority. It has been held that the har of res judicata arises where the Court deciding the first suit was competent to try the same and its inability to entertain it arose not from incompetence, but from the existence of mother Court with a preferential jurisdiction (2)

⁽¹⁾ The same Council in Run Balalur Sight Licho hore surper refort in about a rearrise further same. If thus construct in of the law were in the lifeth hoscest Court in line light the run of naily art with tappart to the light to rit the the good at east in the Indian I produce the light and light l

irought In Parga : Unn katti - t M 270 (1900) il sit was lell to lergy heat for Hough lergy heat in the short hate like a tourt at orgit of rightly valuel to have been trought in the Monefa Contact with the first leading with the property of the leading with the property of the leading with the

It has also been held that "competent to try" means "competent to try with conclusive effect: '(1) and that concurrence of juri diction must exist not only as to the original Court, but also as to the appellate tribunals and their powers in the respective suits (2) The Cilcutt's High Court, and later decisions in the Madras High Court, have, however, dissented from this view, holding that there was nothing in sect 12 of the last Code to indicate that the judgments in two suits must be open to appeal in the same way, in order that the decision upon any issue in the earlier suit can bur the tital of the saine issue in the later one So it was held that the decision of an issue in a suit in which no second appeal has to the High Court bars the trial of the same issue in a subsequent suit in which such second appeal is allowed (3). And see now the new Explanation If which is intended to affirm the view that the competence of the jurisdiction of a Court does not depend on the right of appeal from its decision. The word "competent" is further to be considered with reference to the time when the suit is brought, and the jurisdiction of the Court at that period. The words of the section must be taken to mean competent to try the subsequent suit if it had been brought at the same time that the former suit was brought (1) A plaintiff cannot, however, ovado the provisions of the Code by joining several causes of action against the same defendant in the sub equent suit and instituting it in a Court of superior jurisdiction (5) In a recent case in the Bombay High Court, where the defendant in a suit for restitution of conjugal rights pleaded res judicata on the ground that plaintiff had filed a previous suit, though this had been disnussed for want of jurisdiction because the leave necessary under clause 12 of the Letters Patent had not first been obtained, it was held on second appeal that the former Court had not been "competent to try ' and that there was no res judicata (6)

The prevailing view as to the effect of an appealable decision is that it constitutes res judicata until appealed against, when it causes to be such, oud does not so operate again unless it is adopted by, and thus becomes the decision of, the Appellate Court (7) Where there were decrees in cross suits on

⁽¹⁾ Bholabhai v Adessang, 9 R 75 (1884), Bahabhat v Narharbhat, 13 B 224, 228 (1888), Govind v Dhondbarav, 15 B 104 (1880), Anusuyabai v Salharam Pandurang, 7 B 464 (1883), Vythdimga Padayashi v Yythdinga Vudali, 15 V. 111, 118 (1891), soo also Bhayanshankar v Naranshankar, 23 B 536 538 (1899), but seo also N W P cases etted in Hukm Chand, op. cit. 394, 395, and Shib Charan Lal v Raghu Nath, 17 A 174, 183, 186 (1895)

⁽²⁾ Vythihnga Padayachi v Vythihnga Mudah, supra, 118, Srirangachariat v Ra masami Ayyangar, 18 M. 189 (1894)

⁽³⁾ Rai Churn Ghoss v Aumud Mohan Dutt Chowdhury, 2 C W N 297 (1998), s c, 25 C. 571, followed in Bhugwanburs chowdhran v Forbes, 28 C 78 (1990), s c, 5 C W N 483, Ahmed v Moidin, 24 M, 444

⁽¹⁹⁰¹⁾ following Subbammal v Huddlestone, 17 M 273 (1894), in, however, the recent F B decision, Aranasi Gounden v Nacham mal, 29 M. (1905), those last two cases were overruled, it being held there was no resjudicate, see also David v Grish Chunder Golhs, 9 C 183 (1882)

⁽⁴⁾ Gopi Nath Choboy v Bhugwat Pershad, 10 C 697 (1881), Raghunath Panjali v Issur Chunder Chowdhry, 11 C 153 (1881), Kunji Amma v Raman Menon, 15 M 494 (1891), Rachurn Choso v Kumad Mohan Dutt Rachurn Choso v Kumad Mohan Dutt

⁽⁵⁾ Bhugwanbutti Chowdhram v Forbes, 28 C 78 (1900)

⁽⁶⁾ Abdul Kadır v Doolanbıbı, 37 B 563 (1913)

⁽⁷⁾ See Milvaru v Nilvaru, 6 B 110 (1881) faffirmed in Balkishan v Kishan Lal, 11 A

the same facts, and an appeal against one decree only, it was held that the decree unappealed was no bar to the decision of the appeal (1) In a suit brought in the Agency Court at Kattiawar, relating to the villages in Katti awar, the Court decided that there existed between the parties a custom of metap (i c , right to an extra share by the senior member) A second suit was subsequently brought in a British Court as regards the villages belonging to the parties situate in the British territories, wherein plaintiffs alleged that the custom of metap did not exist in their family It was contended, on behalf of the defendant, that the question was res judicata, on the ground that the test of competency to try the subsequent suit was whether the suit was one which in respect of its subject matter and the valuation thereof could have been tried by the Agency Court, and that its exclusion on territorial grounds had not to be taken into account The High Court declined to accept the contention, as not being consistent with the express terms of sect 11 of the Code (2) There can be no res judicata unless the Judge who made the decree in the previous suit had jurisdiction to try and decide, not only the particular matter in issue, but also the subsequent suit itself, in which the issue is subse quently raised (3)

The under mentioned cases and authorities may be consulted as to the competency of special Courts, and of Courts in special cases. Revenue Courts, (‡)

148 (1888), where the effect of judgments in pending suits is considered], and Gunga bishen Bhugut v Raghoonath Oths 7 C 381 Rajah Mokond Naram Deo 1 Jonardan Doy, 15 W R 208 (1871), Hukm Chand on cit 144 et seq , Caspersz, op cit 344 ct seq , 397, 410 , Emamooddeen Sowdag hur : Shaikh Futteh Ah, 3 C L R 447 (1878) As to matters not entertained by an Appellate Court, see Mussamut Imanian t 1 azul Karım, 7 N W P 251 (1875) Gunga bishen Bhugut t Raghoonath Oilis supra Chinniya Mudali : Venkatachella Pillai, 3 M H C R 320 (1867), Ghurphekni t Purmeshar Dayal 5 C L. J Go3 (1907) In Narayanan t Kannammai 28 W 338 (1901) it was hell that the H C dil ailogt the in lines

(1) Panchamalas Varthmatha 23 M 333 (1 05)

(2) Prithevingus Unidoning of Ben L R 8(1903) doubling Bababbat e Narharbhat, 13 B 22 (1888) No those case inferred to jest for judjunent In Latsuichank, it Vishuman 24 B 77 see I Bom L, P 534 (1893) it was left that there was no respudied a because it. Baroka C art Laf no junel in 1 over the defendants.

(3) Cokale P is around 4 Box Le R 734 (1 etc) a. c. a. C. Coff in which the P C point out that in this respect s 13 went

beyond the Duchess of Lingston s case (4) Hurri Sunker Mookerice a Muktaram Patro 15 B L R 238 (1875) Gangaraju t Kondireddiswami 17 M 106 (1893) Hati Charan Singh v Har Shanl ar Singh, 16 A 461 (1894), 18 A 59 (1894), Rangayya Appa Ray : Ratnam 20 1L 392 (1897) . Kalliani : Dassu Pande 20 A 520 (1898), I seld, Lr 301 305, Caspersz, op cit 338-310, Jafar Ithan & Gholam Muhammad 25 A 282 (1903), Madari Bani Mal 21 A 153 (1901), Viranjan Rao v Abdul Rahman I A L. J 122 (1904), Dharam kanta Lahm v Galer 1h Khan 30 C 339 (1903) Gokul Men lar 1 Pudmanand Singh 6 (W N 825 (1902) Gomti Kunwar : Guari 25 A 138 (1902), Vedachala r Boomeappa 28 M 65 (1903). as to the decision of the special Judge und r the Bengal Jenanes Act 1b v Shewbarst Note : Airpal Roy 16 (537 (1880), Lala Kurut Narum t Palukdhari Pandey, 17 C 326 (1853), and of Revenue Officer as to entre sin Record of Rights Gokhul Sahu : Joda Nundun Roy 17 (721 (1850) , Pandit Sar Isr c Meajan Mirdha 21 (378 (1873) , Rachubar D al t Binke Lal -2 1 152 (1500) As to proceed has of a Settler ert Officer s 1h Secretary of State f r India in Council : Kapimully, 27 C 247 (1534)

land proceedings, (1) applications by petition under sect 63 of the Administrator General's Act (II of 1871), (2) applications for the gnardianship of a minor . (3) proceedings of Registration Officers . (4) Collector's decision under Madras Act III of 1895 (5) A decision by a settlement officer, under Chapter X of the Bengal Tenancy Act, as to which of two persons claiming to be tenant ought to be recorded as such, does not operate as res judicata in a subsequent civil suit between the same parties concerning the title to the land (6) A finding in a suit for the recovery of interest on a mortgage is not res judicata in a subsequent suit under the Dekhan Agneulturists' Rehef Act (XVII of 1879), which is in relief of a certain class and has a special character, unless the previous suit falls within the class of suits to which that Act applies (7) A settlement officer's decision, under sect 107 of the Bengal Tenancy Act, was held in the undermentioned suit to have the force of a decree, though it did not make the question of rent res judicata it was admissible in evidence as to the rent (8) A decision in a previous suit in a district Munsif's Court, in the exercise of its ordinary jurisdiction, may operate as res judicata in a subsequent suit between the same parties on the Small Causo side of the Court (9)

In respect of the presumption as to jurisdiction the rule is, that nothing shall be intended to be out of the jurisdiction of a superior Court, but that which specially appears to be so, and, on the contrary, nothing shall be intended to be within the jurisdiction of an inferior Court, but that which is so expressly alleged (10) It is necessary, therefore, for a party, who relies upon the decision

And as to the effect of an award under the Central Proxinces Land Revenue Act (AVII of 1881), see Rowa Pershad Sukal v Dec Dutt Ram Sukal 4 C W N 582 (1899), Bem Pando t Kausal Kishore, 29 A. 160 (1906), Bihari t Sheobalal , 29 A. Col (1907) [Agra Ichanev Actl. Natesa Gramani i Reddi, 17 M. L. J 518 (1907), Bed Saran & Bhagat, 33 A. 453 (1911), Jaimangal t Bed Saran, 33 A. 493 (1911)

- (1) Raja Nilmoni Singh Deo Bahadur t Ram Bandhu Ras. 7 C 388 (1881) . Nobodcep Chunder Chowdhry t Brojendro Lall Roy, 7 C 406 (1881), 9 C L R 117, Admonce Singh Dec t Rambundhoo Roy, 4 C 757 (1879), Mahadevi t Neclamani, 20 M. 269 (1596)
- (2) Smith i Secretary of State 3 C 340 (1875)
- (3) Nchalo e Nawal, 1 1, 4-5 (1577)
- (4) MohimaChunder Dhur : Jugul Kishore Bhuttacharm, 7 C. 736 (1881) (5) Balijepalli t Balijepalli, 30 M. 320
- (1306)(t) Pandit Sardar e Meajan Mirdta, 21 C 375 (1533) . Hamid un mea r Abdul Hamid,
- 1 L. L. J J (1 01) forder under a 63, 1ct

- XIX of 18731
- (7) Vithal Ramchandra i Sitabai, 36 B 548 (1912), s c, 14 Bom L, R 579
- (8) Ashutosh Nath Roy : Abdool, 28 C 676 (1901), see as to same section. Mohim Chandra Ray : Kalitara Debya, 11 C W N 939 (1996), as to a proceeding under a 104 of the same Act, see Maharaja Durga Charan Laba : Hatteen Mandul, 5 C W \ cly (1901), s c , 29 C 252 See generally as to proceedings under the Bengul Tenancy let. Golul Mandur : Pudmanand Singh 29 C "07 (1902), Mohunt Jagannath t Chandra Kumar, 5 C W N 421 (1300) Sheikh Kor ban t Sheikh Jafar, 5 C W \ 738 (1901) . Dharam hant Lahiri e Gobar Mr 7 C W N 33 (1.302)
- (9) Raja Sumhadri t Ramchandrudu, 27 M. 63 (1502)
- (10) R. e Nabadwip Goswami, I B L. R. O Cr. 15, 29, 30 (186s), 15 W R. Cr. 71. hild, he doe, where also an ormon is expressed that the High Courts, and the Courts occupying a similar position in the Punjab and Burna, are probably the only Courts which can in India be regarded as superior Courts within the rule.

of an inferior tribunal, to be prepared to show that the proceedings were within its jurisdiction. In the case of a Court of superior jurisdiction, the want of jurisdiction is not to be presumed

A decree made without jurisdiction cannot operate as res judicata (1) And the consent of parties will not give to a Court a jurisdiction which it does not otherwise possess (2) But the jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the clump put forward by the plaintiff as his cause of action, and the matter involved in it, and does not depend upon what the defendant may assert by way of defence (3)

Such matter must have been heard and finally decided by the Court in the former suit .- In order to operate as ies judicata, the matter must have been heard and finally decided There must have been a decision upon the matter alleged to he res judicata, which finally granted or withheld the relief sought in respect thereof "Res judicata by its very words means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly In my opinion, res judicata signifies that the Court has, after orgument and consideration, como to a decision on a contested matter" (1) These words should be read to meau "heard and finally decided" by such Court, either if no appeal is picferred from its judgment, or if an appeal being picferred has been disposed of, and the judgment of the Appellate Court, which takes the place of its judgment, has decided the point (5) "The conditions for the exclusion of jurisdiction, on the ground of res judicata, are that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted, and that it shall have been finally decided That is just what seet 13 requires, there must be a final decision " (6) As to judgments by consent, see post

According to Explanation V of the last Code (which has now been counted) a decision was final within the meaning of the section, when it will

Kalka Persul t Kanhaya Singh, 7
 W P 39 (1875)

⁽²⁾ Kadambin o Das ce i Door₀ y Churn Dutt, Mirsh. I (1852), The Government of Bombay i I animol Sungii Yuaranin, 9 B II C R _12 (1872), Roy Bhopendro Nath Clow hiry c Kal o Progunn (Close, 21 W R _2y (1875)

⁽³⁾ Chun lee Coomar Mun lul e I skul Mi Klar J W R 5 (1868) J g Lul e Har Aara 18 16h 10 V 11, 015 (1888), but see Kali Charam e Steobur, 17 C I J J

^{(1865),} Sheosagar Singh t Sitaram Singh, 21 C 016 (1897), Kailash Mondul v Baroda Sundari Dasi, 21 C 711 (1897), Bitto Kumwar t Kesho Prasad Misr, 19 A 277 (1856) la Balarim Mondul t Kartick Chandri Roy Chowdhurs, t C. W N 161 (1859), it wis

held that the joint (rate of rent) was never rused and decried in the jrevious suit. (a) If it Churn Cho e i Kunnid Mohan Dutteth wildiary, 2 C W \ 2.7, 309 (1858) 8 c, 2 S C, 571 See Ghurj hel ni t Prime shar Duts, 5 C L. J 623 (1807)

⁽⁶⁾ Lar tam Gir C Nithela (1r, 21 No., 511 (1894), citing Linger also Maple 18 C B N No. 25 20 In Range (Mathyappa, 23 B 203 (1898), the decision was 1 to be not final

such as the Court making it could not alter (except on review) on the application of either party or recousider of its own motion Though this Explanation has been now omitted, the word "final" presumably has still the same meaning A decision liable to appeal may be final within the meaning of this section until the appeal is made (1) It is not, however, necessary, in order to justify a plea of res judicata, to show that the first case was fully entered into and discussed, either by oral or written testimony, where no question was raised but all the parties interested declared themselves satisfied on the point, (2) and a final decree is conclusive, notwithstanding it may have proceeded upon an erroneous view of the law (3) It, however, generally speaking, follows from the rule which requires a hearing and final decision, that a finding which is inconclusive, or which is based upon technical points and which dismisses a suit for any reason not on the merits, will not operate as a bar, as where a demurrer was allowed, (4) or a suit is dismissed for misjoinder and failure to pay court-fees, (5) or improper valuation, (6) or because the permission of Government was not previously obtained, (7) or because of failure to give security for costs, (8) or on the ground of jurisdiction, (9) or non joinder of all proper parties, (10) or as against a party whose name was ordered to be expunged from the record in a former suit, (11) or where a suit has been dismissed for failure to pay the costs of service of summens on the defendants, (12) or where a suit to remove an attachment is dismissed on the ground that the attachment has already been removed, (13) or where a suit has been disimissed on the ground that it was premature, (11) or wrongly framed (15) In a suit to recover principal and interest due on a bond executed

(2) Dundas v Waddell, L. R. 5 Ap Ca. 265 (3) Gourt Koer t Audh Koer, 10 C. 1087 (1884)

⁽¹⁾ Seo Ndvarue Ndvaru, 0 B 110 (1881), Balkishan v kishan Lol, 11 A 148 (1888), as to cx parte decree, seo Modhinuddin v Brao, 16 C 300 (1889) But seo Kianakayya v Janardhana Paddi F B, 30 W 439 (1910), a final decree is one which is neither under appeal nor hable to be set aside or modified on appeal.

⁽⁴⁾ Lakshman Dada Vada r Ramchandra Dada Anik, 5 B 48 (1880), L. R 7 L A, 181, 7 C. L. R, 320, see Broughton, op cat 94, 99 (5) Muhammad Sahm r Nabian Bibi, L. R, 8 A 282 (1886), I attab Singh r Wassamut Luchmen Koor, 21 W R, 100 (1873)

⁽b) Dullabh Jogi e Narayan Lakhu, 4 B II C. R., A. C., 110 (1865), see also Rajendro Lall Gossami e Shama Churn Lahori 5 C. 188 (1879), Irawa e Satyappa, 35 B 38 (1910)

⁽⁷⁾ Pattaravy Mudali v Audimaul Mudali, 5 M. H. C. R. 413 (1870), Putali Melicia v Tulja, 3 B. 223 (1873)

⁽⁵⁾ Rangrav Rasper Sidhi Mahomed, & B

^{482 (1882),} soor 173

⁽⁹⁾ Baban Mayacha v Nagu Shravucha, 2 B 19 (1876), Mahabeer Singh v Rambhayan Sah, 16 C 645 (1899), Bhukhandaa Vibhu khandaa v Lallubhat Kashidas, 17 B 562 (1892), Ram Govind Jha v Mungur Ram Chowdhry, 13 C L. R. 34 (1884), Gancah Koer v Umdat un masa Begum, 6 N W IV 77 (1874), Grah Chundra Mookrjee v Ramessurce Dabee, 22 W R. 308 (1874)

⁽¹⁰⁾ Pursun Gopal Pal v Poornanund Mullick 21 W R 272 (1874)

⁽¹¹⁾ Kaleo Coomar Dutt Roy t Fran Atshoroe Chowdhram 18 W R. 2J (1872) (12) Bessessur Bhugut t Murh Sahu, J C 163 (185...)

⁽¹³⁾ Kashmath Morsheth v. I amchanira Gopmath, 7 B 403 (1883)

⁽¹⁴⁾ Lalahman Dada Naik r. Lamchandra Dada Naik, 5 B. 45 (1950), Shaikh Elahoo Lukahi i Baboo Shio Narain Singh, 17 W. R. 300 (1972), Ramreddi i Subbareddi, 12 M. 500 (1953).

⁽¹⁵⁾ Dobart Singhe Lala Sousurun Lall, 3 t. L. R 3.5

of an inferior tribunal, to be prepared to show that the proceedings were within its jurisdiction. In the case of a Court of superior jurisdiction, the want of jurisdiction is not to be presumed

A decree made without jurisdiction cannot operate as res judicate (l) And the consent of parties will not give to a Court a jurisdiction which it does not otherwise possess (2) But the jurisdiction of a Court to entertain and decide upon a cause of action depends upon the nature of the claim put forward by the plaintiff as his cause of action, and the matter involved in it, and does not depend upon what the defendant may assert by way of defence (3)

Such matter must have been heard and finally decided by the Court in the former suit - In order to operato as res judicata, the matter must have been heard and finally decided. There must have been a decision upon the matter alleged to be res judicata, which finally granted or withheld the relief sought in respect thereof "Res judicata by its very words means a matter upon which the Court has exercised its judicial mind, and has come to the conclusion that one side is right, and has pronounced a decision accordingly In my opinion, res judicata signifies that the Court has, after argument and consideration, come to a decision on a contested matter" (4) These words should be read to mean "heard and finally decided" by such Court, either it no appeal is preferred from its judgment, or if an appeal being preferred has been disposed of, and the judgment of the Appellato Court, which takes the place of its judgment, has decided the point (5) "The conditions for the exclusion of jurisdiction, on the ground of res judicate are that the same identical matter shall have come in question already in a Court of competent jurisdiction, that the matter shall have been controverted and that it shall have been finally decided That is just what sect 13 requires, there must be a final decision" (6) As to judgments by consent see post

According to Explanation V of the last Code (which has now been omitted) a decision was final within the meaning of the section, when it was

⁽¹⁾ Kalka Persul r Kanhaya Singh 7 N W P 99 (1875)

⁽²⁾ Ixadambinco Dassee i Doorga Chum Dutt, Marsh 4 (1802), The Government of Bombay i Ranmol Singji Imarsinji 9 B H. C. R. 212 (1872), Roy Bhopendro Nath Chowdhry (Nake Presumio Ghose 24 W. R. 200 (1872)

⁽³⁾ Chunder Coomer Mun fol e Bakul Mr Khan J W R 5JS (1868) Jag Lal e Har Naram Singh 10 V 21 528 (1888) but 866 Kali Charam e Sheobur, 17 C 1 J 93

⁽¹⁾ Johans e Polestson L R 1 II I. See Aj., 117 see also Ddaya Levir e Kutuma Natchur 2 M II C P 131, 110 (1881) Sakaj ja Glettie Pam Ivalandaj ur., j. M II C P 81 (1866), Chander Schur Bh I ey e Doorg, n fro Dab J W L 33

^{(1865),} Sheosagai Singh v Sitaiani Singh, 24 C 616 (1897), Kaidash Mondul v Baroda Sundari Das, 21 C 711 (1807), Bitto Kunwar t Acabo Piasad Misr, 10 A 277 (1890) In Balaram Wondul t Kartick Chandra Roy Chowdhury 4 C W N 161 (1899), it was held that the point (rato of ren) was nover rused and decided in the previous suit

⁽a) Rai Churn Choso t Kumud Mohan Dutt Chowdhury 2 C W N 297, 300 (1899). s c, 2 C 571 Seo Ghurphikhi t Parme shar Dubey 5 C L J 633 (1907)

⁽⁶⁾ Parsitani Gir t Narbada Gir, 21 A 505, 511 (1899) etting Langmen I t Maj k. 18 C B X 5 255 2 0 In Rango t Mu I hyappa, 23 B 256 (1858), the decision was full to be not had

such as the Court making it could not after (except on review) on the application of either party or reconsider of its own motion. Though this Explanation has been now omitted, the word "final" presumably has still the same meaning A decision liable to appeal may be final within the meaning of this section until the appeal is made (1) It is not, however, necessary, in order to justify a plea of res judicate, to show that the first case was fully entered into and discussed, either by oral or written testimony, where no question was raised but all the parties interested declared themselves satisfied on the point: (2) and a final decree is conclusive, notwithstanding it may have proceeded upon an orroncous view of the law (3) It, however, generally speaking, follows from the rule which requires a hearing and final decision. that a finding which is inconclusive, or which is based upon technical points and which dismisses a suit for any leason not on the merits, will not operate as a har, as where a demurrer was allowed, (4) or a suit is dismissed for inisnoinder and failure to pay court fees . (5) or improper valuation . (6) or because the permission of Government was not previously obtained , (7) or because of failure to give security for costs . (8) or on the ground of jurisdiction . (9) or non joinder of all proper parties. (10) or as against a party whose name was ordered to be expunsed from the record in a former suit. (11) or where a suit has been dismissed for failure to pay the costs of service of summens on the defendants . (12) or where a suit to remove an attachment is dismissed on the ground that the attachment has already been removed. (13) or where a suit has been dismissed on the ground that it was premature, (14) or wrongly framed (15) In a suit to recover principal and interest due ou a bond executed

- (2) Dundas v Waddell, L. R. 5 1p Ca. 265 (3) Gours Locr 1 Audh Loer, 10 6, 1087
- (1851) (4) Lakshman Dada Vail e Raischandra Dada Naik, 5 B 48 (1880), L R 71 1 181,
- 7 C. L. R. 320 , see Broughton, op cat 14, 99 (5) Muhammad Salum : Nabian Bibi, L. R. 8 1 252 (1856), lattch Singh t Mussamut
- Luchmee Loor, 21 W R 105 (1873) (6) Dullabh Jogi t Narayan Lakhu 4 B
- 11 C. R., L.C., 110 (1500), see also Rajendro Lall Gossamir Shama Churu Labort, 5 C. 188 (1873), Irawa : Satyaj pa, 35 B 38 (1910)
- (7) Pattaray Mudah t Audimaul Mudah, 5 M. H. C. R. 413 (1870), Putali Mebets : Pulja, 3 B. 2.3 (1873)
 - (5) Rangray Raype Sidhi Mahomed, 6 B

452 (1852), see r 173

- (9) Baban Mayacha t Nagu Shrayucha, 2 B 19 (1876), Mahabeer Singh : Rambhaian Sah, 16 G 545 (1889), Bhulhandas Vubbu Lhandas t Lallubhar hashidas, 17 B 562 (1892), Ram Govind Jha v Mungur Ram Chowdhry, 13 C L. R 83 (1853), Ganesh hoer e Umdat un nissa Begum, 6 N W P 77 (1574). Grad Chundra Mookerico e
- Ramessureo Dabee, 22 W R 308 (1874) (10) Pursun Gopal Pal : Poornanund
- Mullick, 21 W R. 272 (1574) (11) hako Coomar Dutt Roy t Prau
- Arshorco Chowdhrain 18 W R. 23 (1872) (12) Bessessur Bhugut : Murh Sahu, J C 163 (1552)
 - (13) hashmath Morsheth v. Ramchan ira
- Commath, 7 B 403 (1883) (14) Ialahman Dada Nask r. Lamchandra
- Dada Nash, 5 B 45 (1550), Shashi Liahto Luksha Laboo Sheo Amain Singh, 17 W R 300 (1572), Ramunddi i Subbariddi, 12 M. JUN (155J)
- (15) Doham Singh r Lala Schaufun Lall, 3 (L R 3 J

⁽¹⁾ Soo Nilvaru v Nilvaru, 6 B 119 (1881). Balkishan v hishau Lal, 11 A. 148 (1888) . as to ex parte decree, see Modhusudun v Brac, 16 C 300 (1889) But see hanakayya v Janardhana Paddi P B. 36 M. 439 (1910), a final decree is one which is neither under appeal nor hable to be set aside or modified on appeal.

by the defendants in favour of the plaintiff's father (deceased), it appeared that the plaintiff had previously brought a similar suit, which was dismissed for the reason that the plaintiff produced no succession certificate it was Idd that the previous proceedings did not bar the present suit (1) And generally a case summarily dismissed for a technical defect or irregularity of any kind cannot operate as a res judicata (2) Where a snit was dismissed, having regard to sect 42 of Act I of 1877, on the ground that the plaintiffs had omitted to sue for possession, the decision was held no bar under sect 43 (correspond ing with O II r 2 of the present Code) to a suit for possession and to have a deed declared void (3) In a recent case in the Allahabad High Court two suits had been instituted by the plaintiff on the same day and in the same Court, he had made A. defendant to one and A and S defendants to the other, and both suits had been decided by a single judgment, followed by separate decrees In the first suit A appealed and in the other S only During the pendency of 1's appeal, S died and his appeal abated and the judgment in that suit became final Held that the hearing of A's separate appeal was barred (4) Where a party agreed to be bound by the oath of certam persons, and an issue was thus decided, this was held not to be an adjudication which would have the effect of an estoppel in subsequent proceed ings (5) No finding upon a question not directly put in issue, and no opinion incidentally expressed, can be regarded as a final judgment (6) The dismis at of a suit under sect 102 of the former Codo (corresponding with O IX r 8) for non appearance was not intended to operate in favour of the defendant as res judicata It imposes, however, when read with sect 103 of the former Code (corresponding with O IX r 9), a certain duability on the plaintiff whose suit has been dismissed. He is thereby precluded from bringing a fresh suit in respect of the samo cause of action (7) Where a plaintiff appeared in a suit and went into evidence, but before the evidence was closed made default and the case was dismissed, there was held to be a bar (8) There is no such thing known to the law as constructive estoppel, and if there were it would not satisfy the require-

(1) Petaperumala Chetti i Murungandi Servaigaran, 18 M. 460 (1895)

(2) Ramnath Rai Chowdhari t Bhagbat Mohapatro, W R, Art N, 140 (1800), Shokheo Eewa t Medheo Mundul, 9 W R, 277 (1804), approved in Ramreddi t Subbareddi, 12 M. 500 (1809), see also Pegha Mathoon t Gooroo Baboo Gunesh Ram, 24 W R, 114 (1875) [The striking off a suit on the day of hearing, because neither 1 laintiff nor defendant is pracent, does not bar the plaintiff from suing again.]

(3) Ram Sewak Singh r Nakehed Singh, 4 L 201 (1882)

(4) Anant Das t Udai Bhan, 35 L 187 (1913)

(b) he hava Tharaban t Rudran Nam tudn b M = 00 (185a) desented from m Sansa i baritya - Artasnaro = 1 M L J

321 (1913)
(1) Shib Nath Chatterjee t Nubokasen
(1) Shib Nath Chatterjee, 21 W R. 159 (1874), Ghela
Ichharan t Sankalchand Jetha, 15 B 597
(1893), see Shib Charan Lal r Raghu Nath,
17 A. 175 (1895)

(7) Chand Kour r Partab Singh, 16 C. 95. L. R. 15 L. Y. Loo (1888), see also Shankar Baksh t. Dava Shanker, 16 C. 422, L. R. D. L. A. too (1887), Ramchandra Juan Tilver Ahat. J. Wahom. G. Gori, 10 B. S. (1882). Gobind Chunder Addya t. Mrul Rabban, 9 C. 420 (1882), Ramchandra t. Blikhan, 6 B. 477, Ringray Paype Sidhi Mahomed, 6 B. 182, 480 (1882), Ram Chandra t. Narringba charya, 24 B. 201, 23 (1899).

(a) Loma Nath Das r Mohesh Chanlet

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ments of sect 11 Where in a former suit between the same parties in which the same claim upon title was made, a decree dismissed the suit, but the judgment in the former suit stated that it was left open to the plaintiff to sue again and that no matters affecting the rights of the parties were decided between them. it was held that the prior decree was not a final decision within the meaning of the Code and the defence of res redicate was not maintained (1) Where though there has been a decision on other points, the matter of the second sout has literally not been determined in the previous suit, there can be as to it no res sudicata (2). The section does not apply where the former soit is withdrawn (3) It has already been remarked that upon appeal a matter ceases to be res sudicata. When a matter although decided by the Court of first instance or by the lower Appellate Court, is not decided by the last Court of Appeal, it has not been heard and finally decided. The fact of an appeal being in point of form dismissed is not conclusive as to every point decided by the lower Court (1) As to the effect of withdrawal from a suit, see note below (5) The dismissal of a claim after issue has been teined, because the plaintiff has failed to produce evidence to substantiate it, has the same effect as a diemissal founded upon evidence and the subject matter of such claim will be res judicata (6) A subsisting judgment on an award is as hinding as any other judgment (7) As between the parties a decree arrived at after the taking of an eath on a question of fact in a case under the Oaths Act is none the less a final adjudication (8) A judgment by consent is as effective an esteppel between the parties as a judgment whereby the Court exercises its mind on a contested cause (9) And where a Court has heard and determined

⁽I) Parsotam Gir i Narbada Gir 21 A. 505 (1899)

⁽²⁾ Field, Ev 289, Broughton op cit 103 and cases there eited, so where no issue is raised and decided, or an issue is raised and the Court declines to decide it there is of course, no extended.

⁽³⁾ Durdundyapa : Malhar 2 Bom L R 871 (1900)

⁽⁴⁾ Chunder Coonar Mitter: Shb Sundari Dossee, S C 631 (1882) 11 C L R. 22 Gungababen Bhugut t Raghoonath Ojha 7 C, 381, 9 C L R 34 (1881) Mitrau t Mitrau 6 B 110 (1881), Enamoodeen Sowdaghut : Shaikh Futteh Ah, 3 C L R 447 (1878), Rajah Vokond Naram Deo ; Jonarhan Deo, 15 W R 208 (1871), Caspersta, op cit 440, 344, 345 Field Er 289, 290 Asto an appeal putting an end to any finality in the decision of the lower Court see Soosagar Singh t Sitaram Singh 24 C 616 (1897)

⁽⁵⁾ O XMIII post Watson v The Collector of Rajshahye 13 M. 1 A. 160, 170 (1869) Bunwar, Dasv Muhammad Mashad, 9 1 690 (1884), Sukh Lai t Bhikh, 11

A 187 (1888) Ram Charan Buhardur 1 Rearuddin, 10 C 557, 500 (1884), Caspersz, op cut 436-438, Field, Ev 203 234, O hincaly Cu Pr Code, notes to s 373

⁽⁶⁾ Marnott Hampton, 17 East, 209, ref to m Deld, Ev 271. Vatson v The Collector of Raphahye 13 M I A 170 (1869), Sahadoo Pandey v Nokhid Pandey, 15 W R 573 (1871) Mofiscodidens 18ahk Amouddeen 13 W R 58 (18"u), Kartik Chaudra Pal v Sridar Mandal 12 C 563 565 (1886)

⁽⁷⁾ Wazer Mathon v Chan Singh, 7 of 27, 9 C L R 377 (1881), foll. in Vyanic 127, 9 C L R 377 (1881), foll in Vyanic (1830)) see as to refusal to file an award, Wahammad Nawaz Khan * Alam Khan, L. R 18 L A 73 (1891) As to awards, see further, Casperze on Estoppel, 235 238

⁽⁸⁾ Ahmed v Moidin, 24 M. 444 (1901), foll, in Sanyasi Baritya v Artaswaro, 24

M L J 321 (1913)

⁽⁹⁾ In re South American and Mexican Co 1 Ch. (1805) 37 [explaining Jenkins v Robertson, L. R. 1 H. L. (Sc. App.), 117, 122, 125, ref to in Minalal v Karsteji, 30 R 395 403 (1906), and see The Belleauri, L. R.

Part 1

SEC 14 the case judicially, and there has been an appeal, which has been withdrawn owing to a compromise entered into by the parties, the original decision becomes a final decision and operates as a bar to a second suit (1) When a decree is passed by consent of parties, the question whether or not the compromise on which such decree is based is valid, cannot be gone into on an appeal against that decree (2) The Court, bowever, has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties Se a consent order which had been completed and acted upon but without affecting interests of third parties, was set aside by the Court on the ground of common mistake (3) The test for determining whether there is an estoppel in any particular case is whether the parties decided for themselves the particular matter in dispute and the matter was expressly embodied in the decree passed on the compromise (1) Compromises of suits by Hindu females are to be dealt with upon the principles applicable to alienations by them (5) The rulings as to the effect of ex parte and unexecuted decrees in subsequent suits (a question which has been considered principally in connection with rent suits) are conflicting (6) An ex parte decree is, when final, res judicata only so far as the decision necessarily decided an issue, but nothing more is concluded The conclusive effect is confined to the point actually decided (7) Thus an ex marte decree for cent concludes nothing more than that so much rent was due it a certain time from the tenant to his landlord, and assuming that the plaint goes no further, and makes no claim for a declaration as to the

rate of the cent, the defendant having a proper opportunity to meet the case, the sate of sent is not res judicata, even although the decree may recite or declare

10 P D 101 , Aubhoyrssury Dibeo : Gourt Bunkur Punlay, 22 C 860, 861 (1895), arguentil, foll in Nicholas v Asphar, 24 (* 210, 217 (1996) , Laksmishankar Dovshan kar y Vishnuram, 21 B 77 (1899), see Lala Shib I it a I ala Gours Prasad, 2 C W N 171 (1937), I ikshmi Ammal e Likarum lovil, 1 M H C R 240 (1863), I d shun shank ir t Vishmirain, 21 B 77 (1893), Uramkumarath Kaunan Nayar : Uram kumarath Penju Nayar, 5 M 1 (1882), a decrea passed in accordance with a compra mise may be first under O AXIII r 3,

(1) Vythiloga Mapp vaira Vijayataminal, 6 M 13 (1892), as to decrees by consent dismissing a suit, see the bellearn, L. R. 10 P D 161, Breughton, ep ed 162, and where the consent is that the action be discontinuel, Owners of the Cirps of the Arongring 1 Own is of the Cirks of the Lidalusia, L. R. 12 Apr. Cit . at

(...) Behart I al c Maji I MI, .. I N IIN $(1 \approx 1)$

(1) Hulberstell Banking Co. Ld .

Henry Laster & Son, Ld (1895), 2 Ch D 273 . as to the effect of a clause not contained in a petition of compromise being added in a consent decree, see Rameshwar Prosad Naram Singh v Chandreshwar Prosad Naram Siu_b, 7 C W N 880 (1903)

(4) Voulata Pernual : Thatha Rama samy, 15 M 75 (1911), Behari Lal t

Daud Husem 35 A 240 (1913) (5) bant Kumir v Dio Saran, 8 A 365 (1886), Ram Kuber Pande i Ram Dasi,

15 1 128 (6) 1 x 11, Ev 201-2 iii , Castersz, op cit III 116, Broughton op cit, 97, 98, Ma haruja Bearchauder Mamek i Ramkishen Shaw (P B), 11 B 1 R 370 , 23 W R 128 (1474), Burchun br Manickya i Hurrish

(hunder Doss (1 B), J C, 383 (1878), Malliman lan Shaha Main bil i Brao (F. B.). Id C, 100 (155) where the cases will be hand rated in I discussed, and see Raj Kuroar - Monu I II, 17 C W N 627 (1312)

(.) M. Husulan Shaha Munlul i Brace auju I

the rate (1) Such decrees generally will be held conclusive as to all matters which shall have been heard and decided on the ments. A defendant respondent cannot avoid the application of the principle of res audicata, by saving that he did not appear at the trial of the sut, and a plaintiff who has got an ex parte decree on proof of his title or on failure of the defendant to prove a defence the onus of proving which was on him, cannot be deprived of the full benefit of the decree which he has obtained by the fact that the defendant did not amount in court to protect his own interest (2) An ex parte decres in a suit for rent operates as res audicata upon the question of relation of landlord and tenant (3) A finding on an issue not necessary for the determination of the suit will not effect a res sudscata Where an issue is not necessary for the decision of the sunt in which it is raised, the decree, couched in general terms does not cover the finding on that issue, nor can the insertion of such finding in the decree give it the force of res sudicata. The Code does not contemplate findings on issues heing inserted in it, and there is no section in the Code which makes it necessary to appeal from the decree, because such finding has been inserted in it (4) A decree in a maintenance suit is not final in the sense that the rate fixed can never he altered Altered circumstances may justify a suit for reduction of maintenance or a suit for its increase. If there be such altered circumstances a previous decision will be no har (5) An order of the Small Cause Court. made in a proceeding under sect 278 of the former Code, is an order made in a suit within the meaning of sect 37 of the Presidency Small Cause Courts Act (XV of 1882), and as such is final (6) A possessory suit filed in the Mamlatdar's Court was dismissed by the Mamlatdar on the merits The plaintiff there upon filed another suit under sect 9 of the Specific Relief Act in a Civil Court which allowed the claim and passed a decree in his favour It being contended that the Mamlatdar's decree barred the second suit it was held that the Mamlatdar's decision was not conclusive (7) Where there are conflicting decisions, the last decision operates as a har (8)

Preclusion by rule (sect 12)—See first paragraph of the notes to these sections

Foreign judgments (sects 13 and 14)—The provisions of sect 13 between rearranged with a view to clearer statement and are substantially the same as those of sect 11 of the last code with the exception of the addition

⁽¹⁾ Modhusudan Shaha Mundul r Brac (P B) 10 C 300 (1889) Is to whether a decision on a provious rent suit as to relationship of landlord and tenant will operate as reg judicate on a subsequent suit for rint, see Vitile in 5 C W X (No 29) cexiv, and leaves three rich.

⁽²⁾ Biraj Mohini Dassi r Srimati Chinta Moni Dasi 5 C W N 577 (1 81)

⁽³⁾ Ray Kumar : Ahmuddi, 17 C W \
627 (1912)
(4) Chila lehharam : \ankal Chand Jetha.

⁽⁴⁾ Christehharam r Sankal Chand Jetta, 18 B '97 (1893) | 80 Stib Charan Lal r Rajhu Nath, 17 A, 174 (1844), Irswa r

Satyappa 35 B 33 (1910)

^(*) Bangsru Ammal : Vijayamachi Red dier, 22 M 175 (1898)

⁽o) Deno Nath Batabyal r Nuffer Chunder Nan By, 3C W N 531 (1859), this judgment was reversed on appeal upon grounds which rendered it unnecessary to dicide whether if e order was final under s 37 of the P S C, C

ict., 4 C. N. N. 470, 473 (Loo) (7) Ramchandra t. Natsinhacharya, 24 B.

^{251 (1859),} disapproving of Pamchandra r Bhilaba, o B 477 (1882).

^(*) Malla Mal r Shamman L.J. 1 A L. J. 123 (1-04).

of clause (a) and the omission altogether of the last clause of the former section as to which, see post A foreign judgment is a judgment of a foreign Court, as to the meaning of which term, see notes to sect 2, ante, and ante "Court' A foreign indement may be used in two ways. It may be either pleaded by a defendant as res judicata by way of defence to the claim made against him, or a suit may be brought to enforce it Seets 13 and 14 recognize the effect of a foreign indigment as res judicata, the latter section providing that where a foreign indgment is relied on the production of the document duly anthenti cated is presumptive evidence that the Court which made it had competent nurisdiction

All indements, whether domestic or foleign if delivered by a Court without jurisdiction are void (1) As regards competency, a question arose as to the meaning of the words "Court of jurisdiction competent to try such subsequent suit" in connection with foreign judgments. In the case of domestic indgments these words as has been already stated mean a Court having con current jurisdiction with the Court trying the subsequent sint whether as regards the pecuniary limit of its jurisdiction or the subject matter of the snit, to try it with conclusive effect (2) The same construction has been given also with regard to foreign judgments it being held that the mere fact that the actual (second) suit could not have been tried in the first Court did not matter, it heing enough if a suit of that class could have been tried if the subject matter of it had been within the local hmits of that Court's juris diction (3) So it has been held that the determination of an issue as to adoption in a smt brought in the Court of a Native State for the recovers of land was conclusive on that question in a suit brought in a British Indian Court for the recovery of property in British territory (4) It has however been donkted whether this decision is correct in so far as it holds that exclusion on territorial grounds is not to be taken into account, it heing pointed out, with reference to the contention that otherwise Explanation VII of the former Code (now sect 14) would be deprived of all meaning, that there are many snits which are within the jurisdiction both of a foreign and domestic Court, to which that Explanation would attach () The existence of juris diction will primarily be determined with reference to the law of the country in which that Court may be situate and from the Covernment whereof it may derive its judicial power (6) The Courts of other countries however are not bound and generally not inclined to recognize the jurisdiction as sufficient when it is conferred or exercised against the general principles of international

⁽¹⁾ See Authors Parking Act notes to

⁽²⁾ See Babathat : Nasharhhat 13 B at

p. 228 (1888) (3) Ib. [See comments on this case in

Prithisingji i Umedangji 6 Bom. L. R. 18. 102, 103 (1303)]

⁽⁴⁾ Ib.

^() Prithamali t Umedaran 6 B m 1 R is 103 (1 03) per Sir Lawrence

Tenking C I It is possible that the question of Poreign Courts Iu lyments was overlooked when the section was amen led so as to ren ler competency of jurisdiction necessary in regar I to the subsequent suit also See as to purishetion Hukin Chan I C P C. 207

⁽f) Cartrigue Imrie 11 & I \ 118 (B krama Singh: Br Singh (1888) P R No 131 Hukn Charle PC 1

last (I) So me the under mentioned exect the was held that the Brieda Court had no turns betton over the defendants who were Buttah subjects residing in British territors

The Inlian Levelsture, however, while recognizing foreign indements is the military, did not adont the view of the English Courts as to their absolute conclusivences, (3) and qualified the general rule enacted in sect. 11 by a number of huntations embedied in sect. 13. Res sudicata in connection with foreign sudements, is only of hunted extent. Jurisdiction and the existence of the other elements common to both domestic and foreign judgments were formerly both dealt with in sect. 11, but mirediction is now separately provided for in sect 13 (a)

The other special limitations prescribed by sect. 13 in order that a foreign

judgment may operate is res judicula, are-

1. It must have been given on the ments. So a sudement of dismissal of a suit, as harred by limitation will not be deemed to be on the ments and therefore to operate us res judicata, except where that law not only bars the remedy but extinguishes the right itself (1)

2 There must be no apparent mistake of International or Indian law (5) In the under mentioned case (6) the Court rehed on this clause in support of the view that the judgment of a Court having jurisdiction otherwise than in secordance with the general principles of International law would not be res judicate, but this clause has reference to the judgment itself and not to the question of inrisdiction, which is provided for in clause (a) and which must be dealt with on general principles. As appears from the words used, a mistake of fact does not but the operation of res nudicate, the indement being a bar even though the foreign Court had come on the evidence to an erroneous conclusion as to the facts Nor will a mistake as to the law of the country in which the indement is passed, or of any country other than British India, affect the operation of the judgment as res judicata (7)

3 It must not be contrary to natural justice. It is never advisable to limit the meaning of wide terms intentionally used by the Legislature The words are wide enough, it has been said, to allow of an investigation into the moral rightness of the decision, (8) though they would not permit the Court to inquire into the merits on the simple ground that the conclusion drawn from the facts was erroncous. For such a case assumes a mere error in decision and not a contrariety to natural justice. The scope of the term has, however, as a matter of general practice, been restricted to narrower limits, being used in

⁽¹⁾ Hukm Chand, C P C 219, 223, sco Parry & Co & Appasami Pillar, 2 M. 407 (1880), and the leading decision, Gurdial Singh t Rajah of Faridkote, 22 C 222 (1894), and other cases cited post See Flint on Res Judicata, 21 Eneve Law, 281 to accessory suits, see hashee Nath v Deb Kristo Ramanooi, 16 W R 240 (1871). Bombay Coast and River Steam N Co t Réné Heleux, 4 B H C R ,O C , 149 (1867) (2) Lakshmishankar v Vishnuram, 24 B

^{77 (1899)}

⁽³⁾ See Hukm Chand, Res Jud. 578 (4) See Hukm Chand, Res Jud 580, C P C p 225

⁽⁵⁾ Ib, 582, C P C, p 226

⁽⁶⁾ Hinde v Ponnath, 4 M. 358 (1880)

⁽⁷⁾ See Hukm Chand, C P C 227. Res Jud 583-585

^{(8) 1}b, C. P C 228-231, Res Jud 585,

reference rather to the conduct or mode of procedure of the foreign Court has to the ments of the particular case (1) Thus a decision passed without reason able notice to the persons concerned is contrary to natural justice (2) This view is adopted by the amendment, that it is the proceedings leading to the judgment which are to be looked at

4 The judgment must not have been obtained by fraud All judgments whether domestic or foreign, are void if obtained by fraud or collision(3). In the case of domestic judgments it has sometimes been held that the fraud for which they may be set aside must be extrusive to the matter tried in the cause and not merely that consisting in false evidence or forged documents submitted to the Court (4). The rule has been held to apply to foreign judgments also (5). As regards these judgments, however, the weight of opinion appears to be in favour of the contrary view (6).

5 It must not sustain a claim founded on a breach of any law in force in British India. If so, the judgment will not be enforced, even though the defect be not apparent on the face of the proceedings (7). This clause refuses recognition to every foreign judgment which recognizes a legal relation condemned in this country. But it has been held that a domestic judgment is res judicate even when its effect is to sanction what is illegal in the sense of being prohibited by Statute (8).

Foreign judgments in rem stand on a footing somewhat different from that of domestic judgments in rem as well as from that of foreign judgments in personam. Their recognition and enforcement is still void of express legis lative sanetion, as while they are beyond the rule of res judicate enumenated in these sections, there is nothing in sect. 41 of the Evidence Act to directly indicate that its provisions relating to judgments in rem are to be construed so as to include foreign judgments. But it is apprehended that in analogy with the practice of the English Courts such judgments given in the exercise of probate, matrimonial, admiralty, or insolvency junisdiction will, speaking generally, receive in India the same recognition as is afforded to domestic judgments of the same character (9). While as in the case of other judgments they are no less binding because erroneous, foreign judgments in rem are generally

⁽¹⁾ See Hinde v Ponnath, 4 M. 359-365

<sup>(1580)

(2)</sup> Bangarusam v Balasubramaman, 13
M. 496 (1890), Jones v Zahru Mal (1889), P
R No 66 (absence of actual notice), London,
Bombay, etc., Bank v Burjorn, 5 B 223
(1881) [no de facto notice or what could be
seemed equivalent to it], Bikrama Singh v
Bur Singh (1883), P R No 19 [notice must
be given of institution of suit and probably
notice a reasonable time before judgment, but
the question of the irregulantly of the
frockdure in serving process cannot be
discuss. [1]

⁽³⁾ See Authors Leidence Act, n tes to

⁽⁴⁾ Ib

⁽⁵⁾ Castriguo e Behrens, 30 L J Q B 163

⁽⁶⁾ Abouloff t Oppenheimer, 10 Q B D 295, Vadala v Lawes, 25 Q B D 310, ref Naturan Dasa t Nundo Lal Bose 26 C at pp 910-913 (1893), and see these Paghsh cases commented on in Hukin Chand s C P C 233, 231

⁽⁷⁾ Duchess of Kingston's case, Sm L C, 9th ed., 812, Rousillon's Rousillon, 11 Ch p 3.1

⁽b) Chaganlal t Bai Harka, 33 B 17 (1.00)

⁽⁹⁾ See Authors' I vilence Act, notes to

open to the same objectious as those in personam, such as want of jurisdiction,

While the rules applicable to the class of cases where the defendant sets up a foreign judgment by way of defence are contained in sect 13, yet apart from the amendment of that section, introduced by sect 5 of Act VII of 1888, no statutory provision existed with reference to suits brought to enforce foreign judgments. That amendment, however, recognized the previously existing right to bring a suit on a foreign judgment, and in fact such judgments have heen frequently enforced by suit in this country, heing considered to impose a duty or obligation which the Courts are bound to give effect to (2). In respect of the latter class of suits, the general rules are that the judgment must he an adjudication upon the actual merits, (3) final and conclusive, (4) and may be impenched upon the ground that the Court was without jurisdiction to try the case, (5) or that the defendant had not been summoned, and had had no opportunity of making a defence, (6) or on the ground of fraud (7)

(1875). Fazal Shau Khan v Gafar Khan 15 M. 82 (1891). Nallatamlu Mudahar v Pon nusamı Pillai, 2 M. 400 (1879) , Kahyugam ı Chokalinga, 7 M. 105 (1883), where the suh mussion to surradiction is not voluntary, sco Parry & Co v Appasamı Pillai, 2 M 407 (1880) Where there is no submission, see Gurdyal Singh v Raja of Faridkot. sunra . Sivaraman v Iburam, 18 M, 327 (1895) As to the transactions of Joint Stock Com pames formed for the purpose of carrying on business in a foreign country, see Nallatambi Mudaliar : Poppusami Pillai supra . Ldulii Burrorn : Manchi Sorahn Patel, 11 B 241 (1886). The London, Bomhay, etc., Bank v Hormasit, 8 B H C R , O C , 200 (1871) feall order treated as foreign judgmentl. Tho London, Bombay, etc., Bank t Burjorji, 5 B 223 (1881), The London Bombay, etc. Bank v Govind Ramchandra, 9 B 346 (1885)

(6) Ocisienhem v Papelier, post, per Mellish, L.J. Srechure Balshee t Gopal Chunder Samunt, 15 W R 500 (1871), Syed Moazum Hossein r Robinson, 5 C W A 741. s c, 28 C 641 (1901), Hadjeo haseem t Hadgeo Isup, 6 C. W A 829 (1902), Hulm Chand, Res Jud. 585, and see a consistent on the contract the companies cited, and the companies cited, and the companies of the contract the companies cited, and the companies of the contract the companies of the contract the companies of the compa

⁽¹⁾ Hukm Chand a Res Jud. 667

⁽²⁾ Nallatambi v Ponnusami, 2 M. 400, at p 403 (1879), Bhavamshankar r Pursadri, 6 B 292 (1832), Nalla Karuppa Settiar v Mahomed Iburam Saheb, 20 M. 115 (1896), Hukm Chand s Res Jud 642, 570, Caspersz, Estoppel, 459 An act of State, however, cannot be made the hasis of an action, and be regarded as a foreign judgment Stiman Goswamii, 16 200 (1878)

⁽³⁾ Srechureo Bukshço v Gopal Chunder

Samunt, 15 W R 500 (1871)

(4) Nouvion v Freeman, L R 15 Ap Ca.

1, hut the pendency of an appeal in a foreign
Court is no bar to a suit upon the judgment
which is the subject of appeal, ib 13 see

Patrick : Shedden, 2 E & B 14

⁽⁵⁾ As to jurisdiction, see Christian v Delannov, 26 C 931 (1899), s c . 3 C W N 614, Nalla haruppa Settiar t Mahomed Iburam Saheb, 20 M. 112 (1896), and Schibsby v Westenholz, L. R. 6 Q. B 155, 161, referred to and explained in Gurdyal Singh : Raja of Faridkot, 22 C 222 (1894), s c, L R 21 I. A. 171, Mathappa Chetts & Chellappa Chetti, 1 M. 196 (IS-6), Gurdyal Singh v Raja of Faridhot, supra Bangarusami v Balasubramanian, 13 M. 496 (1890), Syed Moazim Hossein t Robinson, 5 C W N 741, s c, 28 C 641 (1900), Hadjee Kasscem t Hadjee Isup, 6 C W A \$29 (1902), Mathappa Chetti v Chellappa Chetty, 1 M. 190 (1876), as to the effect of appearance and voluntary warver of objection to jurisdiction, handoth Mammi t Niclancherasil, 8 M. If C R 14

⁽⁷⁾ Srechurce Bukshee : Gopal Chunder Samunt, 15 W R 500 (1871). Duches of hingston ease, 28m L Ca, 9th ed, 522, the data an which apply to foreign as to English tribunals (Ochscahem r Papelor, pagl), Ochscahem r Papelor, L R, 8 Ch

in the judgment (1) It may, in fact, be generally said that whatever objections are declared by the Legislature to be admissible against a foreign judgment produced by a defendant in bar to an action are equally admissible against a foreign judgment produced by a plaintiff either to found or support an action (2) There is, however, a distinction between a case in which a defendant puts forward a foreign judgment as a har to a sut under sect 11, and a case in which a plaintiff seeks to enforce a foreign judgment In the former it may fairly be supposed that the parties submitted to the jurisdiction of the foreign Court (3) Jurisdiction being properly territorial and attaching, with certain restrictions, upon every person permanently or temporarily resident within the territory, does not follow a foreigner, after his withdrawal thence, living in another State As to land within the territory, jurisdiction always exists, and may exist, over moveables within it, and exists in questions of status, or succession, governed by domicile But no territorial legislation can give jurisdiction, which a Court of a foreign State ought to recognize, over an absent foreigner owning no allegiance to the State so legislating. In a personal action, to which none of the above cases of jurisdiction apply, a deerce pronounced by a Court of a foreign State in absentem the latter not having submitted himself to its authority, is by international law a nullity Not to the Courts of the State in which the cause of action has arisen, not in cases of contract to those of the locus solutionss, should resort be had by the plaintiff, but to the Courts of the State in which the defendant resides, the Courts of the latter State having jurisdiction in all personal actions (4) Though, as a general rule, a Court can exercise jurisdiction over a foreigner only if he is resident within the limits of its territorial jurisdiction, and though natives of British India are foreigners, yet they own allegiance to the common Sovereign of England and British India, and are subject to the supreme legislative authority in the British Empire If, therefore, the supreme Legislature in the British Empire authorizes an English Court in any class of cases to exercise jurisdiction over a non resident foreigner by reason of the cause of action arising within its jurisdiction, and the foreigner is a native of British India he cannot treat the judgment passed as a nullity, merely because he did not reside within the jurisdiction of the Court which passed it Order XI r 1 (e), under the English Judicature Act, constitutes a Legislative Act of the sovereign power regulating the jurisdiction in the case of a British subject resident in British India and outside the ordinary territorial jurisdiction of the English Courts, and gives the latter jurisdiction over such British subjects, assuming that the particular ease falls within the order But it is open to a defendant to show that this is

Ap 605, Aadala t Lawes, L. R. -5 Q B D 310, Abouloff e Oppenheimer, L. R. 10 Q B D. -9., Wallingford i Vitual Society, L. R. 5 Ap Ca 701 [proof of fraud], Cammel t Sowd, 3 H & N 617, 646, Boloram t Mameence, i W R. 108 (1860) [Innitation]

⁽I) Srochurco Buksheo t Copal sugra (2) Bikrama Singh t Bir Singh (1888), P

¹ No 131, p 506, Ifukin Chan I, Res Ju 1

<sup>578, 579
(3)</sup> Christian e Delanney, 26 C 531

<sup>(1899)
(4)</sup> Gurdyal Singh : Raja of Landkot 22
C 222 (1891), followed in Nalla Karuji a Settivi : Mahome I Iburani Saheb, 20 M 112 (1809), Christien v Delunny, 26 C 31

^{(1833),} s c, 3 C, W \ 811

uot so, and that the Enghsh Court had in fact no junisdiction (1) It is not sufficient ground for impugning the judgment of a foreign Court, which ordinarily proceeds in accordance with the recognized principles of judicial investigation, to show that in the particular instance its procedure may have been irregular. It may he assumed that the procedure was regular, but if there was irregularity, it would not he sufficient ground for refusing respect to the judgment (2)

On the other hand, as has been already observed, the general rule is that a Court which entertains a suit on a foreign judgment cannot institute an inquiry into the ments of the enginal action or the propriety of the decision (3). This rule, however, was in the last Code abrogated with reference to the judgments of certain fercian Courts in Asia and Africa by the enactment in sect 5 of Act VII. of 1888, amending seet 13 of the Code, and which enactment was passed with reference to the arguments urged by the Bombay High Court (1) for distinguishing the judgments of the Courts of native States from those of other foreign Courts. So where a smt was brought in a Court in British India upen the basis of a decree of the Council of Regency of the State of Rampur. it was held that the Court was empowered by sect 14 (corresponding with sect 13) of the Code of Civil Procedure, as amended by Act VII of 1888, to consider the ments of the case in which the deerec of the Council of Regency had been passed (5) It was held in effect by the Madras High Court that this amendment did not alter the general rule already mentioned, except hy vesting in the Court a judicial discretion to inquire into the merits of any case in which it appeared that ne confidence was to be repesed in the jud_nuent of a fereign Court, being one of those which are mentioued in the amended section. A party to an action on such a judgment had not a right to have the case reheard All that the section said was that the Judge was not to be precluded from inquiry into the merits (6) The last paragraph of the corresponding

⁽¹⁾ Syed Moazim Hossem v Robinson, 5 C W N 741, s c. 28 C 641 (1901)

⁽²⁾ Nalistambi Mudaliar t Ponnusami Pillai, surra, at p 406, as to limitation vide ib, and Parry & Co t Appasami Pillai, surra

⁽³⁾ Bhavamshankar Shevakrans Purasdir kalidas 6 B 292 (1882) Boloram r ka meence 4 W R. 108 (1860) Hendarson r Rinderson, 6 Q, B 288 289, Bank of Yustra kasa c Yans, 16 Q B 717, 735, Scotta Palciar, L. R. 8 Ch. Vp. 0.5, Godard r Gray, L. R. 6 Q B 133, Bank of Yustralsass r Harding J C. B 661, De Cossé Brassac c Rathlong, 6 H, X × 801

⁽⁴⁾ BhavanahankarShivakramir Punsatra kalidas, 0 R. 12 (1982), Himmat Lafir Shivajiras, 5 R. 533 (1884), in which it was hild that no suit was in a niamalus fill unjoint upon the judgment of a tentr of a native

State The contrary of mon prevailed in the Madras Court. Sams a Unanamali, 7 M. 104 (1883), and has since the anendment of the section been a logic 1 by the Bombay High Court. Mayaram: Hany 2 H. 18 of Highy James 1 Hay 2 H. 18 of Hand a Native State | a c. 1 B. L. 15 J. where the preceding cases are received. Viden founding Mayara Hay of Faridiot, 256 and founding Mayara Hay of Faridiot, 256 and (1894) the Drivy Council Is Hit that there was no ground for any possing that the seat will be upon the judgment of free junctifiers and Indian Mates. See Les to a J. 1 be last paragrap to a H of the former Code was added to call see the Naw of the Madras H 5

Court. As to execution see a 113, ped.
(a) The tractor of Massachula Harlans
Sm. h 21 h 17 (1994)

⁽c) hand had him or train him, 15 M had (1911). He was The transfer of Michaeland of Harland hands, 21 A, 17 (1915).

section in the last Code has been now omitted, and no distinction now exist between the judgments of Asiatic and African Courts and other foreign Courts Where a decree is obtained upon a foreign judgment it is to be executed according to the provisions of the Code (1). The judgment of a foreign Court obtained on a decree of a Court in British India is no bar to the execution of the original decree (2). Seet 112 provides for the execution of decrees of Courts established by the Government of India in Native States, and seet 113 allows of the execution in particular instances, upon the permission of the Governor in Council of the decrees of other Native Courts as if they had been made by the Courts in British India.

It is a well recognized principle that erimes, including in that term all breaches of public law punishable by peeumary mulet or otherwise, at the instance of State Govennment, or of some one representing the public, are local in this sense, that they are only cognizable and punishable in the country where they were committed. Accordingly, no proceeding, even in the shape of a civil suit, which has for its object the enforcement by the State, whether directly or indirectly, of punishment imposed for such breaches by the lex fori, ought to be admitted in the Courts of any other country (3)

Interlocutory orders and orders in execution proceedings -Sect 11 is not exhaustive of the effects of the principle of res judicata (4) These orders, if not appealed from, are binding upon the parties in all subsequent proceedings in the same suit Though seet 11 of the Code does not in terms apply to these orders, yet the principle which underhes it is equally applicable to them as to regular suits The Privy Council, speaking of such an order, held that, "It was as hinding between the parties and those claiming under them as an interlocutory judgment in a suit is binding upon the parties in ovory proceeding in that suit, or as a final judgment in a suit is hinding upon them in earrying the judgment into execution. The hinding force of such 1 judgment depends, not upon seet 13 of Act X of 1877, but upon general principles of law If it were not binding there would be ue end to higation "(5) The principle of res judicata applies to prevent parties raising a second timo in the same suit, or in the same execution proceedings, an issue which, in that suit or ou the execution proceedings in that suit, had been pre viously determined (6) Orders in execution proceedings, if not appealed from

⁽¹⁾ Kandasam Pillar v Moidin Saib, 2 M. 337 (1880) (2) Fakuruddin Mahomed Assan r Official

Trustee of Bengal, 7 C 82 (1881)

⁽³⁾ Huntington : Attrill (1833), A C at p 155

⁽¹⁾ Manchharam i Kalidas, IJB 826(1891) (5) Ram kurj d i Rop Kuari, 6 Å. -1.7, I, R II I A, 37 (1883), and see Krishin Sahari Mulad Khan, II V of, 66 (1891), Ban ley Karim i Romesh Chundir, 9 C. 65, 67 (1882), Mungul Pershad Dakut & Grija Kant Lahiri Chow Iry, 8 C 51, L. R 8 I V. L. 3 (1881), Benl Ram i Namu Mal, 7 V.

^{102.} L. R. 111 A. 181 (1881), cases cited in Casperse, op. cit. 319-351, Tield, Ev. 296, 297, Lakehmanan Chettir, Kutenyan Chetti, 24 M. 669 (1901), Shooran sangha: Aameshar Nath, 24 A. 28 (1902), Nair Unhammad: Jawla, 27 A. 118 (1901). In Ban Micherbai Magan Chand, 29 B. 96 (1904), the execution proceedings which were held a bar watern a former suit. As to awards, see Casperse, 235, 230, Coventry v. Lukhir Prasad 8

C. W. V. 672 (1904)
(b) Bohari Lal i. Mapid. Mr. 24 A. 135
(1901). Vithoba e. Leprann, 14 Bom. Le. Lett (1912).

re hinding upon the parties to the suit in all subsequent proceedings in that uit, on principles analogous to these of res sudicata strictly so called herefore, necessary to constitute a har that there should be a hearing and inal decision Where an application for execution is allowed to he withdrawn, he matters in dispute are not heard and decided There is, therefore, no res udicata (1) Though a deerce does not in terms give a certain rehef, yet if t is construed in orders passed upon it as having given that rehef, it is not ompetent to the Court on a subsequent application to treat those orders as proneous and put another construction on the decree (2) Seet 47 differs from sect 11 m this respect, that the latter section hars not only the trial of a out or issue, where the suit or issue had been previously heard and determined, but also the trial of an issue which should have been raised in a previous suit by either party When an issue arising out of the execution of a decree has not been raised and determined under sect 47, there is nothing in that section to prevent a defendant, in a separate suit subsequently brought, from raising that issue in that suit (3) For a case where a previous application for execution was refused and judgment debtor's objection as to limitation disallowed, and as to the effect of such an order in a subsequent application for execution, see below (4) A judgment debtor cannot question the right of a decree holder te apply for execution when execution has been on previous occasions applied for by the latter, and grauted by the executing Court (5) In the under mentioned case,(6) it was held that though the analogy furnished by seet 11 could not be altogether left out of sight in the application there dealt with, yet the Court ought to facilitate inquiries which are necessary for the purposo of carrying out decrees passed by it, and to accept with readiness any information which shows that the litigants have disregarded any part of the Court's decree It would be wrong to dismiss an application made with the above purpose, simply because the applicant may have made the same endeavour without success in another proceeding

A witness in a proceeding under sect 115 of the Criminal Procedure Code had asked for his costs in the Magistrate's Court hut had been refused and was referred to a civil suit On his bringing such suit it was held that there was no adjudication, no issues, no contesting parties, and that therefore the principle of

res judicata did not apply (7)

The grant of letters of administration by one High Court does not prevent another High Court from entertaining a petition for probate (8)

⁽¹⁾ Hari Ganesh v Yamunabai, 23 B 35 (1897) In Bhavanishankar : Naranshankar, 23 B 536 (1899), it was held, with reference to s 211 of the former Civil Procedure Code (now seet 47), that the Judge could and should have acted in the execution proceed ings upon the determination he had come to upon the same point in the suit Tepram, 14 Bom. L. R. 264 (1912)

⁽²⁾ Venkatanarasımlıa Vaidu t Papam mah, 13 VL 54 (1895)

⁽³⁾ Ail hamal Mukerjee t Jahnabi Choud

hurani, 26 C 916 (1899)

⁽⁴⁾ Bholanath Dass t Prafulla Nath Kundu Chowdhry 28 C 122 (1900), dist in Vapura Chidambara, 24 M. L. J 26 (1912) (5) Umrao Singh r Lachmi Narain, I A

LJ 80 (1303)

⁽b) Hari Narayan r Moro Narayan, 4 B L. R. 960 (1902)

⁽⁷⁾ Yemai Chandra Ghose r Ijahar Chowdhury, 8 C W N 178 (1903)

⁽b) In the goods of Charlette Rodgers, 8 C. W. N. clxxxv (1904)

In a suit for probate, the caveators assailed the whole of the will on the ground of undue influence, but the probate Court granted probate disallowing the objection. Held, that in a subsequent suit it was not competent for the caveators to show that any particular clause in the will had been inserted through undue influence (1)

PLACE OF SUING.

15 Every suit shall be instituted in the Court of the lowest courtin which suits grade competent to try it.

"Shall be instituted"-There is no provision either in the various Civil Court Acts or in the Code prescribing a minimum jurisdiction as there is prescribing a maximum jurisdiction. A superior Court is by this section forbidden from trying a suit cognizable by an inferior Court, not on account of any inhorent incompetency to try it, but on grounds of public convenience and economy It has been thought that this section prescribed a minimum limit of jurisdiction, and that, for instance, a Subordinate Judge would have no jurisdiction to try a suit which, owing to its value, was triable by a Munsif But it has been held that this section refers to procedure only, and regulates the practice of the Courts, but does not deprive any Court of jurisdiction which it may otherwise possess (2) The section is merely directory, and does not oust the jurisdiction of a Subordinate or District Judge, (3) and the institution of a suit cognizable by a lower Court in a Court of higher jurisdiction is merch in irregularity which does not affect the jurisdiction of the Court (4) or the merits of the case (5) and such as was covered by sect 578 of the former Code (6)

As to Lower Burma, see Lower Burma Courts Act, VI of 1900, Central Provinces, sect 16, Act XVI of 1885, Punjab, Act XVIII of 1884, Apmere,

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sect 25 of the Almere Courts Regulation, I of 1877

⁽¹⁾ Nuzhat ud Doula Abbas Hossem v

Mirza Kurratulam 31 C 186 (1903)

(2) See following notes 1 Hos Russick
Chunder Mohunt t Ram Lall Shaha, 22 W R

301 (1871), Joy Ixshen Das t Iurnbull, 24
W R 137 (1876) [but the Hantiff should
not be illowed any more for cost than he
ould have recovered it he had sued in the
right Court], Suffecollah Sircar t Begum
Blace, w W R 219 (1870) (the Judge should
however, if he find the suit to be trable by a
lower grade Court, senfir to that Court],
Mascoollah Khan t Ram Lall Ygursollah
u C 0 (1850), Hukin thand, Res Jul. 281,
Larger t Jaladlar, 11 C W N J.2 (1909)

^{(1884),} Krishnasami v Kanakasabai, 14 M 183 (1830) B appears however, to have been assumed in Velayudam v Arunachala, 13 M, 273 (1854), that the jurishetion of the Higher Court was excluded, the objection to the jurishetion having been taken for the first time on second appeal, but see Ranasya

Subbarayudu, 13 M 25 (1883)
 Matra Mondal v Harr Mohun Mullick.
 C 155 (1889). Rain Nirain Singh v

Mria Koery, 25 C 16, 18 (18,77)

(5) Augustino i Mediyeott, 15 M 211, 216

⁽⁵⁾ Augustmo r Medlycott, 15 M 211, 246 (1832)

⁽⁶⁾ Matra Mandal e Hari Mohun Mullick 17 C 155 (1883), Napib Beg : Jodha (1888). P R No 184, cited in Hukin Chan J. C P C

Court —The term "Court of the lowest grade" refers only to Courts to which the Civil Procedure Code is applicable (1) It has been therefore held in Madris that Small Cause Courts had concurrent jurisdiction with Courts of Village Munsifs to hear suits which are convigable by the latter (2)

"Lowest grade "-Throughout the country there are Courts of different grades having jurisdiction in suits of different amounts in certain prescribed local areas The pecuniary jurisdiction must be determined with reference to the various Acts constituting the Courts and the question of the valuation of particular suits, in order to ascertain within the jurisdiction of which Court they fall, by reference to the Court Fees and Valuation Act, and the cases decided thereunder, to which reference has been made in the notes to seet 9. ante, "Pecumary Jurisdiction," Sect. 144 of the Bengal Tenancy Act was held to be controlled by sects 15 and 17 of the former Civil Procedure Code A suit for rent is therefore to he instituted, subject to pecumiary limitations, in the Court of the lowest grade competent to try it (3) Where there were two plaintiffs, one of whom should have sued, if sole plaintiff, in the Subordinate Judge's Court as the Court of lowest grade, and the other could, by reason of the provisions of Act XX of 1863, only sue in the District Court, it was held that as it was competent for the plaintiffs to join this section did not apply so as to prevent the first plaintiff from joining with the second in instituting the suit in the District Court (4)

"Competent to try"-Competency here means jurisdiction The com petency of a Court depends upon the nature or subject matter of a suit, and upon the local and pecuniary extent of the Court's jurisdiction As regards the first certain Courts are Courts of special jurisdiction masmuch as some classes of cases involve disputes with which superior or specially experienced tribunals are particularly familiar, and which can more satisfactorily be disposed of by them such as Revenue, Admiralty, Probate Divorce Patent Insolvency Courts, and the like Further, cases of importance affecting considerable interests or involving questions of intricacy are left to be determined by the higher grade or superior Courts (5) So suits for damages for the infringement of the exclusive privilege to an invention or of a copyright in a design under the Inventions and Designs Act (6) or, for damages for the infringement of the copyright in hooks (7) have been specially made eognizable only by District Courts So suits under seet 92, post, can be instituted only in a High Court or District Court Miscellaneous proceedings unconnected with suits are generally triable outside the Presidency towns by District Courts though sometimes Subordinate Courts are empowered to

⁽¹⁾ Mirkhan : Kadarsa 13 M. 145 (1889) (2) Ib

⁽³⁾ Fazlur Rahim & Dwarka \ath Chowdhry, 30 C 453 (1.003) s c, 7 C. W \

⁽⁴⁾ Narayana + Kumarasami, 23 M. 537 (1899)

⁽⁵⁾ Hukm Chand C P C 238, Res. Jud 251

⁽⁶⁾ Act V of 1888, ss. 29, 57

⁽⁷⁾ Hamredoollah r Mahomed Asghur Hossein, 6 C 499 (1880), Ledgard r Bull, 9

A 131 (1880), a. 7, Act AX. of 1847, as amended by Act XII of 1876

dispose of them on a reference by the District Court (1) And in Bombay the District Judge can alone take cognizance of suits in which the Government or any officer of Government in his official capacity is a party (2) So in Madras, a suit by a zemindar for the dismissal of a zemindar larnam cannot be entertained by a District Munsif, such suit being cognizable only by a Subordinate or, if none, a District Judge (3) On the other hand, cases of easy settlement and minor importance are relegated to petty tribunals or to special Courts, such as Small Cause Courts or Village Munsifs' Courts See generally as to jurisdiction over the subject matter and persons, the notes to sect 9, ante, and the same also as to locality of jurisdiction which is more particularly dealt with in the next four sections and the notes thereto. The present section has reference mainly to the pecumary jurisdiction of Courts, the limitations of which, in regard to different grades of civil Courts vary in the several provinces of British India. See notes to sect 9 ante.

16 Subject to the pecuniary or other limitations prescribed Suits to be instituted by any law, suits—

subject-matter (a) for the recovery of immoveable property, with or without rent or

profits,
(b) for the partition of immoveable property,

(c) for the foreclosure, sale or redemption in the case of a mortgage of or charge upon immoveable property,

(d) for the determination of any other right to or interest

in immoveable property,

(e) for eompensation for wrong to immoveable property,

(f) for the recovery of moveable property actually under distraint or attachment,

shall be instituted in the Court within the local limits of whose jurisdiction the property is situate

Provided that a sunt to obtain relief respecting, or compensation for wrong to, immoveable property held by or on behalf of the defendant may, where the relief sought can be entirely obtained through his personal obedience, be instituted either in the Court within the local limits of whose jurisdiction the property is situate, or in the Court within the local limits of

⁽I) See 8 ... 6 Succession Certificate Act, 1853 Bengal Civil Courts Act AII of 1887, as repar is Probate an I Admin stration.

⁽a) Birday Civil Courts Act NIV (F1809, a 32 as an in let by a 17 Birday Revenue Jurish tin Acta N. (1180) a t. Act NV (f180) Act NII (f181) but in twice the attachment of the late off relinated as a private per in

Gopi Mahal I swar i Shiso, 12 B 358 (1887) as to suits against a municij ality — thin cla la l Municij ality i Mahan ad Jai ial, 3 B 110 (1978) — suits to which C lictor is a party Musa Miya Salich i Saya l Gulam 7 B 100

⁽³⁾ Venl'atanarasimha + Suryanarayana, L. V. 158 (1688)

whose jurisdiction the defendant actually and voluntarily resides, or carries on business, or personally works for gain.

Explanation.—In this section "property" means property

"Pecuniary or other limitations"-See as to these, notes to seets 9 and 15, ante

Scope of section -This section deals with local or territorial jurisdiction, which in the case of real actions depends on the situation of the property in higherian, and seek 20 deals with personal actions which depend on the place of accrual of the cause of action, or the residence of the defendant. The general rule of local turisdiction, of which this section is an embodiment, is that immoveable property is exclusively subject to the laws and jurisdiction of the Courts of the country in which it is situate. It follows from this that no other laws or Courts can affect it As expressly stated in the Explanation, the Courts of this country have, subject to the proviso, no jurisdiction in respect of immoveable property situate outside British India (1) But all property which has a foreign origin is not always outside the jurisdiction of Courts of this country (2) Where however, a suit was brought in the Court of the Subordinate Judge of Mirzanur for redening tion of lands lying within that district but included in the same mortgage with other lands lying within the family domains of the Maharaiah of Benares it was beld that as the Court had jurisdiction to entertain the suit in respect of the immeveable property in Milzapur, that jurisdiction could not be ousted hecause in the course of the trial of the suit it became necessary incidentally to decide, for the purposes of the suit, questions relating to mortgaged property held by the defendants outside the jurisdiction in order to determine whether the plaintiff bad a right to recover the mortgaged property situated in Mirzapur (3)

This section does not apply to the original civil jurisdiction of the Presidency High Courts which are governed by clause 12 of the Letters Patent, which empowers them to try suits for land or other immoveable property if such land or property shall be satuated either wholly or in case the leave (i) of the Court shall have been first obtained in part within the

⁽I) See Hukm Chand, Res Jud 324, 310
Prem Chand Dey t Mokhoda Dels 17 C
609, "03 F B (1890), Ragim Nath Das t
Kakkan Mal, 3 A. 568 (1881) Keshav t
lmaysk 23 B 31 (1897) So a Court cannot
declare a charge on property whelly outsile
its jurisdiction Gudri Lal t Jagannath
Ram, 8 4 117 (1886), and the decree can
only be given effect to as a money decree
ib, Vahomed Khuleel t Sona Koort, 23
W R 123 (1874) See Baldee Doss't Mod
Koort, 2 N W P 19 (1870) In Kashimath
t Anant 2 B L B 18 7 (1869) the suit was
ill to be exclude by the explanation and

therefore not to fall within the t rms of the

section
(2) Kashinath + Inant sugra

⁽³⁾ Girdham * Sheoraj I 1 431 (15"), and see Bolakee t Thakoor 5 C 3-8 (1880)

⁽⁴⁾ As to leave generally see the following cases. It must be obtained before the institution of the suit. Abdul Hamed t. Promothe

nath Bose 1 Ind. Jur N S 215, Rampurtab t Premsulh 10 B 50 J (1850), the late so given is in respect of the cause of action stated in the plaint and does not cover an amended plaint. Pampurtably Premsulh, 15 B 93 (18 9), and where a new diefin laint is

local hunts of the ordinary original jurisdiction of the High Courts. The High Courts have therefore jurisdiction if the land is in part within the jurisdiction (1) As to what suits are deemed to be "for land," see post.

Immoveable property.—As to the meaning of this expression, see notes to sects 2, 4, ante. The following have been held to be such I lands, houses; and such other things as are physically incapable of being removed, incorporcal hereditaments not of a purely personal nature, rights of common way, and other profits in alteno solo; rents, pensions, and annuities secured upon land, but not pensions and annuities not so secured, (2) taskashan allowances charged on revenues of certain villages, (3) an easement, (4) standing crops, (5) a tree standing on land, (6) the hie interest of a widow on meome arising from

added fresh leave to sue may be necessary Rampurtab v Foolibai, 20 B 767, 772, 771 (1896), Foolibai v Rampurtab, 17 B 466 (1893), it is not a mero formal order or an order regulating procedure, but one giving jurisdiction, Rampurtab v Premsukh, supra, at p 97, Hadjee Ismail v Hadjee Mahomed, 13 B L R 91 (1874), it must be distinctly sought and obtained, and cannot be implied from the fact that the plaintiff has leave to sue in formal pauperis Jairam v Atmaram, 4 B 482 (1880), the granting of leave is a matter of discretion, and has been refused where the plaintiff, defendant, and witnesses resided at a long distance from Calcutta, and the decree, if obtained, could be satisfied from property outside the local jurisdiction Radha : Mucksoodun, 21 W R 204 (1871), also where as to the great bulk of the claim the cause of action arose elsewhere Souza : Coles, 3 Mad H C R 384 (1868), Kessown t Luckmidas, 13 B 411 (1889), leave has been given it being reserved to the defendant to move to have the order set aside Radha i Mucksoodun, 21 W R 201 (1874) [it was held that the plaintiff could not object as he had acted on the order]. where an order is granted groung leave and the suit is withdrawn, the force of the original order is spent. Sabhapathi i Lakshmi, 21 M 293 (1900), leave given may be rescinded a defendant is not bound to wait for the hearing, but may apply on summons to take plaint off the file Kessow ji . Luckmilas, 13 B 404, 410, 411 (1559), or it may form the subject of an issue for trial in the suit Nagamon y r Janakuram, 18 M 142 (15)4), Rampurtab e Premankh 15 B at p '13 (15 0) though formerly doubted Balha r Mucksoodun sujri, it is new

settled that an appeal has from the order De Souza v Coles, 3 Mad H C R 38 (1868), Hadjee Ismail v Rohma Bye, 13 B L R 91 (1871), but an unsuccessful applicant should appeal and not male another application to another Judge Mudelly v Mudelly, 8 Vad H C R 21 (1873) As to absence of leave and res judicates as Abdul Kadir v Doolan Ribs, 97 B 763

(1913)
(1) Prasannamayi Dasi i Kadambun Dasi,
3 B L R, O C J 85 (1868), Jaram i
Atmaram, 4 B 482, 187 (1890), Jagadamba
i Padmamaun, 6 B L R, 086 (1871),
Seshagiri i Rama, 10 M, 448, 450 (1890),
Balaram i Ramchandra, 22 B 922 (1898),
[putition], Punchanun v Shih Chunder, 14
C 835 (1857) [id], the words "or in all other
cases of the cause of action shall have arised,
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Mortgage Bank i Suddurudeen 'hmed, 10 C

363 (1892)
(2) Collector of Thana : Krishnanith, 5 B

322 (1880)
(3) Keshav Covinda Vinayak, 1897, Boin
P J 425, s c, 23 B 22

(4) Mohunt Deo Sarun : Moonshee Mahomed, 24 W R 300 (1875), this was held for the purpose of the lumination Act

(6) Cheda Lal v Vulchrud, 11 A 39 (1891), Maddayya v Venkata, 11 M, 193 (1897), Gangy Prava I v Naram, 15 A 391 (1993), as soon as they are cut they become moveable property Sura Lall Montal I Amar Haji, 22 C 577, 885 (1893), Mangua Jha v Dollini, 25 C 692 (1892), but see now in all cast sp. 2, cl. 17

(6) Sakharama Vishram, 14B 207 (1894) Pan heratga Bhimray 22 B 610 (1837) lands of her husband's estate . (1) but not allowances paid in compensation for sauer collections from a hat . (2) not a night to be placed on the revenue register (3) The meaning of the term, as used with regard to Hindu Law was discussed in the under mentioned ease (1)

Suits deemed to be for immoveable property -In the case of the High Courts there has been considerable conflict of opinion as to the essentials of umsdietion, for which provision has been made by the Charters, to avoid which in regard to the practice of the Mofussil Courts the section contains detailed provisions as to local inrisdiction. The High Courts have ordinarily no purisdiction to try suits relating to unproveable property, where such property is wholly situate without the local hours of then original invisdiction (5) and it would appear to be doubtful whether the Equitable jurisdiction of the High Courts in India is of the same extent as that which has been claimed by the Court of Chancery, namely to take cognizance of any courty between persons residing within the jurisdiction respecting lands ontside it (6) Moreover, the present tendency, even in the case of English Courts, is to abstain from interfering in personam where the matter concerns land outside their jurisdiction (7) It is generally agreed that a suit for partition of immoveable property is a suit for immoveable property (8) So also is any suit seeking delivery to the plaintiff of land or other immoveable property. The Bombay High Court formerly appeared to take a view which would restrict the words "suits for land or other immorcable monerty ' to suits of the last mentioned character (9) The other High Courts have held that that expression includes suits other than those for the possession of land . in fact, every suit in which a decree is asked for operating directly on the land such as to enforce a security upon it for forcelosure or redemption Thus the decisions were conflicting upon the point whether such Courts are empowered to entertain suits for foreclosing or sale or redemption of property beyond their local jurisdiction, (10) or for

- (1) Natha : Dhunbham 23 B (1898)
- (2) Surendro Prosad : hedar Nath 19 C 8 (1891)
- (3) Bhilager Pandu, 19 B 43 (1893)
- (4) Balvantrao t Purshetant, 9 Bom H
- C R 99 (1872) (5) Letters Patent, clause 12, see Hukm
- Chand, Res Jud 318
- (6) See jer Sargent, CJ, in H. H. Holkar t Dadabhar, 14 B 353 359 (1890)
- (7) Land Mortgage Bank : Sulurudeen Ahmed, 19 C. at p. 367 (1892) See De Souza t British South African Co. 2 Q B (1892) 358 British South Mircan Co r Companhia de Mocambique 1893 A. C. 602 Hukm Chand, Res Jud 320 See Keshas r \inaval, 23 B at p. 97 (1897)
- (5) Ramchandra t Dada Mahades 1 B H C. H App. 70 (1801) Jairam's Atmaram. 4 B 482 (1880), Padmamanı : Jagadamba,

- 4 B L R 134 (1870) Balaram t Ram chaudra 22 B 922 (1898), Panchanun Wullick + Shib Chunder Mullick, 14 C 835 (1887) Sesharin Rau t Rama Rau, 19 VI
- 448 (1896) (9) But see heshas Govind a Vinaval. Ramchandra 1897 P J 425 in which Ranade J observed that analogs should not be pressed too far, and had been departed from in suits brought to recover money charged on immoveable projectly

(10) According to the decisions of the Calcutta High Court at is settled that the Court has not jurisdiction in such cases Last Indian Railway Co r Bengal Coal Co. 1 C. 95, 100 (1875) Juz. odumba Dossee r Pud domony Dosce, 15 B 1. R. 328, 329 (1875) . Bibee Jaun v Meerza Vahomed Hadee, I Ind. Jur \ S. 40 (1566), Lalmoney Dasur Juddomanth Shaw, 1 Ind. Jur N S 319 (1867). Bla puerer Ramdhene Doss, Bourke local limits of the ordinary original jurisdiction of the High Courts. The High Courts have therefore jurisdiction if the land is in part within the jurisdiction (1) As to what suits are deemed to be "for land," see post

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(1913)
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- (1) Natha : Dhunbham 23 B
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- (5) Lettera Patent, clause 12 see Hukm Chand, Res Jul 318
- (6) See per Sargent CJ, in H. H. Holkar t Dadabhai, 14 B 353 JoJ (1890)
- (7) Land Mortgage Bank + Sudurudeen Alimed, 19 C. at p 367 (1892) See De Souza t British South African Co. 2 Q R (1512) 358 British South Mircan Co t Companhia de Vocaimbi que 1893 L t 602 See heshau r Hukm Chand, Res Jud. 320 \mayak, 23 B at p. 97 (1897)
- (8) Ramchandra : Dada Mahades 1 B ll C. R 41p 70 (1861) Jairame Atmaram, 4 B 482 (1880) Padmamari t Jagadamba,

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Part.

specific performance of contracts relating to land similarly situated (1). In L. e. recent cases the Bombay High Court has also taken the broader view (2) Inthe Madras High Court, it was held that a " suit for laid" ircludes any aut in which a decree is asked for operating directly upon the land (3) and therefore includes any suit brought to enforce a security upon land, such as a suffire sale of land equitably mortgaged by deposit of title decids. Moore, J , ta ze that the pre ent section of the Code was simply an amplification with differ the old section of the Act of 1859, on which clause 12 of the Letters Patent Wait appears, based, ob erved that he was prepared to go further, and to kell that the phra e " suit for laid or other im roscable , roserts, as used in the Letters Patent, includes all suits mentioned in clauses (a) to (f) of this ect the If the property is situate out ide the juri-diction, the High Court cannot take cognizance of it, even if moveable property within the jury diction is also classed in it, as clause 12 does not quably the expression "in sur's for last," etc. with the word only, and the words "all other cases" are not to be uninted as including cases of suits for immoveable plus moveable property but the in which immoveable property is not involved (4) It is, homever remember admitted that every suit having any reference to immoveable property as not

a suit for immoveable property (5). It has been held that a me to recover title deeds of certain land out ide the local builts, even thoughts with the question of title to that land, is not a suit to obtain poses, on cr, or dad in

ny way with, land and is therefore cognizable by the High Court, (i) but this is a been disputed (2). So also where in a suit by a landlord for rent no relief is claimed in respect of the land, but it becomes necessary to determine what he nature of the tenancy was, that question does not make the suit on "for an I" (3). The High Court has also taken cognizance of an application to file in award which provided for the dissolution of a partnership in lands outside holocal limits, and also that the defendant is share in the property should stand harged with the payment of a certain fund to be due by him to the plaintiff, and that the defendant should execute a mortgage of his share to the plaintiff is security for such payment, and that the tea garden at Darphing should be old in Calcutta (4).

The general Launtable pure-diction of the High Court on the original side shich it has inherited from the supreme Court, which in its turn administered he Chancery Rules, must also be considered (ude post) So the Courts of quity will exercise their powers in personam in the case of trustees and others endent within their purishetion, to oblice such persons to perform trusts, to ATTY OUT CONTracts and to obey the rules of Laurty even where the subjectnatter of the trust or contract or equity may be land situate out of their juris betton (5) Again there is the Laustable surrediction by grant of an impraction r appointment of a receiver I has a suit for damaces to certain immoveable roperty by a nursance caused on it and for an injunction to restrain the nursance, ias been held to be a suit not for unmoveable property, but exclusively in ersonam (6) Simularly, a suit by some of the trustees of an endowment of ertain lands against their co trustees in possession, for a declaration of plaintiff s itle to be shebails jointly with the defendants for the settlement of a scheme or the performance of the worship, for the appointment of a receiver, for an ajunction to restrain the defendants from interfering with the property, and or an account, 15 not a suit for those lands (7)

(1) Juggernauth t Brijnath 4 C 322 18"8), folk in Rungo Lal Lohea t Wilson, C. W N 719 (1898)

(2) Zulckabar i Lbrahim Haji Vyadna, 7 B 494 (1912) Suit for title deeds of unoveable property is a suit for immove ble property, and see Bussunt Koomaru Kumal Koomaru, 78 D A Sal 168

(3) Rungo Lall Lohca v Wilson, supra, or even though the plannill a tile to the mid in respect of which the rent is sought o be recovered may incidentally come in uestion Chintaman v Madhavrav, 6 i.H. C. R. 29 (1869), and the property is tuate in a foreign State libuplat (lanhaju, 19 A 450 (1877) But such suits any be treated as local under special legis iton, vide post

(4) Kellio t Frascr, 2 C 445 (1877) The counds of the decision were that the suit did of involve any determination of title to land being in this respect distinguishable from Delhi and London Bank: Wordle 1 C 249 (1876) In the case however, of such a suit, and also others outside Presidency towns the effect of clause (2) of the section will have now to be considered

(J) See Delhi and London Bank v Wordie, 1 C 249, 252, 263 (1876), Bagram v Moses,

1 Hyde 284 (1862 3)

(6) Rajmohun Bose v L. I. R. Co., 10 B. L. R. 241 248 (1872). Sec allo East Indian Railway Co. v. Bengal Coal Co., 1 C. 9., 100 (1873). Delhi and London Bank t. Wordie 1 C. 249 2-1, 263 (1875) and cases there exted. As to the issue of prohibitory orders see Raimbohun Surkar v. hamince Debce 10 B. L. R. 63 π (1868), and Wood ref0s s Inquestions, 2nd ed., Ch. I.

(7) Juggodumba t Puddomoney, 15 B L. R 318, 324, 325, 330 (1875), but see as to recover, Hadjee Ismail t Hadjee Mahomed. it regards its decrees as commands or directions addressed to the defendant personally rather than as decisions directly affecting the subject matter of Though the Court cannot, in the case of lauds situate without the juisdiction, give relief in rem, still it em enforce its judgment, which is in personam by process in personam, as hy attachments of the person, lauds, and goods of the defendant within the invisdiction until the defendant complies with the order of the Court Thus in accordance with the principle laid down in the leading case on the subject, Penn v Lord Bultimore, (1) the Court of Chancery has entertained actions for account and discovery of rents and profits, for specific performance and injunction, for foreclosure of mortgages, and for the execution of conveyances and the like regarding lands situate abroad, and whether within the King's Dominious or not, though if the very title itself to the lands is in quest on, the Court will not assume jurisdiction (2)

The Courts have thus compulled the performance of contracts and trusts, which were not either locally or ratione domicility within their jurisdiction (3) But in this country the power to make orders in personam, though the subject matter of the snit is without the jurisdiction, which jurisdiction exists both 14 the case of the High Courts and the Provincial Courts, ninst he considered with reference to the limitations on immsdiction imposed in the case of the former by the Letters Patent, and in the ease of the latter by the provisions of this section In the case of the High Courts, regard must be had to the roal object of the smt and to what are the rights and intentions of the respective parties, and those eases which are founded upon the principle laid down in Penn v Baltimore must be distinguished from those which depend not so much upon the jurisdiction generally exercised by Courts of Equity, as upon the question whether the suit is substantially one within the statutory junisdiction conferred upon the Courts (4) So when a smt which, though in form one brought for an injunction or rehef obtained through personal obedience, is in substance a suit " for land," which land is situate without the local limits of the jurisdiction of the Court, the latter has no power to grant the rehef prayed (3) The Equitable jurisdiction of the High Courts is not as extensive as that which has been claimed by the Court of Chancery (6) Though the Courts here are governed by the same principles as those which are acted upon hy Courts of Equity in England, this is only so far as such principles are not at variance with express legislative enactment (7)

The test of jurisdiction in all such cases is rather the nature of the claim

^{(1) 2} White and Tudor, L C 837, 5th ed (2) See Woodroffe's Injunctions, 3rd ed

^{§ 19,} and cases there cited, and ante, p 157 (3) Ewing v Ewing, 9 A. C. 34, cited in Mashinath v Anant, 2 Bom L R 47, 43 (1839), but the jurisdiction has its hmits see

In re Hawthorne, 23 Ch D 743, ref to in heshav t Vinayak, 23 B at p 27 (1897) (4) Delhi and London Bank t Wordie, 1 C 249, 263 (1876), Land Mortgage Bank : Suduruddeen Ahmed, 19 C 358, 367 (1892)

⁽⁵⁾ Last Indian Radway Co t Bengal

Coal Co, 1 C 95 (1875), similarly in the case of relief by receiver Delhi and London

Bank v Wordie, supra (6) Vide ante, p 150 So it has been pointed out that the express words of clause 12 of the I etters Patent render the principles

of the decision in Paget v Ede, L R 18 Lq 118, mam beable Last Indian Railnay Co. t Bengal Coal Co , 1 C 95, 100 (1875) (7) Kashmath v Anaut, 2 Bom L R 17

⁽¹⁸⁹⁹⁾

made in respect of the property in suit rather than the actual situation of the latter. If the suit is not by reason of its substantial character and the provisions of the Charters, within the cognizance of the Court, the latter is unable to grant relief. But where the relief sought is purely in personam and not in rom the Courts are empowered to make a decree which shall be of the same character (1)

The same rule applies in the case of Courts other than the Presidency High Courts, but in this case the provisions of this section must be considered Under it, such Courts may exercise a purisdiction in personan, but the jurisdiction seems to be of a more functed extent. Not only are they expressly deprived of power to entertain suits for forcefosure, sale or redemption, but the limitations imposed by clause (d) are in terms extensive, and the provise determining their powers to act in personan limits the exercise of such powers to cases where the property is leful by or on behalf of the defendant (2) resident within the jurisdiction (3) when the rule foodly can be entirely obtained through his personal obedience, and where the property is situated in British India (3).

"Actually and voluntarily resides."— is to the meaning of these words, see the notes to seet 20

17. Where a suit is to obtain rehef respecting, or comsults for immoveable property
pensation for wrong to, immoveable property
stuate within the jurisdiction of different
Courts, the suit may be instituted in any

Court within the local hmits of whose

Jurisdiction any portion of the property is situate

Provided that, in respect of the value of the subject matter
of the suit, the entire claim is cognizable by such Court

Scope of section — This section gives jurisdiction to a Court to entertain a such in respect of properties partly attente within its territorial limits and pirtly out of it, where the same rulef is sought in respect of the whole of the properties (5). The section corresponds to sects 11 and 12 of the Code of 1859, as also to sect 19 of the last Code, with the exception that the

⁽¹⁾ See Weedreffe's Injunctions 3rd ed b 47

⁽²⁾ Crap t Watson, 20 C 683 (1893), in which the provise was hild not to apply where the wrong for which compensation was accept was tresp-as to property in the plant tiff spossession. The reason of the ratine tien introduced by these words does not appear to be clear, but to make the provise appear to be clear, but to make the provise provided by the property must be so held at the time of the institution of the sut. Lack man Das v Hasiett, 1891 P R No. 39.

Hukm Chand C P C 282

⁽³⁾ Isak v Khatua, 23 B 756 (1899), s c, 1 Bom L R 370

⁽⁴⁾ See Reshav v Vinayak 23 B 22 (1897) (dist Ratanshankar & Gulabshankar, 4 B H O R 173 (1867) in which the question of table only mendentally arose), where the sunt was held to fall within the substantive clause of s 16 of the Code of 1882, and was not covered by the previse.

⁽⁵⁾ Masovk : Steel, 14 C at p 666 (1887)

grounds upon which jurisdiction is given on account of residence a guide will be found to the true interpretation of the term, and the grounds upon which such jurisdiction is given are the convenience not of the plaintiff but of the defendant and his witnesses, and the advantage which may accrue to the former by enforcing the judgment of the Court within its own jurisdiction (1) These connote a residence of a more or less permanent character

Nextly, even in the case of the same enretment and the same portion of it there can be no fixed rule for all cases. Each case must depend upon its own particular circumstances (2)

It is necessary, in the first place, that the readence be actual and bona fide, and not merely colourable or collusive, for in such case there is no residence at all. Assuming this, it cannot, however, be laid down with precision how long a person must stay in a place, and in what way, so as to be deemed to reside there. A very short period of actual living has been held sufficient in some cases (3). This if may be considered those cases where a man has no permanent residence. Great stress is laid in the cases on the fact as to whether or not the person said to reside within the jurisdiction had at the time any other residence elsewhere (4). When a man has no permanent residence he must be taken to dwell where he is actually staying (5). So in such cases a stay of a month was held sufficient in the case of a man who had no other residence, (6) the stay of a ship's captain in port, (7) and even ten days (8).

The other case is that in which a person has a permanent residence else where A person may, however, dwell or reside at more places than one (9) But in order to afford foundation for jurisdiction the residences must be of a permanent character and be visited from time to time (10). When the defeu dant has a fixed and permanent residence elsewhere, to give jurisdiction on the ground of residence, something more than a temporary stay within the local limits of the Court is required (11). So a temporary residence of time days, (12) a residence for the temporary purpose of attending a trial of a suit in which the party was a defendant, (13) staying in a place with a definite object

⁽¹⁾ Lmritloll v Kidd, 2 Hyde, 117, 119

<sup>(1864)
(2)</sup> Ib at p 119, Mahomed Shuffli i
Laldin, 3 B 227, 229 (1878)

⁽³⁾ In the matter of Do Momet, 21 C 634, 638 (1894)

⁽⁴⁾ Ib

⁽⁵⁾ Shri Goswami v Shri Govardhanlalji, 14 B at p 549 (1890)

⁽⁶⁾ Morris v Baumgarten, Goryton, 162 (1865), foll, Maybav v Tulloch, 4 N W P 25 (1872) Tho decision would probably have been the other way if the defendant had had a permanent dwelling elsewhere Shri Goswami v Shri Govardhanlalji, 14 B at p 549 (1890).

⁽⁷⁾ The Judges of the Small Cause Court, 2 Inyl t Bell, 1 nef, Emuricoll a Kidd, 2 Hyde, 117, 118 (1861)

⁽⁸⁾ In the matter of Do Momet, 21 C

^{634 (1994)} a case under the Insolvent Act (9) Orde v Shimor, 3 A 91 (1889), Patima v Sakima, 1 A 51, 52 (1875), in Arshadmey Dossec t Kally Kristo Ghose, Goryton, 24 (1864), jurisdiction was upheld, as Calcutta was the usual residence for part of

the year
(10) Shri Goswaini t Shri Govardhanlalji,

¹⁸ B 299, 293 (1891)
(11) Ib at 14 B p 550 (1890), Zalom
Towarree : Gobindgeer Gossam, 1 Ind. Jur

<sup>85 (1862)
(12)</sup> Cowasjeo Framjec v Wallace, I B.

H C R 113 (1863)

⁽¹³⁾ Emritloli v Ludd, 2 Hyde, 117 (1861), see Sammatha v Varisai, 2 M H C R 304 (1865)

or fixed purpose for a short and limited period,(1) will not, in the case of a man who has a bond fide and permanent abode elsewhere, give jurisdiction. So where an officer attached to a regiment at Vellore went on medical leave to Madras, where he resided in a rented house and finally returned to Vellore, the latter was held to he the place where he dwelt (2)

In conclusion, it may be said that while neither "dwell" nor "reside" necessarily implies a permanent state of things, (3) yet when it is desired to speak of residence for a limited time a limiting adjective is applied, and when there is no such qualifying adjective permanent residence is understood (4). The residence contemplated by the Letters Patent, (5) and (subject to Explanation I) the Code, must be of a more or less permanent character, of such a nature as to show that the Court in which a defendant is sued is his natural forum (6). The Court will not snatch a jurisdiction which was not intended to be conferred (7). As regards Explanation I, wide post. Sect. 265 of the Contract Act is permissive and does not prohibit a suit elsewhere than at the place where the partnership was carried on, if a sufficient ground of jurisdiction exists (8).

Explanation I —The term residence is hero applied to the temporary residence of a defendant in respect of a cause of action arising at the place where he has such temporary residence. That is an enlarging explanation for a limited purpose, and not an interpretation or definition of the word as the such that the small Cause Courts Act, XI of 1865 (10) In respect of any cause of action arising at the place of permanent dwelling, he must be sued there (11) The change in the Explanation appears to be of a verhal character

- (1) Shri Goswami v Shri Govardhanlali, 14 B at y 550 (1800) So the Supreme Court refused jurisdiction in the case of a prison having daily employment in Calcutta but reading outside it Goculchund Banerjee t Camdeb Mookerjee 1 Mor 371, but to whin he often slej t in Calcutta Haberley t Bason, 1 Mor 371, or outside when the sole purpose was to avoid jurisdiction. Martindell t Toman, 1 Mor 371, Bhano t Hossein Mr. 1 Mor 371, Blano t Hossein Mr. 1 Mor 371, Mor 371, Bhano t Hossein Mr. 1 Mor 371, M
- (2) hissun Sing : Sturt, 5 M. H. C R
- 471 (18"0)
 (3) Shri Goswami i Shri Govardhanlahi,
 14 B at p. 543 (18.0), Mahomed Shuffli i
- Laldin, 3 B 227 (1873) (4) Shri Goswami t Shri Govardhanlalji,
- supra (5) 1b, at p 502
- (0) He. It was not the intention of the latters Patent to give jurisdiction in cases of temporary residence only. Shir Goawsini t Shir Govardhanlalp, 18 b. at p. 22 (18-1)

- jurisdiction is given on the score of residence when that residence is substantially the ordinary residence or dwelling of the defendant hmittoli | haida, 3 Hade at p. 119 [1861], and see Nusserwanjie Pestonjio Wadia 1 |Leonora Pistonica, 38 H. 224 (1913)
- (7) Shri Goswami c Shri Govarlhanlalji, 14 B at p 554 (1530)
- (8) Ramasami e Thiruvengadasami, I M. 319 (1877)
- (4) Shri Goswami : Shri Goswithandaly, It B at p. 419 (15-50), the jurpose is to axe; it he rule (see Macdougal) : laterson, 14 G, 15 7-50) that a jerson having a jermanan it residence at a jlace cannot be said to reside at any other place where he has a hologing for a temporary jurpose only, or, to be the words of the jersent Code, a temporary
- readdine. (10) See Ugarchand o Smajimil, 2 hourds. R. 1605, 100 (1509)
- (II) See Lir_ma Luray e Hackim, 7 W. ls. 117 (1555).

Explanation II .- This is in general conformity with the Eu_lish decisions, though under the Indian rule the carrying on of husiness is not only a circumstance for determining the residence of a company, but an independent ground of jurisdiction also (1) The Secretary of State in Council is not a body corporate, though he may be used as such (2) Foreign corporations or companies have their domicile in the country where they are incorporated, and thus come into existence But they may also be deemed to reside in the country in which they have their seat and principal place of business (3)

"Carries on business."-This phrase is of varying import, and must be interpreted according to the context and the apparent purpose of the Legisla ture (1) In the first place this expression here connotes more than being busy or doing husiness merely, and more than mere service, employment, or occupa A man who busics him elf about science or politics, though he may have a great deal of husiness to transact in respect of these matters, does not "carry on business", nor does a domestic servant, a clerk, or assistant in a trading or mercantile concern. The words mean the carrying on of business by the person whose husiness it is, and mean to describe a person managing or conducting his own, and not somebody else's, husiness. He must either manage or conduct a business of his own, or the husiness which is managed or conducted for him must be his own The servant or employee is not carry ing on his own business, but his master's A person carries on husiness when he controls or directs it (5)

The term "business" is not limited to commercial business. So where a person was in daily attendance on his patients as surgeon, anothecary, and acconcheur within a certain district, ho was held to he carrying on business there (6) It has, however, been held that zemindary business is not within the rule, (7) nor the receipts of presents or offerings (8) There is a conflict of opinion as to whether the Government can (9) or cannot (10) be said to carry on business

⁽¹⁾ See the English cases which will be found cited in Hukm Chand, C P C. 315, 124, where it is also pointed out that the Explanation settles a number of points upon which there is a conflict of opinion in the Lughsh Courts

⁽²⁾ Doya Naram Towary v Secretary of

State, 14 C 256, 271 (1886) (3) See Hukm Chaud, C P C 317, where

the question is discussed (4) Goculdas v Ganesh Lal, 4 B 416, 122

⁽¹⁸⁸⁰⁾ (5) Graham t Lewis, 22 Q B D 5

⁽⁶⁾ Mitchell : Hender, 23 L J Q B 273

⁽⁷⁾ Anonymous, 23 W R 223 (1875) Sea Nobin Chunder v Buroda Kant Shaha, 19

W R 341 (1873) (8) Shri (soswami i Shri Govirdhanlalji, 11 B 541, 552 (1850), s c., m ipped, lb b

_90 (1831)

⁽⁹⁾ Biprodus Dey : Secretary of State, 14 C 262 n (1885), Subbaraya v Government, 1 M. H C R 286 (1862) It is also pointed out m Hulm Chand, C P C p 321, that several stats have been decided in the High Courts and Presidency Small Cause Courts in which the cause of action did not accrue within the local limits of their jurisdiction, and those Courts could have jurisdiction only if the Government could be held to carr) on business within those limits see Ros Johnston v Secretary of State, 2 Hyde, 153 (1864), P & O S N Co & Secretary of State, 5 B H C R App 1 (1861), Brito v Secretary of State, 6 B 251 (1881), Hart Bhanji t Secretary of State, 4 M 311 (1579)

⁽¹⁰⁾ Rundle : Secretary of State, 1 H) de, 37 (1563), in which it was said that Govern ment should be suid where the cause of

In the under mentioned case (1) the Court of first instance, whose judgment was reversed on appeal (2) hell that the earrying on of business must involve pretty much the same element of permanency as a necessary to convert a nere "staying" into "dwelling." But it does not seem to be necessary that the business should be carried on permanently, and each case must be decided on its own facts (3). Thus a person who had no regular office, but went once or twee a week from the Mofussal to a friend's house in Calcutt, and saw people there on business, and contracted there with some man for the hire of cargo-boats, was held to carry on business or personally work for gain at Calcutta (4).

The husiness need not be one extrict on personally (5). This is shown by the emission of the term "personally" before the words "carry on business," and its introduction before the words "work for gain". The defendant must, however, carry on some independent rigular business in person, of at an office or other fixed place of business, either personally or by clerks or servants employed by the defendant and conducting the business under his control, and in his individual or partner-hip name (6). So in the last mentioned case it was held that the defendant had no place of business in Madras the sales being effected by another person. X in his independent business or trade of a general broker for a commission received from the purchasers. In such case it was X and not the defendant who was carrying on business in Madras.

A person may carry on business at the same time at several places by means of different agents as it often really the case. The employment how ever, of a person as one's commission agent, or simply consigning goods to a commission (7) or general (8) agent for sale by him in the exercise of his own calling does not constitute carrying on business at the place where that person or agent may be residing or carrying on his own business or

action arics Doya Narain Tewary i Secretary of State, 14 C 256 (1886) (the words "earry on business or personally worl for gain ' are inapplicable to the Secretary of State)

⁽¹⁾ Haydan Das v Bhajwan Das 7 B I R 102, 112 (1871)

^{(2) 7} B L R 535

⁽³⁾ In Bill No 2 of the Code of 1877 an Frplanation was added to provide that the business contemplated must be carried on at a fixed place for at least a certain time but the Explanation was omitted from Bill No 2.

⁽⁴⁾ Grish Chunder v Collins 2 Hyde, 79 (1862), and so does a captain of a foreign ship trading to this port R v Judges of Small Cause Court, 2 Tayl & Bell 7 (1851)

 ⁽⁵⁾ Yuthaya Chetti t Alian 4 M 209
 (1880) , Kessowji t Ahimii 12 B 507 721
 (1888) Girdharv Kassigar, 17 B 662 (1893)

Chunammal t Tulu hannatammal ? VII C R 146 (1866) in which Scotland, C J mo hided bus opinion to the contrary in Subbaraya t Government 1 V H C R 286 (1862) which last case was followed as regards the jurisdiction of the Small Cause Court in Chundeo Churn Dutt v Edulpic Cowaspee S C 678 (1832) In addition to actual inhabitancy the Supreme Court hal jurisdiction by constructive inhabitancy on the ground of trading. As to factors, however, see Sunker Doss t Manickram Pulton, 334 (1843)

⁽⁶⁾ Chinnammal v Tulu Kannatammal

^{3 %}L H C R 146 (1866)

⁽⁷⁾ Khimjeo t Forbes 8 B H C R
O C 102 (1871) Gopee Mohun t Protab

Chunder 11 W R 530 (1869)
(8) Chunammal v Tulu Kannatammal 3
W H C R 146 (1866)

doing or selling what he may have been employed to do or sell. In the under mentioned case (1) it was held that a defendant does not carry on business at a place, though he may have an agent there for certain purposes connected with his business, where that which is the essential ingredient in his business does not take place within the local limits of the jurisdiction of the Court In delivering judgment, Saus c. CJ, said "To determine whether a defendant is carrying on business, it must first be ascertained what his par ticular trade, calling, or occupation is, and then we can examine whether the facts proved amount to a carrying on of that particular trade, calling or occupa tion within the jurisdiction. The present defendant is admittedly a retail vendor in European goods, and obtains his highhood by the profit which he makes upon his siles, without 'sale' he could not make profit, or, in other words, he could not carry on business for the purpose of gaining a livelihood 'Sale' is an essential in redient in carrying on this defendant's business, and in the present case, to give this Court cognizance of suit upon that ground it must be shown that 'sale' by the defendant in the way of a retail dealer has taken place within our territorial limit. The place of sale, in the present case, is the true place of the defendant's carrying on business

As to the question whether jurisdiction in regard to foreigners is limited to those who personally carry on business, tide ante, p. 171

"Personally works for gain "-These words were inserted to give the Courts jurisdiction over persons who, though dwelling out of the local limits, personally worked for gain within them (2) So a person residing at Ghoosery, outside Calcutta who habitually and constantly came to Calcutta for the pur pose of making contracts as part of his business as a contractor, was held to carry on business and worl for gain in Calcutta (3) An advocate of the High Court residing out of the local limits but who holds hunself out as ready to practise in the High Court and who goes whenever he is engaged to appear personally worls for gun within the local limits (4) In order that jurisdic tion should attach on the ground of working for gain, such working should be liabitual (5) Further, to constitute work there must be some mental or physical effort. To take advantage of an innate holiness as a reason for accepting presents or offcrings as your natural due is not work, nor is the blessing which the defendant invokes upon the dwellings which he visits (6) As to whether Government can be said to personally work for gain, wide ante p 180

"Gause of action —The meaning of this term has been the subject of considerable controversy which however, so far as this section is concerned is now settled, and it is not proposed to do more than to give the references to the somewhat immerous decisions in which the question was discussed prior

Hyde 79 (1862)

⁽¹⁾ Framjee v Hormasji 1 B H C R, O C 1, 220 (1865)

⁽²⁾ Siri Goswami v Shri C varli anlah

¹⁴ B 741, 553 (18 0)
(3) Greeschunder Bonn tjee / Collins 2

⁽⁴⁾ Ras Naram Dave Acrton 6 N W P 13 (18 3)

⁽⁵⁾ Shri Goswan it 1 Shri Govar II at lolj 14 B 541 553 (18 ii)

⁽C) Ib at p ""4 v c in appeal 18 II "() (1894)

to the amendment of the section in 1888. Sometimes these words have been even the restricted sense of mimediate occasion of the action, which itself means the right to have recourse to the Courts, in other and nerhans the greater number of cases, the wider sen e of necessary conditions of its maintenance. In the former sense it is the more matter of fact, the failure of the defendant to do, or forbear from doing, to give or make good, that which the plantul's right entitles him to misst upon-in other words, the infraction of the right, as, in the case of a contract, its breach. In the latter sense it is this matter of fact alus the right re ident in the plaintiff, or, to take the example cho en both the making of the contract and its breach (1) In this list sen c. "can c of action ' therefore means every fact which is material to be proved to entitle the plaintiff to succeed. (2) and everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cau e of action . (3) though the term does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved (1) In this view of the case, the cause of action (which must exist at the date of the action (5)) is composed of several parts. which must, of course, neces arily include as one of such parts the infriction (6) of the right claimed

The next question is, whether in order to give jurisdiction the whole cause of action should have air en within the jurisdiction or whether it is sufficient that a part of such cause of action should have so arise. As regards the Presidency High Courts, it is well settled that the term "cause of action," as used in clause 12 of the Charters (which, and not this section, governs such Courts), means the whole cause of action and not a material part of it (7)

⁽¹⁾ See the learne t sudement of Holloway J, in Do Souza t Coles, 3 M II C P 381, 406 (ISGS) as also the judgments in Copt Krishna Gossami r Micomul Banner 100, 13 B L R 401 (1874) and Kahdhun Chuttanadhya : Shiba Nath Chuttapadhya 8 C at p 488 (1882), in which the I'nglish cases will be found collected. Whatever meaning be attached to the term it does not depend upon the relief claimed Thakur Shankar v Dya Shankar, 15 1 1 66 (1887) an I has no relation whatever to the defence but refers entirely to the grounds set forth in the plaint or in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in his favour Mt Chand Lour t Partab Singh 15 I 1 156 (18881)

⁽²⁾ Cooke: Gill, 8 C P 107 So in a suit for a legacy against an administrator the grant of administration (Fuller t Mackey, 2 E & B 573) for a reward for apprehension and conviction of a thief, the conviction (Hernaman; Smith 10 Fr 6.9)

on a life policy the death of the assured (Callant's Champion 7 T R: 20-3) are parts of the respective causes of action. The fact must be both necessary and material to be proved. If not it is no part of the cause of action. Loudon, Bombay and Mediter ranean Bank's Ba leo Beebee 5 B 42 (1880) (3) Read w Brown 22 Q B D 128

⁽⁴⁾ Ib at p 132 Sec Pragdas r Doula tram, 11 B 257 (1886)

⁽⁴⁾ Gulzar Singh t Aalyan Chand, 15 A 339 (1883) in what case though the plain tiff was not entitled at the commencement of the aut to possession, it was held that if the other party would have been without a defence

⁽⁶⁾ Nurdin t Alavudin, 12 M 134 (1888)
(7) De Souza v Coles 3 M H C R 384 (1868) Methoot Volum Roy: Jadoomoney
Dossee 10 B L R 122 (1872), Hills t
Clarl, 14 B L R. 367, 369 (1874), Jum
moonah Persad t Zaibunessa 5 G L R at p
276 (1879), Mulchan I v Suganchan 1, 1 B

though if a part of the cause of action shall have arisen within the purishet a suit will be in the High Court if leave have been proviously obtained. For the purposes of the Letters Patent, the expression 'cause of action means the bundle of facts which it is necessary for the plantiff to prove before he can succeed in his suit. It does not include irrelevant or immaterial facts, but embraces material facts without which the plantiff must fail. If any of these material facts have taken place within the jurisdiction of the Court then leave can be given under clause 12. But if no such material facts have taken place within the jurisdiction of the court then leave can be given under clause 12. But if no such material facts have taken place within the jurisdiction and leave is given there then it is open to the defendant to contend at the hearing that the Court has no jurisdiction (1)

Pror to the amendment of the corresponding section of the last Code in 1888 it was held that the words therein used did not mean the whole cause of action but any material portion of the nature stated in Explanation III to that section which was added in the year mentioned. And therefore the Courts governed by the Code were held to have jurisdiction if such a material portion of the cause of action arose within their jurisdiction (2). Seet 7 Act VII of 1888, gave effect to these decisions by adding the third Explanation to the former section which rendered further discussion in the case of suits arising out of contract unnecessary (wide post). The rule moreover, has been reaffirmed recently to be of general application in all suits (3). And now the section expressly gives jurisdiction where the cause of action wholly or in part arises. No leave is required in the latter case.

Under the Code British Courts are empowered to pass judgment against a non resident foreigner provided that the cause of action has arisen within the jurisdiction of the Court pronouncing the judgment (4) The Court in whose local jurisdiction the funds of an endowment received from a foreign

^{23 (1875)} Dhunjesha v Fforde 11 B 649 (1887) Kalidhun v Shihanath 8 C at p 493 (1889) Rampurtab : Premsukl 15 B 35 (1890) Doya Narain Tewry v Secretary of State 14 C 256 (1886) In Muhammad Abdul Kadar v E I Railway 1 M. 3 5 (1878) where it was admitted that cause of action meant the whole cause of action it was held that the breach of the contract constituted the whole cause—a view which has been dissented from by the Calcutta High Court Doya Narain Tewary v Secretary of State 14 C at p 270 (1886) and the Bombay High Court Rampurtab: Premsukh 15 B at v 102 (1890)

⁽¹⁾ Motilal v S majmull 6 Bom L R 1038 (1904)

⁽²⁾ Gopi Krishna Gossami v Nilcomul Ban nerjec 13 B L R 461 (1874) Hills v Clark 14 B L R 367 (1874) Llewhellin v Clum 1al 4 A 423 (1882) Bishunath i Hal Baksh 5 4 2 7 (1883) Kal Ihuu i Sliba

nath 8 C 40.5 (188°) Lalge Lall v Hurdey Naran 9 C 105 (1882) which also dealt with the effect to be g ven to the Illustrations the first of which is taken from Winter v May 1 M. H. C R 200 (1863) and the second from De Souzar Coles 3 M. H. C R at p 307 (1868) Contra Jummononah Persaq v Zarbunessa 5 C L. R 263 (189)

⁽³⁾ Banko Behari Lal v Pokhe Ram 25 A 48 (1902) which was a suit asling that a compromise and decree founded thereon might be declared vod and for an injunct on restraining execution

⁽⁴⁾ Rambhat v Shankar Baswant 2.5 B 528 (1901) s c 3 Bom L R 82 So also mader the Charters Barah Meah Saib t Khajee Meah 4 M H C R 218 (1869) contra Kessowji v Khimj 12 B 507 (1883) which was dissented from in Gudhar t Kass gar I B C (2 (1893) t de post 1 180

territors are expended by the parties reading there, has full power to determine questions as to the management of the finide quite apart from the title to the grant, which may not be in dispute (1). As to residence, etc., giving jurisdiction in case of foreigners, so post, and as to cases in which the cause of action arrises below law water mark and within three indes of it the case undermentioned (2).

Whatever the cause of action may be the jurisdiction created at the place of its accrual is not affected by the death of the person originally hable, and it is a general principle that the representative of a deceased person may be sued in that Court within the jurisdiction of which the cause of action with the deceased person arose (3). The accrual of a cause of action within the local limits of a Court's jurisdiction will not give the Court jurisdiction over a suit in which any other cause of action arising out of those limits is joined, it being, in fact, a pre requisite of the right to join in one suit more than one cause of action against a defen hant that the Court to which the plaint is presented should have jurisdiction over all the causes of action (1).

The term "cause of action as used in the Code applies to torts as well as contracts (5). Reading clauses (a), (b), and (c) with the words 'energy suit' it appears that all suits of whatever nature subject to the limitations in the preceding sections, are referred to Sect 19 contains special provisions with regard to suits for compensation for wrong done but suits on tort not within the words of that section will fall under this. In India, the cause of action has been always held to furnish the forum not only of suits in contracts but in its

broader sense to apply also to suits on torts

As already stated the words 'cause of action in this section do not mean necessarily the whole cause of action but a surt to which the section epplies may be instituted where some portion of the cause of action arises (6). So m a surt praying that a fraudulent compromise and decreo founded thereon might be declared your and for an injunction restreining execution it was held that though the decree was made and compromise entered into in Calcutta (where in respect of them the cause of action arose) yet a material part of the cause of action, naturally the infringement of the plaintiff's right by executing the decree having taken place in Crumpore the suit lay in that district (7).

Though a special provision as to jurisdiction over suits on torts has been made in sect 19, there is nothing in the general words of the present one to exclude them from its operation. The Courts will therefore have jurisdiction

(1) hashmath v Anant 2 Bom L R 47
 (1899)

(1899)
(2) Balan Mayacha t Nagu 2 B 19
(18 6)

(3) Ladd t Parbutty, 2 Hyde 18 (1862) Hargopal v Abdul Khan 9 B H C R 429 (1872)

(4) Khmji Jivragu v Purushotam 7 U
171 (1883) And if the main relief cannot
be granted a right which is only ancillar;
to the principal right cannot be enforced

immbal : Lakshman 20 B 495 500 (1895) (5) Katidun Chuttapadhya : Shiba Nath,

8 (at p 491 (1882)

(6) Banke Bebari Lal t Polhe Ram 2, 4 48 (1992) Under the last Code as regards sunts arising out of contract the matter was made plain by Explanation III and now clause (c) shows that is so in all cases

(~) Ib

when the cause of action arises within their jurisdiction or the defendants reside, etc, there And it is not necessary that both the constituents of jurisdiction should exist in British India (1) The previsions of this section are independent of the general principles of international law, but there is nothing even in these principles to restrict the jurisdiction of the Courts of any country to cases in which the cruso of action should have rusen in that country. In England it is settled that an action will be there against a defendant there upon a trans action in a place in another country (2) Explanation III to the former section had no reference to torts But the term "cause of action" was, under the last Codo, independently of that explanation, construed to mean not the whole cause of action—if such cause of action involves more than the mere commission of the delict-in suits to which the Code applies (3) Probably, the cause of action will usually be construed in a restricted sense, so as not to involve the right violated, but to denote only the violation or the breach of a duty which outsitles the plaintiff to relief (1) In any case, a large number of cases in tort will come within the special provisions of the preceding section. In a recent English case dealing with the offect of a judgment in the Calcutta High Court in divorce proceedings coudoniming in damages a defendant, a British eubject, who though formerly resident in Iudia, had left this country before the potition was assued, and was now domicaled in England, it was argued on his behalf that the Calcutta High Court had ne jurisdiction over him, but it was held that the power to give damages was ancillary to the judgment on status concerning the marriage, which judgment, being in rem, would bind the world (5)

A Court may entertain a cust to set aside a decree on the ground of fraud provided that the requirements of this section or of the Charter, as the case may be, are satisfied (6) In the case of a libel, the suit will be where it has boen published (7) In a suit to get aside a release executed in Calcutta of the plaintiff's interest in certain property in Bombay it was held that the cause of action included the effect of the release on the property in Bombay, and did not wholly arise in Calcutta (8) This section, in the case of suits between

⁽¹⁾ See Bahan Mayacha : Nagu Shra vucha 2 B 19 (1876)

⁽²⁾ Hukm Chand, C P C 310, Machado v Fontes, 1897 2 Q B 235

⁽³⁾ Vide p 184

⁽⁴⁾ See Hukm Chand C P C 311, Lal tec Lal : Hardey Naram 9 C 105 (1882) Gom Krishna v Nilcomal, 13 B L R 461 (1874) Hills v Clarl, 14 B L R 367 (1874), Llewhellin : Chunm Lall, 4 A 423 (1882), Bishanath & Hahi Bal sh, 5 A 277 (1883), Ram Pertab Singh v Bholabutty, 9 W R 486 (1868) See as to different parts of cause of action in suits on torts | Kartin Churn : Gopal histo, 3 C 261 (1877) [1 kdgo. Trau 1], Hudjee Ismail v Hadjee Mahomed, 13 B L R 391 (1874) [Fraudulent rope sentations, suit to set asido releas], I u kly

v Johnston 6 B L R 141 (1870) [Malicious prosecution? The matter is not of practical importance so far as suits in the High Courts are concerned, as in all cases of doubt leave is usually asked for and given, and as to

other Courts see now clause (c) (5) Phillips v Batho 17 C W N celxi

⁽⁶⁾ Nistarini Dassi v Nundo Lal Bose, 30 C 369 (1902), s c, 7 C W N 353 A suit to act aside a consent decree of the High Court on the ground of fraud may be brought without provious leave to sue having been obtaine I, though all the defendants dwell without the jurisdiction Bibes Soloman t Al lul Azız, i C. L. B. 366 (1879)

^{(7) (.} flett : Ruel chand, 13 B 178 (1888) (9) Halpe Ismail : Hadgee Mahon ed, 13

H H H (1874)

landlord and tenant, is controlled by seet 141 of the Bengal Tenancy Act (1) In cases instituted under Act IX of 1861, the Court is to be guided by the Code, and where there is an objection to jurisdiction this section will be considered (2) As regards Prohato jurisdiction, see Act V of 1881 (3)

Explanation III. of former section -This has been omitted, as its relation was considered unnecessary owing to the addition made to sub clause (c) of the words "whelly or in part" in reference to the cause of action Though omitted the Explanation gave a correct statement of what is still the law (4) and is therefore hero dealt with This Explanation settled the signification of the term "cause of action" in the case of suits arising out of contract. Its language was wide enough to include all eases of contract, though not obhermon in the nature of quasi contracts,(5) though it is said (6) that the corresponding rule of locus solutionis in other countries does not apply to contracts already executed or creating personal status Certain relations, such as those of marriago and adoption, though originally based on contract, are not themselves sources of rights and duties on account of the grounds of contract (7) While a suit may be arising out of contract within the meaning of the Explanation, it does not follow that all the clauses of that section will be applicable to it, as in the case of a suit arising out of contract claiming a suni pavable not in performance of the contract, but as damages for its breach (8) It may be a question whether the language of the Explanation is explicit enough to include suits for the can cellation of contract, the forum controctus in Roman law being generally held to apply to actions arising out of the natural development of the obligation, and, therefore, leading to its fulfilment A suit for the cancellation of a contract must, however, always be for some cause, and the nature of the cause and the place of its accrual, and not necessarily the place of the contract, will furnish the forum for such suits (9) But whether it does or not the suit will be within the section

In suits arising out of contract the cause of action is deemed to arise, accord-

ing to the omitted Explanation, at three places -

(a) The place where the contract was made. The determination of this question belongs to the law of contracts. This will be the place of meeting where there is a personal meeting of the parties—except perhaps, where the validity of a contract is made to depend upon the observance of a particular form, in which case the place at which that form is completed in the true place of the contract, because untilsuch completion no party is bound (10)

⁽¹⁾ Fazlur Rahim : Dwarks Nath, 30 C 4 3, 456 (1903), s c, 7 C W N 402

⁽²⁾ Sarat Chandra Chakarbats v Forman, 12 A. 213 (1890) [removal of minor from plaintiff's custody]

⁽³⁾ And see Bhanrao t Lakshmibas, 20 B 607 (1892) Lardunji t Navagobias, 17 B C+3 (1892) Asto suits to set aside certifu ate of heirship granted by Political Resident see Ammuuni t Krishina 16 M 405 (1892)

⁽¹⁾ Sal gram r (1 abs Mal 31 4 49(1 111)

^() See Hukm Chand C P C 235 309

⁽b) Ib . 29%

⁽⁷⁾ As to the cause of action in suits for restitution of conjugal right see the, p. 229, Laktagar e Barbura; IN B. 316 (1892). A suit for the recovery of douer is a suit on a contract. Shankar Dial e Muhammad Muji taba, 18.4—109 (1896).

⁽b) hamsetti r hatha, 27 M 355 (f.s/3)

⁽¹⁾ See Hakir Chind, (P C ...)

"Of any of the parties '—1 person who has received a notice of an application made by a judgment-debtor to be declared an insolvent, and who e name is on the record is in opposing creditor, is a party on whose application a transfer may be made under this section (1) The section permits transfer upon the application of parties as well as of the Court's own motion without such application (2)

"Notice"—The present section, unlike the two previous sections requires notice to be given by the Court and not by the party. Where the order was made without notice having been given to the plaintiffs it was set aside (3). The provision as to notice is one of procedure and practice, and the requirements as to notice may be warved (4).

"At any stage"—These words have been added to the first paragraph to remove the difficulty created by the New that a suit cannot be transferred ifter the hearing has once commenced, as to which there was a conflict of decision boe note, post, "Pendana"

Power of High Court to transfer -Besides the powers conferred by this section, the High Court, under clause 13 of the Letters Patent has power to transfer to itself only when it thinks proper to do so either on the agreement of the parties to that effect or for purposes of justice the reasons for doing so being recorded in the proceedings of the High Court No statement of the grounds on which the Court will act can be exhaustive Transfers That the parties and have been granted on the following grounds witnesses resido in Calcutta, that it would be cheaper to try the suit there, that all parties desired a transfer, (5) that to of the property claimed was in Calcutta, and that it was undesirable that an amin of a Mofussil Court should Partition such property, that the suit might be tried more cheaply and expeditionsly in Calcutta, (6) that difficult questions of law were involved and the conduct of the Judge towards the plaintiff made it impossible that he should be able to deal with the suit with im partiality or freedom from prejudice (7) that the questions involved were of importance or difficulty, the balance of convenience of cheapness of trial, the residence of parties really interested and witnesses either in Calcutta or its immediate neighbourhood the advance of money and presence of books in Calcutta, the defendant's want of means to go herself or take her

Q C J 1 (186a)

⁽¹⁾ Nassaryan i v Kharsedji 22 B 778 (1897)

⁽²⁾ Id at p 783 (1837)

⁽³⁾ Janardhan v Dahya Vallabh, 1898 P J 11

⁽⁴⁾ Sankumanı v 1koran 13 M ...11 (1889)

⁽⁵⁾ Payn v Administrator General 5 C 706 (1880), 6 C L R 221

⁽⁶⁾ Jotendronanath v Raj Kristo, 16 C 771 (1889)

⁽⁷⁾ Kaprinauth Sahar v Government, 10 B L R 168 (1872) Courjon v Courjon, 9

B L R App 10 (1872) proceeded on the ground that there was no reason to suppose that any very specially difficult questions of law would arise in that case. In Doucett it Wise 1 Ind Jur N S 94 transfer was granted on the ground that difficult points of lay asiose and it generally appeared that the case should not be tired in the Motassi provided that the interests of the applicant will be projudiced if there be no trinsfer Borrodallo v Gregory Bourke Put II Ex

writes a to a Mofu all Court the refusal to transfer placing difficulties in the way of the lefence, at I that the project for injunction and access rendered the case commently one to be tried in the High Court (1). It has also been held that the mere fact that it would be less expensive to try the case in the High Court was not sufficient of itself for the Court to act upon and order the case to be transferred, and that to justify transfer it must be shown that the trial in the Court in which the suit had been instituted would be unsatisfactors (2).

The application should be made to a Judge sitting on the original side of the Court (3). The substantive law applicable to the case will be the law of the Court from which it has been transferred (1). The words to remote and try and deterrance in the Letters Patent have a wide signification. They are not limited to any particular period or stage of the sunt, considered as a regular series of steps in procedure. Meet the confinement of a sunt between parties, as long as the proceedings in the Court of first instance are in such a condition that the party is cutified to ask that Court to raise and judicially determine in question material to the first result of the sunt as between himself and the other party, so long is the suit in existence in the first Court and capable of being removed under clause 13 in order that such questions may be determined in the High Court (5).

District Court -In the Punjab Central Provinces and Burmah, the Courts of the Divisional Judge and Commissioner are by the Courts Acts of those provinces aren the powers conferred on the District Court by this acction, which has not been drafted with reference to the system of judicial administration prevailing in the provinces mentioned (6). An order of transfer made by a District Court under this section, transferring a suit in which an appeal would be from a deerce made therem, was held not subject to revision (7) And the principle was considered to apply where a District Judge had trans ferred a suit from a Subordinate Court to his own file, and before his hearing it an application was made to the High Court for its transfer to some other Court (8) The High Court refused in its extraordinary jurisdiction to juterfere, execut under eircumstances of a very special nature, with the discretion of a Judge who had transferred, under the provisions of the last Code execution proceedings under a deereo from one Subordinate Court to another (9) It was held, under the Code of 1859 that where a District Court had jurisdiction to try a suit and the defendant made no application to the Judge or communication

⁽¹⁾ Harendra Lill t Sarvamangala Debee, 24 C 183, 186 (1830) 1 C W N 109

⁽²⁾ Ojooderam v Nobinmoney Dossee, 1 Ind Jur N S 396 (1866)

⁽³⁾ Doucett v Wise, 4 W R Vise 7

<sup>(1865)
(4)</sup> Grose v Americana i Dossee, 4 B L

R, O C J, 1 (1869)
(5) In the matter of the Decree Suits in the

⁽⁵⁾ In the matter of the Decree Surts in the Court of the Munsif of Dibroghur, 7 B L R 308, 312 (1971)

⁽⁶⁾ As to the Punjab see as 34, 37, 38 Act VIII of 1884 As to Village Munsifs in Madras see Lakshmakka v Bab, 8 M 500 (1885) Ajmere and Marwara, ss 2 and 26.

Reg I of 1877

⁽⁷⁾ Farid Ahmad v Dulari Bibi, 6 1 233 (1884)

⁽⁸⁾ Muhammad Safdar Husen v Puran Chand, 20 A 395 (1898), s c, 1898, A W N 89

⁽⁹⁾ Krishna v Bhau, 18 B 61 (1893)

to the pluntiff with a view to its being tried in a different district the case was not one for the exercise of my special power by the High Court for that purpose (1)

"Transfer or withdraw"-Ihis section, which corresponds with sect 25 of the last Code, is clearly worded to show that it applies both to the transfer and withdrawal of suits, covering also transfers to a Court newly estab lished There is no restriction as to the grounds on which a transfer or withdrawal may be ordered under this section, which applies to the High Court, whose powers under the Letters Patent have already been considered A usual ground is personal disqualification on account of pecuniary of other personal interest of the presiding Judge (2) A transfer has been ordered on the ground that serious questions of law were likely to arise in connection with winding up proceedings, which it would be difficult to discuss in the absence of the necessary authorities, and that the pro ceedings were such that they would ultimately go before the High Court in a variety of appeals from orders , (3) also of execution proceedings "in order to do equity between the judgment creditors according to the spirit of the Civil Procedure Codo", (4) also on the ground that the transfer would tend to the convenience of both parties, and more especially to the applicant (5) The fact howover, that the Judge of the Court was not sufficiently acquainted with the character in which the disputed signatures were written was held not to be sufficient ground, as in such a case it would be open to the parties to call exports (6)

The section does not make it obligatory in a Court to record the reasons. for its order, and though it is desirable that the reasons should be recorded yet a failure to do so will not vitiate the order or the subsequent proceedings (7) Not is the transfer invalid if the order has been made under a misconception of facts (8) As to the presumption where there is no order on the face of the proceedings, see note, (9) as to jurisdiction to transfer, see note "Pending post

"Surt, appeal, or other proceeding' -The term "surt" in the earlier Code should it was held be construed in its broadest sense (10) The section. itself shows that it is applicable to appeals, a power which was not given to the High Courts by the Letters Patent (11) or appeals The case law under the Code of 1882 was as follows -As regards miscellaneous proceedings this

⁽¹⁾ Kristo Dass Koondoo i Issur Chunder

Chowdhry, 11 W R 189 (1869)

⁽²⁾ Lobnri : Assam R & T Co , 10 C 915 (1884), in which case the transfer was refused only on the ground that the Judge had mean time been replaced by another officer and in which the principles on which transfers on

this ground are made are discussed (3) In the matter of The West Hopetown

Fea Co, Ld, 9 A 180, 184 (1886) (4) Krishna Velji t Vansaram 18 B 61

⁽¹¹⁾ As to Bengal Civil Courts, acc s 22 (1893)

⁽⁵⁾ Kadambini t Madan, 3 C W \ 247.

^{248 (1898)}

⁽⁶⁾ Muhammad t Puran Chand .0 A 395 (1898)

⁽⁷⁾ Tarucknath v Gouree Churn, 3 W R 147 (1865)

⁽⁸⁾ Rambux v Girdharilall 2 Agra 178

⁽⁹⁾ Sheo Prasad Singh v Kastura Kuar, 10

A 119 (1887) (10) In the matter of The West Hopetown

Ter Co 9 1 at p 182 (1886)

Act XII of 1887

section, taken with sect 617 (corresponding with sect 141) was held to authorize the transfer of a claim under sect 331.(1) and of winding up proceedings under the Indian Companies Act. 1882, by the High Court from a District Court to itself, the Act providing for their transfer from one District Court to another (2) There was a conflict of omining whether the word "suit" in the section which this replaces included execution proceedings or not Allahabad (3) and Bombay (1) High Courts held that it did It is to be observed that sect 223 of the former Code related to transfer of applications for execution The Madras High Court appears to have been of opinion that the word "sust" in this section in the last Code was used in its restricted sense of proceedings before decree, but that even assuming that it included execution proceedings. the limitation as to jurisdiction contained in the section, which authorized the transfer to a Suhordinate Court competent to try the suit, could only be imported into sect 223 of the Code of 1882, so far as it was consistent with that section (5) The Calentta High Court held both under the corresponding provisions in the Code of 1859.(6) as also under the Code of 1882.(7) that there was no power under this section of that Code to transfer execution proceedings. The present section extends the Courts' power over miscellaneous proceedings other than suits or appeals

"Pending"—The word used in the corresponding section of the Code of 1859 was "instituted". It was accordingly held that the transfer could take place only on the institution of the suit, and that it was not intended that a case in progress of trial might be transferred (8). The substitution of the word

(1) Sithelakshmi v Vythilinga, 8 M 548 (1881)

(2) In re West Hopetown Tea Co, 9 A 180 (1886) (3) Gava Parshad v Bhup Singh, 1 A 180

F B (1876), a decision under the Code of

(4) Balaji v Banchoddas, 6 B 680 (1881). Krishna Velji v Bhau Mansaram, 18 B 61. Assarranji v Kharsedji, 22 B 778 (1897), in which this section was held to apply to the transfer of an application to be declared an insolvent as such an application was a proceeding in execution, and therefore a suit

(5) Shanmuga t Ramanathan, 17 M 309 (1893) The prec ding decision, Muttalagiri t Muttayar, 6 M 337 (1883), appears to favour the other view See Massarvanji t Khursedji 22 B at p 782 (1897)

(6) Kedarnath i Bungabee, 17 W R 45 (1871) Shaish Hamdooddeen i Bhadae 18 W R 34 (1872) Abdoof Hyor Macrao, 23 W R 11 (1874) of Anun I Mohun v Gras Kant, 13 W R 222 (1870) (a. 20, Act VI B C of 1862) Chowdhrye Mutecoonses, 15 W R 574 (1871) [a. 19 Act VI of 1863] Liy to I coherred however, that a 6 of the

Code of 1859 has been considerably modified by the present Code See Hukm Chand C P C 343

(7) Kishori Mohun Sett t Gul Mahomed Shaha, 16 G 177 (1887), in which, however adherence was given to previous decisions chiefly as a rule of practice and in which no reference was made to the substitution of the world 'pendiag' for 'mattute.'

(8) Ram Nath v Gowhur. 2 N W P II C R 230 (1870), Yakoob Ali v Luchmun Das GN W P 80 (1874) Asmedh Koonwar v Taylor, 1864, W R 14 . Dumree Sahoo v Jugdharce, 13 W R 393 (1870) Soorendro Pershad Dobey t Nundun Misser 21 W R 196 (1874) but see Tarucknath Mookenee v Gource Churn Moolerjee, 3 W R 147 (1865), in which it was held that when a Judgo transfers a case to his own file, he is at liberty to amend the issues first laid down, and to frame additional issues and to go into the whole case except upon any question upon which there has been a judicial finding And as to remand, see this case an I Mahomed Zahoor v Thaloorance Rutta, 2 N W P 431 (1570)

"pending" bars any such construction in future, a construction which is further prohibited by the insertion of the words "at any stage". So it has been held, that the High Court had jurisdiction under this section to make a transfer to a Subordinate Judge, though the case was in part heard (1). Even now, however, the section will not authorize a transfer affecting any special exclusive jurisdiction conferred by law (2). So as the Court which pronounced the judgment is the only Court which can review it, proceedings on an application for a review of a Court's decision cannot be transferred to another Court (3). Nor may a District Court exercise its powers to transfer so as to oust any Court of a jurisdiction over any particular suit which may have been referred to it by order of a High Court or other Supreme Court (1). Thus, it has been held that the terms of the section are mapphcable to a suit which the Subordinate Court had received by an order of remand from a Court to which the District Court was itself subordinate (5).

The word "pending" denotes, it is said, duly pending. The suit, therefore, to be transferred must, it has been held, be pending in a Court of competent jurisdiction, and an order made under this section will have no effect if the Court in which the suit is pending has no jurisdiction over it (6)

"Subordinate"—A transfer may be made only from or to a Court to which the Code applies In the under mentioned case, (7) Hutchins, J. considered that the District Judge would have the power of transferring a case pending before one village munsif to another, not under this section, which he considered questionable, but under general principles, as some one must have the power, and it would be best vested in the munsif's official superior, the District Judgo. The subordination contemplated is apparently not that

on the creumstance that a transfer made 12 such a case might be inconsistent with the order of remand, and change the Court to which the appeal from the final order would lie in the case But see also Taruchauth Mockerjee v Gource Chura Mockerjee, 3 W R 147 (1865) In Sita Ram v Nanni Dulanja, 21 A 230 (1899), it was considered that s 25 was not applicable to a case

⁽¹⁾ Palamsami t Thondama, 26 M 595 (1902) See Bandhu Nail v Lakh Kuar, 7 A 342 (1885) though as to the decision that if a case is part heard and transferred it connot be determined on the evidence taken in the first Court, see O AVIII r 15, cl 2, post See also cases in paragraph on the term 'Suit,' ante 'The observations in Kishon Mohin v Gul Mahomed, 15 C 177, which decided that the section did not apply to execution proceedings, overlooked the change which has been effected in the section, and aro, it is submitted, neither hinding nor good

⁽²⁾ See Hukm Chand, C P C 344

⁽³⁾ Ram Nath v Gowhur, 2 N W P 230 (1870)

⁽⁴⁾ Hukm Chand, C P C 344

⁽⁵⁾ Mahomed Zahoor * Thakooranee Rutta, 2 N W P 481 (1870) As pointed out in Hukm Chand, C P C 344, the decision in Hamedoollah v Mutecconissa, 15 W R 574 (1874) also turned to some extent on the same principle, stress having been laud in it

remanded under s 562 of the last Code (6) Peary Lall v Komal Kushore 6 C 30 (1881), Mothal v Jammadas, 2 B H C R A C 40 (1865), Jagivran v Magdum, 7 B 487 at p 480 (1883), Ledgard v Bull, 9 A 191 (1887), s c, 13 I A 134, R v Mangal Tekchand, 10 B 274 (1886), Pachaom Awastho v Hahi Buksh, 4 A 478 (1883), Ram Naram v Parmeswar Naram, 25 C 39 (1897) Waiver will not avail where the Court has no inherent jurnsdiction, otherwise in cases of mere irregularity Sankumani t Horma 13 V 211, 213 (1889)

⁽⁷⁾ Lalshmalka v Bali, 8 M 500 (1883) See Hukm Chand, C P C 348

for the purposes of anneal as in sect. 23, clause (1), ante, but of an administrative character (1) It has fermerly held that oneo a Court withdrew a suit and transferred it to its own files for trial, it exhausted all its powers under this section and it is not competent to retransfer it again to a Subordinate Court (2) The section however [see (1) (b) (m)], now authorizes a Court after withdrawing a case to retransfer it for trial or disposal. The Suberdinate Court must be competent to try the smt—that is, must have jurisdiction (3) A District Judge can transfer a probate case for trial to a Suberdinate Judge under clause (d), suh sect (2), sect 23. Act XII of 1887 (1) Where in a recent case a suit was filed as a Small Cause Court suit in the Court of a Subordinate Judge who had both Small Cause and regular purisdiction, and be transferred it to the file tried by him as ordinary Judge, and passed a decree deciding a question of title to immeveable property, it was held that there was no substantial irregularity and that the decree was not final, but appealable, since it could not have been passed by a Small Cause Court (5) As to the power of District Judges under the Bomhay Civil Courts Act, to refer to Assistant Judges applications under special Acts for disposal sec note (6)

"Try or dispose of"—The word "trial" includes every recognized method of procedure laid down in the Code, and it is not necessary for the transfer that the Court transferring should not contemplate a reference of the case te arbitration (7) The present section adds the words "dispose of" which will eften be applicable in the case of the miscellaneous proceedings to which the section is extended

"Court of Small Causes"—The expression "a Court of Small Causes" in the last clause of this section means a Court properly and strictly so called, and does not include a Court invested with the jurisdiction of a Court of Small Causes (8). The High Court, in the excreise of its appellate jurisdiction, has the power to transfer a suit from the Calcutta Court of Small Causes to any other Court having equal or superior jurisdiction (9). The Court to which a suit is transferred will not become a Small Cause Court but only the suit transferred.

⁽¹⁾ See Hukm Chand, C P C 349
(2) Amir Begum e Frahlad Das, 24 A 304
(1902), Patima Bibi v Abduf Mapid, 14 A
63f (1892), Sukharam v Gangaram, 13 B
634 (1899), Sukharam v Gangaram, 13 B
230 (1899) fremand] Anadan Prasad t
Kenney, 24 A 350 (1902) [transfer of
pauper smit) The first and third cases were
distinguished with reference to the pro-issions
of Act All of 1837 [Bengal Civil Courte]
in Gappu Lal v Mithura Das, 23 1 183
(1902)

⁽³⁾ Aritin Lai t Mazhar Ilusain, 7 A 239 (1884). Haji Umar t Goostadji, 34 B 411 (1910)

⁽⁴⁾ hunjo Behari Gossami t Hem Chandra Laluri, 25 C. 340 (1895)

⁽⁵⁾ Hari Balu Gaekawad t Ganpatrao Lakhururao Gaekawad, 38 B 190 (1913)

⁽⁶⁾ First Assistant Collector i Ardesir Frampi, 16 B 277 (1891)

⁽⁷⁾ Hukm Chand, C P C 349, citing Banaru Das e Ram Aishan, 1889, P R. Ao

⁽⁸⁾ Ramchandra t Ganesh, 23 B 382 (1893) diss from Mangal S n v Rup Chand, 13 A 324 which was also dissented from in Dulal Chandra Deb v Ram Naram Deb, 31 C 1057 (1904)

⁽⁹⁾ Kadambini Baiji v Madan Mohan Basack, 3 C. W N 247 (1895) See as to this case, Shamsher Munial v Ganendra

Naram Mitter, 29 G 493, 500 (1902)

will be tried as a Small Cause Court suit (1) In the case under mentioned, (2) a Small Cause Court suit was instituted before a Judge invested with jurisdiction to try it. He retired from office, and the District Judge directed his successor, who had no Small Cause Court jurisdiction, to try it, it was held that the order must be considered as passed under this section, and no appeal lay from the decision to the District Court

25 (1) Where any party to a suit, appeal or other pro-Power of Governor General in Council to transfer suits over by a single Judge objects to its being heard by him and the Judge is sotisfied that there are reasonable grounds for the objection, he shall make a report to the Gozette of India, transfer such suit, appeal or proceeding to ony other High Count

(?) The law applicable to any suit, appeal or proceeding so transferred shall be the law which the Court in which the suit, appeal or proceeding was originally instituted ought to have applied

to such case.

Institution of Suits.

26 Every suit shall be instituted by the presentation of Institution of suits a plaint or in such other manner as may be prescribed.

"Plaint"—A plaint means a private memorial tendered to a Court in which the person sets forth his cause of action, the exhibition of an action in writing (3). It answers to the "statement of claim" in England. In India a plaintiff may present a written statement also. O VII rr. 1-6 presentle the contents of the plaint, which is the document with which every suit is instituted in this country, its object being to invoke the Court's assistance for the declaration, preservation, or enforcement of the plaintiff singht. A suit, according to this section must commence with a plaint, and a proceeding which is capable of terminating in a decree or an order having the force of a decree cannot, on that ground alone, be deemed to be a suit within the incaning of the Code, if it has not commenced with a plaint. Such a proceeding is, in strictness, only a proceeding in a suit (4)

Presentation (a) Time —The only question which arises as to this, is whether a plaint may be presented on a Sunday or holiday, or out of Comb hours. It has been enjoined that, without the consent of parties and in the

⁽¹⁾ Krishna Velji v Winsaram, 18 B 61 (3) Assan v Pathamma 22 M at p 502 (18 10) (4) Venlata Chandrappa i Venkata Rama

⁽²⁾ Kanleshwar Rat t Dost Mahomed 22 W 2"6 (1898)

Khan 5 A 274 (1883)

al since of majorit recessity in a civil trial should proceed on Sundays or garetted he class (1). In Imba however, Surday is not a dice on n,(2) and the helling of a ju heral proceeding on a close helday, though it may be an irregularity which if projudice be shown would entitle a party to have the proceding set a decision in the an irregularity as can be waved (3). It has been expressly provided in the Bengal, N.W.P. and Assum (and Courts Act, and the same will probably be held on general principles, to be the case that a judicial act done on a close holday is not invalid by reason only of its having been done on that day (1). Advantually better that a judicial act do no on a close holday is not invalid by reason only of its having been done on that day (1). Advantually better the dose, for under the Lamitation Act if the period express when the Courts are closed, the suit may be alimited on the day that the Court resorces, and so may any out extend (7).

(b) To whom - The former section required that the plaint should be presented to the Court or such officer who was specially appointed in that lightly This will be a now though the words have been omitted. Ordinarily, the plaint is pit ented to the Court. Addition, to the clerk of a Small Cause Court has be a held sufficient, (8) but not to a nazir (9) or moonserim (10). A plaint under let X of 1859 presented to an Assistant Collector and not to the Collector, was field not to be properly filed (11).

(c) Place—Ordinarily the plaint is presented in open Court. The placing of a patition of appeal on a table when the officer is not present is not a present into it of him (12). The Allahabad High Court held that the presentation of a plaint at the private residence of the Munsif was not a sufficient institution (13). But in Benjal a plaint delivered at the private residence of a clerk of a Small Cause Court has been held to have been properly filed (14). Where a plaint sent his post was accepted the institution was considered

- (1) C If C Cen Rules No A
- (2) l'hter in l'ingland 29 Car II e 7, s 6 but c'hler holidays aro penods of vacatson only and proceedings aro not suspended Petersdoril's Al ridgment, 2ad ed vol v, p 50, n (1) The term appears not to have been used in its strict sense by Dayses, J, in Sambasiva e Ramasami, 22 M at p 181 (1669).
- (3) Ram Das : Official Liquitator, 9 A 366 (1887)
- (4) Act XII of 1887, s 15 (3) 1 sale of property in execution on a close holdary has been held not to be illegat. Bisram: Salub un nissa 3 A 333 (1880) A local inquiry on Sunday was, however, set aside chiefly because the defendant a valui stated be could not attend and no other notice was given Jubilhoo v Jusoda, 17 W R 230 (1872)
 - (5) Un into v Protab, 16 W R 230 (1871)
 (6) Ib Gobind v Hargopal 3 B L P
- (6) 1b Gobind v Hargopal 3 B L P Ap 72 (1869) in the latter case however

- the hotiday was in accordance with a circular which had no legal force
- (7) Pearr Mohun t Anunda Charan 18 C 631 (1891) Sambasiya t Ramasami 29 M
- 179 (1898)
 (8) Mudden Mohun i Takeer Biswas Suth
 S C C Rep 36
- (9) Raj Chunder v Joogul 18 W R 172 (1872)
- (10) Tal Uldeen t Ghafoor ul missa 3 A H C R 341 (1871)
- (II) Musumat Roopa t Sheikh Anwar 4 A II C R 35 (1871) but the proceedings are veidable only at the instance of the defendant Mackintosh t Kashee Nath 21
- W R 450 (1874)
 (12) Taj Uldeen v Ghafoor ul nassa, 3 A
 H C R 341 (1871)
- (13) Jas Kuar v Hoera Lall 7 1 II C R 5
- (14) Mudden Mohanv Fakcer Biswas, Sutl. S C C Rep 36

sufficient by the Madras High Court (1) Where a plaintiff presented a plaint to the District Court, the Suhordinate Judge's Court in which he ought to have presented it being then temporarily closed, it was held that the District Court could not be considered a Court of first instance competent to receive the plaint (2)

Date -The Code does not provide that the plaint should be dated, but it is generally provided by rules framed by the High Courts that the actual date of presentation should be endorsed on the plaint by the officer receiving Where a plaint was presented on the 29th and the endorsement stated that it was accepted on the 31st, the former and not the latter date was held to be the date of institution (3) Where two suits are filed on the same day it must be presumed, until the contrary is proved that they were presented and admitted in the order in which the numbers appear in the Register of Civil Suits (4) The Code does not ordain or imply that, in the absence of a sufficient stamp, there can be no presentation, nor does the Limitation Act There is no warrant for inferring that a plaint means a plaint duly stamped So where a plaint was presented on the 14th September with an insufficient stamp, but the deficient stamp duty was paid on the 18th September, it was held that the suit was instituted on the 14th September (5) The date of institu tion should be reckened from the date of presentation, and not from that on which the requisite court fees are subsequently put in so as to make it admissible as a plaint (6)

Registration -Seet 17 of the Registration Act (III of 1877) does not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties or orders made by the Court (7)

SUMMONS AND DISCOVERY.

Where a suit has been duly instituted, a summons Summons to defendmay be issued to the defendant to appear and answer the claim and may be seried in manner prescribed

Summons -See notes to 0 V r 1

⁽¹⁾ Sankaranarayana v Kunjappa 8 M 411 (1885) approving Moparti v Vappala, 6 M H C R 136 (1871) but lad it not been accepted the presentation would not have been considered valid

⁽²⁾ Rumaya t Muhamudbhat 10 B 11 C Motifal : Jumnidas 2 B R 495 (1873)

C R 40 (1865) (3) Young t MacCorking lale, 19 W R

^{159 (1873)} (4) Murtit Bhola Ram 16 1 165 (1893)

⁽⁵⁾ Dhondiram v Taba Sivadan 27 B 330

⁽¹⁹⁰²⁾ in which it was state I that this view was in accord with the decisions of the Calcutta High Court cite I in the report and

with the interment of Subramania lyyar J. m Issan t Pathamma 22 M. 494 (1899) (who dissented from the decision Venkata mayya t Krishnayya _0 M 319 (189") which was approved and distinguished by Davies J) though not with the decisions of the Allahaba I High Court cited in the first mentione l case

⁽⁶⁾ Mot, Sahu : Chhatri Das 19 C 2-0 (1892) The case of Yakut un missa 1

Lishorce 19 C 747 (1891) was distinguished and explained in Suren ira Kumar r Kunja Behary 27 C. 814 (1900)

⁽⁷⁾ Bind ri Yaik v Ganga Saran 20 1 171 (1897) scl R 221 1 4

28 (1) A summons may be sent for service in another province to such Court and in such manner as may be presented by rules in force in that manner province mountee.

(2) The Court to which such summons is sent shall, upon receipt thereof, proceed as if it had been issued by such Court and shall then return the summons to the Court of issue together with the record (if any) of its proceedings with regard thereto

"Service in another province"-See notes to O V rr 21, 23, post

29 Summonses issued by any Civil or Revenue Court is

Service of foreign situate beyond the hmits of British India

summonses may be sent to the Courts in British India

and served as if they had been issued by such Courts:

Provided that the Courts issuing such summonses have been established or continued by the authority of the Governor General in Council, or that the Governor General in Council has, by notification in the Gazette of India, declared the provisions of this section to apply to such Courts

Foreign summons—The words "or continued" were inserted by sect 62, Act VII of 1888 For Courts in Gwaher, Indore, Bundelkhand Bhopal Mulwa, Bhagelkhand and Bhopawar Ageneues, see the "Gazette of India 'March 16th, 1912, Part I, pp 319-352

30 Subject to such conditions and limitations as may be power to order dis prescribed, the Court may, at any time, either covery and the like of its own motion or on the application of any partit.—

(a) make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogatories, the admission of documents and facts, and the discovery, inspection, production, impounding and return of documents or other material objects producible as evidence,

(b) issue summonses to persons whose attendance is required either to give evidence or to produce documents or such

other objects as aforesaid,

(c) order any fact to be proved by affidavit

Discovery —See Orders XI XII, XIII, XVI, XIX, and notes thereto.
The section is new

1

31. The provisions in sections 27, 28 and 29 shall apply summons to witness to summonses to give evidence or to produce documents or other material objects

32 The Court may compet the attendance of any person to whom a summons has been assued under section 30 and for that purpose may—

(a) issue a warrant for his airest;

(b) attach and sell his property;

(c) impose a fine upon him not exceeding fire hundred supees,

(d) order him to furnish security for his appearance and in default commit him to the civil prison.

JUDGMENT AND DECREE.

33 The Court, after the ease has been heard, shall pro nounce judgment, and on such judgment a deerce shall follow.

Judgment and decree - See notes to O XX, post

INTEREST

34 (1) Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court to any interest adjudged on such principal sum adjudged, from the date of the sunt to the date of the decree, in addition to any interest adjudged on such principal sum for any period prior to the institution of the sunt, with further interest at such late as the Court deems reasonable on the aggregate sum so adjudged, from the date of the decree to the late of payment, or

(2) Where such a depayment of further interest from the date of the decarded date the Court shannterest, and to such that the court shannterest, and the court shannterest, and the court shannterest, and the court shannterest and the court shannterest and the court shannterest and the court shannterest and the court shannterest s

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Interest
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date of the is a same ston of abstance law (1) Ordinarily an I subject to the exceptions recognized by that law, the rate agreed muon must be awarded up to the date of s at (2). Interest after date of suit is according to the onimon of the Calcutta (3) though not of the Wadras High Court (1) in the discretion of the Court is dant of an lug that a fixed rate of interest is mentioned as useable "un to realization" No ad litural Court fee is required on account of the claim for interest from the date of institution of suit till mayment (5). There is no analicy between interest awarded under this section and means profits under O XX r 12 a st (6)

Sect Soul the Transfer of Property Act thou O XXXIV r 2) excludes the discretion given by this section and lands the Court to decree the rate of interest provided by the martgage if not ille, il, down to the date fixed by the Court according to the terms of the second parszraph of the section (7) After this period interest will run at the Court rate up to date of payment according to the tractice and rules of the Calcutta High Court (8). This section relates to a decree for money and a mortgage decree until it reaches the stage shown by sect 'O of the Transfer of Property Act, cannot be so termed (9)

(1) Some decisions on the Interest Act (AAAH of 1830), and others relating to the nulation of interest, such as the doctrino of penaltics (see Contract Act. a. 74, as amended In Act 11 of 1839) which does not at pir to stinulations in consent decrees Ibhiro Auli Timana r Mahaliya, 10 B 435 (1850) contra Na. at mer Venkatras, 24 M 265 (1900), ref. to Ral Balkuhen Dass r Raja Run Bahadoor bingh, 10 C. 305 (1553), and ace Ifun Baha door bingh r Roy Narain Dass. 7 C L. R 52 (1550)], the rule of damdunat las to which also see post). payment of interest after due date and interest payable according to mer cantile usage and other cases, will be found in the notes to O kinealy's Cis Pro Code 1 recent decision is Hant Sundar Loer v Rai Sham Krishen, 34 I A 9 (1900) For pay ments of interest by instalments and limits tion, see Abdul Abad v Mahtab Bibi, 35 A 378 (1913), distinguishing Kallu e Italki, 18 4, 295 (1896) and Anwar Ilusam 1 Lalmi Khan, 20 1 167 (1901)

(2) See Chincaly & Civ. Pro Code The matter is not here dealt with as being beyond

the scope of the Commentaty

(3) Mangniram Marwari v Dhowlal Roy, 12 C 569, F B (1886) and the same was held in Bombay under the Codo of 1859, Carvatho v Nurbibi, J B 202 (1879) But it has recently been held in Calcutta that the Court is bound to award interest from the date of suit to date fixed for redemption unless the rate is penal hali Prosonno e Protab, 17 L W N 221, 226 (1913)

(4) Ramachandra v. Devu, 12 M. 485 (1889) (5) Vithal Harry Govern I Vasueleo 17 B 41 (1832). It stands on the same footing as luture incone i colife, ili

(6) Duarka Nath Brewas . Debendra Nath

Tagore, 33 C 1232 (1906)

(7) Surya Narain Singli t Jogendra Narain Roy. 20 C. 300 (1892) , Subbaraya Rayutha minda e Ponnusami Vaddar, 21 M. 764 (18.)7). Chaturbhai harsan v Harbhamit. 20 B 741 (IS95) See in this connection the distinction drawn in Lines Chunder Smar v Zahar Fatima, 18 C 164 (1590). hali Presonne i Protab 17 C W N 221 (1912), and for case where no interest is stinulated for in a mortga_o bond, see Makbub Ali v Ali Ahmed 40 C 514 (A C) (1913) (mone is recoverable, for being a charge in the nature of a mortage, it should have been on writing and register d), following Kutti umma t Madhava Menon, 11 M L. J 186 (1901) distinguishing Imdad Hasam Khan z Badra Prosad 20 A 401, Rajwanta Kunwar r Shiam Narain Siogh, 36 A 220 (1914) , Ra meswar hoer v Mahamed Mehdi, 26 C 39 (1898) Maharaja of Bartpur v Ranin Kanno Der, 23 A 181 (1900), Bakar Sanad t Udit Narain Singh, 21 A 361 (1899)

(8) Jogendra Nath Mookerjee v Methana Abraham, 6 C W N 769 (1902) See other

cases cited in this

(9) Hargoandas Girdharlal v Mohanbhau Muhasukhabhai, 2 Bom L R 225 (1900) See Ginya a Sabapathy, 29 M 65 (1905)

The Court has also a discretion to award interest after decree The contract becomes merged in the decree, and the plaintiff recovers only such interest as, according to the course and practice of the Court, is allowed on debts for which the creditor has the security of its decree (1) Interest if not given in the decree is taken to have been refused,(2) but a party may by his conduct he estopped from objecting that execution cannot issue for a higher rate than that provided in the decree (3) If a decree holder gives up a portion of his claim and verbally agrees to receive the remainder hy instalments, he does not thereby give up interest to which he is entitled under the decree (4) The rule of damdupat exists only so long as the contractual relation of dehtor and creditor exists, but not when that relation has come to an end hy reason of a decree (2) Thus where a decree has been passed on a mortgage the rule does not apply to the interest accruing after the date fixed for redemption (6) The jule of damdupat is not applicable if it was not applicable at the time when the decree hecame final and binding (7) The discretionary powers conferred by this section may be exercised without reference to the law of damdupat (8)

"In the decree"—A Court is not empowered by this section merely to embody in a decree interest which has been adjudged payable in the sut, for it is said that such a reading of the section would make it surplusage, as it does not require a rule of procedure to enable a Court to decree a rehef which it has adjudged in its judgment (9). It has therefore been held that the Court may in the decree order payment of interest from the date of the suit onwards, although the judgment awards interest for the period prior to the institution of the suit only (10). But where a Judge in adjudging a specific sum, principal and interest, in terms dismissed "the rest of the claim," it was held that as the claim of interest after the justitution of the suit was part of "the rest of the claim," and with it stood dismissed, the Court could not give interest by way of amendment of its decree (11). Where a district Judge gave no interest from the date of the suit and there was nothing to show that this was an over

⁽¹⁾ Bishessur Surmah v Kaleekanath Surmah, 11 W R 455 (1869), the consolidated sum bears interest from and after decree, but this is not compound interest, but interest on a fixed sum declared to be due by the decree Jodonath Royv Dwarka knath Chatterjee, I W R Mise 15 (1864), and see Jaleshar Rai v Anrut Rai, 35 A 302 (1913)

⁽²⁾ See Kallocram Baboo v Doorganath Talocrkdar, 10 W R 175 (1868) In Madhub Lal khan z Nojan Ghose, 6 C L R 231 (1880), the decree gave interest but did not specify the rate, and the usual Court rate was allowed.

⁽³⁾ Sheo Golam Lall v Bant Prasad 4 C L R 29 (1879), s c, 5 C 27

⁽⁴⁾ Mohammed Mojoomdar & Pur Chunder Singh, 6 W R Misc 121 (1866)

⁽⁵⁾ In re Harr Lall Mullick, 10 C W N

<sup>884 (1908)

(6)</sup> Nunda Lal Roy t Dhirendra Nath
Chakravarti 40 C 710 (1913), following
In re Hari Lall Mullick, supra, not following
Ram Kanhyo Audhicary v Cally Chura
Dey, 21 C 840

⁽⁷⁾ Lall Behary Dutt v Thacomoney Dassee, 23 C 899 (1896)

⁽S) Dhondshet v Rav.1, 22 B 56

<sup>(1896)
(9)</sup> Hasan Shah v Sheo Prasad, 15 A 121,

<sup>122 (1693)
(10)</sup> Kolai Ram t Pali Ram, 7 A 755

⁽¹⁸³⁵⁾ in which it was held that there was no variance between the judgment and decree

⁽¹¹⁾ Hasan Shah v Sheo Prasad, sugri

sight or mist ike on his part, the High Court treated the matter as if he had withheld such interest in the exercise of his discretion under this section, and this view was approved by the Privy Council (1)

Costs.

35 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incident to all suits shall be in the discretion of the Court, and the Court shall have full power to determine by whom or out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid. The fact that the Court has no jurisdiction to try the suit shall be no bar to the exercise of such rowers.

(2) Where the Court directs that any costs shall not follow

the event, the Court shall state its icasons in writing

(3) The Court may give interest on costs at any late not exceeding six per cent per annum, and such interest shall be added to the costs and shall be recoverable as such

Costs generally -The present section replaces sects 218-222 of the last Code The first clause is with some additions taken from a 5 of the Judi eature Act of 1890, and in effect embodies the provisions of sects 218-220 of the last Code As regards the subject of execution see sect 36 of this Code Sect 221 has been transferred to O XX r 6 where it appears as the third clause of that rule Sect 222 is incorporated in the third clause of this section, the direction as to the payment of costs being paid out of or charged upon the subject matter of the suit being omitted. The power to order this is contained in the first clause of this section. As regards this, it has been held that a mortgagee having had the henefit of a partition and having accented and approved of it as part of his title was though not a party to the partition suit bound by the equities attaching to the mortgaged property as incidents of the partition and was therefore hable in respect of a proportionate share of the charge for costs created by the order of the Court made in that suit under this scetion and such proportionate share of these costs should be deducted in priority out of the proceeds of the sale of the mortgaged pro perty (2) Under the circumstances stated the cases decided under the former sections are here given

Disposal of costs —Sect 218 of the last Code enacted that When disposing of any application under this Code the Court may live to either party the costs of such application or may reserve the consideration of such costs

⁽¹⁾ Majnumdar Hiralal v Dessi Narsilikal (2) Khetterpal Stiterutno v Khelal Kristo, P C. 37 B 326 (1913) 21 C 204 (1894)

for any future stage of the proceedings." When costs of an interlocutory proceeding have been disposed of, the award of general costs of the suit does not loterfere with that interlocutory order (1). A Court finally determining a suit is hound to decide by which of the parties before it the costs shall he horne, it is not at hiberty to declare that the costs shall be boroc by the unsuccessful party in a suit to be hereafter brought (2). A decree drawn strictly in accordance with the provisions of sect. 88, of the Transfer of Property Act, directs the costs to he recovered out of the mortgaged property (3). An omission to award costs cannot be considered a mere clerical error, but must he rectified by way of review within the prescribed time (4).

Parties paying or receiving costs -The person who receives the costs must, of course, be a party to the suit. As regards the persoo who may be ordered to pay, the general rule in Eoglish Courts has been said to be, (3) that Courts have so power except over parties to the record, though an exception has been made where the party before the Court is a mere puppet in the hands of a stranger to the suit The Courts here have, in some cases, ordered persons not party to the record to pay costs (6) But under the last Code only parties could be made hable This appeared from the words, "any other party to the suit" in sect 102 of that Code (7) Where, however, there has been a con tempt of Court, as where straogers were the real though hiddee plaintiffs, and had executed a false lease in favour of the nominal plaintiff, who had brought the suit oo the strength of such false lease, it was held that though the Code gave no power, yet that the High Court, inheriting the powers of the Supreme Court, could order such straogers to pay the costs of the suit (8) Persons ioterested, on bohalf of whom a suit is brought under O I r 8 (formerly sect 30) but not joining or joined as parties, should out be made to pay costs (9) Where

but as to whether the Supreme Court, whese powers are imberited by the High Court, would have been bound by Hayward a Gifford, 4 M. & W 194, see judgment of Peacock, CJ, in Jontee Chundes Sein v hunded Lill Doss, 14 W R 1 (1865) (vpfc...ls

their consent had been made parties, could not be made liable for costs simply because they had encouraged the plaintiff to bring the suit and provided him with funds

⁽¹⁾ Radhapersad Singh v Ram Parmes war Singh, 9 C 797 (1882), S C 10 I A 113

⁽²⁾ Kashee Chunder v Bungshee Buddun, 23 W R 80 (1874)

⁽³⁾ Maqbul Eatuma t Latta Prasad, 20
A 523 (1898), 1u which a direction in the
decree was held to be merely formal eom
plante with the Code and was not intended
to make the costs recoverable personally from
the judgment debtor
As to mortgager a
personal hability, see Rutnessur Sem t
Jusoda, 14 C 183 (1880), ref Damodar Das
v Budh kuar, 10 A. 179 (1888)

⁽⁴⁾ Ram Sahoy Singh v Rookhoo Singh, ISW R 414 (1871) The Court bas refused to interfero where the applicant has delayed too long Oodoy Tara t Syud Jonab, 17 W R 3-S (1872), or the judyment has been appealed against and v final decree passed by the Superior Court Bolas Singh t Sahg Rum, S D N W (1801) v 460

⁽⁵⁾ Bevis : Turner, 7 B 181, 186 (1883).

from original jurisdiction)
(b) See cases cited in Goolam Hoosein t

⁽⁷⁾ Bevis t Turner, 7 B 484 486 (1883), Jomice Chunder t Anundo Lall Doss, 14 W R 1, A O J (1865)

⁽⁸⁾ Jointee Chuuder Sein & Auundo Lell Doss, 11 W R I, A O J (1865)

⁽J) Syedur Ru + Baidy + Nath Deb 1 C N W 60 (1896)

a party is made defendant without cause of action his co-defendant of course should not be made to pay his costs, which should be traid by the plaintiff (1) But the Court may in a proper case, order one defendant to may the costs of another defendant (2) So where a defendant has colluded with the plaintiff and induced him to bring the suit, he may not only be made to pay his co defendant's costs, but refused his ewn (3) And in a sunt brought against several parties, some of whom admitted the debt and partnership and others demed them the defendants who disputed the claim were made to pay the costs of those who admitted it (1)

Seet 219 of the last Code provided that "the judgment shall direct by whom the costs of each party are to be paid, whether by himself or by any other party to the suit, and whether in whole or in what part or proportion

As to the hability of minors, next friends, and guardians ad litem for costs, see notes to O XXXII If the Official Assignee defends a suit he is hable, in the event of failure, to be ordered to pay the plaintiff's costs in the same way as any other defendant and if the estate be insufficient to pro the costs, he will have to bear them personally (5) As regards executors (6) administrators.(7) trustees.(8) and mortgagees (9) the English O 65 r 1 provides that nothing in it shall be held to deprive any of these persons who has not unreasonably

(1) Ram Chunder : Listo Kaminec 10 W R. 194 (1868)

(2) Rudow : Great Britain, etc. Assur ance Society, 17 C D 608, Sanderson : Blyth Theatro Co. (1903) 2 K B 533 The costs of a successful defendant sucd in the alternative may be ordered to be paid by the unsuccessful co defendant. I As to suits for contribution for costs paid under a joint decree, see Kisto Coomar v Anund Moyee, 7 W R 300 (1867)

(3) Bhyroo Raoot : Anooroodeb Deo Marsh 608 (1864)

(4) Juggat Chunder Roy : Roop Chand Shaw, 6 C 811 (1881)

(5) Bevis v Turner, 7 B 484 (1883)

(6) In the goods of Taramon Dass, 25 C 553 (1898) [executor of will obtained probate, subsequent will, application by another executor Dayabhar Tapidas v Damodardas Tapidas, 21 B 75 (1896) [fund liable for costs of obtaining probate] Trustees, executors and administrators are entitled to costs out of estate except in cases of vexatious conduct or where hy neglect or misconduct they have occasioned institution of suit Simpson : Bathurst, 5 Ch. App 193 In re Chennell, 8 C D 492, Lx parte Wainwright, 19 C. D 140 In suits for construction of wills, where reasonable doubt exists, costs usually come out of the estate see hristoromones #

Norendra Krishna, 161 A 29, 43 (1888), 16 C 383. Tarachurn Chatterico v Suresh Chunder Mookerjee 161 A 166, 174 (1889) . 17 C 123, not so where the construction of the will was not so difficult as to have required the assistance of the Court Nara vant Doss : Administrator General, 21 C 683 (1894), or where plaintiff and to oust a person from possession of property, resting his title upon construction of a will Lala Ramiouan Lal t Dal Ager 24 C 406, 412 (1897) Where the estate was not before the Court an agreement as to costs could not be carried out Malchus 1 Broughton, 13 C 193 (1886)

(7) See last note and Ford . Chesterfield. 21 Beav 426 [estate or fund administered . costs of all necessary parties first chargel. Sharp : Lush, 10 C D 468 [cost of appear me in chambers in administration suitl. as to costs of administrator general, see Amir Jan v Rivett Carnac, 10 B 350 (1886)

(8) See last note but one unte and as to right of dissenting trustee to have bill of costs taxed even after payment, see Jupbhoy Byramn, 18 B 189 (1893)

(9) Vaqbul Fatima : Lalta Prasad, 20 A. 523 (1898), Rutnessur Sein t Jusoda, 14 C 185 (1886), Damodar Das r Budh Kuar, 10 A. 179 (1888) As to attorney and client costs, see Obhoy Churn Sen r Debendronath Mullick SC L. R 437 (1881)

instituted or carried on or resisted proceedings of any right to costs out of a particular estate or fund to which he would be entitled under the Chancery practice. And this will be so here

As to costs in matrimonial causes,(1) and in guardianship proceedings (2) see cases cited. as also as to costs and taration of costs of the Government solicitor, (3) costs in case of excessive bull in salvago actions, (4) and cases of set off (5)

The Court has refused a witness his costs of appearing by counsel (6)

Power of Court as to costs—Seet 220 of the last Code provided as follows "(1) The Court shall have full power to give and apportion costs of every application and suit in any manner it thinks fit, and the fact that the Court has no jurisdiction to try the case is no bar to the exercise of such power Provided that if the Court directs that the costs of any application or suit shall not follow the event, the Court shall state its reason in writing (2) Every order relating to costs made under this Code and not forming part of a decree may be executed as if it were a decree for money."

The discretion to award costs was subject to other provisions and was thus limited in the case of certain suits instituted in the High Court, but cogmizable by the Presidency Small Cause Conrts (7) Where A demanded a particular sum as due to him from B, and the latter tendered a less amount, saying that that was all he owed, it was held in an action brought in the High Court that A was entitled to full costs, not being under any obligation to accept the lesser sum and sue for the balance in the Small Cruse Court (8) For sections of the Code affecting the discretion, see O XI r 3 and O XXI r 72. The power, however, given, though a full power, was subject to the control of the Court of Appeal (9). The discretion as to the award of costs which a Court has is not taken away by the fact that a party to a suit is protected under the provisions of the Judicial Officers Protection Act (10)

As regards apportionment, the general rule is that if a plaintiff recovers a less amount than he claimed in his plaint, his costs should be apportioned

I owle: Towle, 4 C 260 (1878), Proby Proby, 5 C 3.7 (1849) [dist Natal: Natal: 3 M 12 (1885)], Thomson: Thomson 14 C 580 (1887), Mayhew: Mayhew, 19 B 293 (1894), A v B, 21 B 77 (1896)

⁽²⁾ In ro bakaruddin Mahomed Chow dhry, 26 C 133 (1898)

⁽³⁾ Azımıllalı Saheb t Secretary of State, 15 M. 405 (1892), Mahammed Ahm Oollalı t Secretary of State, 17 M 162 (1893)

⁽⁴⁾ In the matter of the ship Champion, 17 C 84, 114 (1889)

⁽⁵⁾ Notesto O VIII r 6 and Brinath Dass t Juggernath Das, 4 C 742 (1879) [set off of costs against mortgage money], and as to pre emption suits, see notes to Rule 130

Leshe, 21 C 999 (1896), 1 C W N 188 dissented from m Yonosuke : Ookerda 21 B 779 (1897), Sabapati Mudaliyar : Narayana Yami Mudaliyar, 1 M. H C R 115 (1862) Jelause 37 of Letters Patent does not give the High Court an uncontrolled ds cretion as to costs? The section has cretion as to costs? The section has observed in the section of the SC C Mutun joy Dutt: Ammeence Dassee, I Ind Jur

N S 95 (1867)
(8) Chunder Kant Mooker;co : Judoo hath

<sup>Khan I C L R 470 (1877)
(9) Tara Prosumo t Satish Chandra, 4
C W N 90 (1890), Pratap Chandra t kah</sup>

Bhanjan, I C W N 600 (1900)
(10) Ganesh Mahadov v Narayan Balslet,

¹ Bom L R 109 (1002)

according to the according and not to the sum claimed (1). Costs thus below the result of the case unless there are reasons to the contrars so that where the a fair tiff has failed in a art and succeeded in that the coate are apportioned to be the care care that the costs applicable to the matter upon which he has racceded (2). It is I wasser not correct to say that costs must be invariable awards I in rapp rison to the amount decreed and dismissed Court live a discreti on an laf a r laustail has an hone it claim in which he mainly storer is he may be allowed full costs (3). As to costs of particular issues, see and " Full of the exent The Court is exent a wide discretion but that discretion must be exercise Lumber all a rangings. It is a mover to be exercised according to law and not according to note carried II. The law as to the award of costs has been latel down by Jessel M.R. in Cooper r Whittingham (5) in a passage which has been cited and adopted in the Madras High Court (6) An Appellate Court will not interfere with an exercise of discretion by the lower Court unless it has proceeded upon a manifestly wrong ground (7) See nost

"Follow the event."—In smeans the result of the decision (8) The second pargraph of the section indicates that costs must follow the event unless there be good or up to the contrary. If a plantial succeeds he is ordinarily entitled to his costs (9). If a defendant succeeds he is ordinarily entitled to his costs (10). A plantial thus cannot get costs against a person be made to pay the costs of action (11). And successful defendant cannot he made to pay the costs of the plantial (12). If i party substantially succeeds and proves his case against the defendant he is entitled to his costs, although he has not got the precise form of rehef which he wanted (13). The mistakes of the outposite party are no reason for departing from the general

(1) Mudhun Mohun Doss r Gokul Doss 10 M. L. A. 563 (1860), Alcha Pillar r. Ghese Mahomed, 17 M. 233, 236 (1843)

(2) Tarachan I Mookerjee i Jadoonath,

March, 79 (1861)

- (3) Sheo Djal Tewarce t Juloonalh Fewarce, 9 W R 61 (185 s) On the other hand, costs have been disallowed to a special at pellant who failed on certain joints oven though the decree was modified in appeal Heera Ram t shruf Wp. 9 W R 103 (1868)
- (4) Gridhari Lall Roy t Sundar Bibi, B L R Sup Vol. F B 496, 497 (1866), Sri Dantuluri v Surappa Razu 3 M H. C R 113
- (1866) (5) 15 Ch D 501, 504
- (6) huppuswami Chetty v Zamindar of halaharti, 27 M. 311 (1903)
- (7) Parshram v Dorabji, 2 Bons. L. R 254, 255 (1900)
- (8) See Ann. Pr 1905 O 65, r 1, p 943
- (9) Ghanasham Nilkant : Miroba Ram

- chandra 18 B 474 (1894)
- (10) Monohur Dass t Romananth I au, 3 C 472, 481 (1878) So also a person who shows that he has been wrongly mado a part, Buhen Dayal t Bank of Upper India, 13 A 20, 293 (1890), or respondent, Sheo Pershal t Lallpe S D N W, July, 1863, p 1 Asabernath Sens t Chunder Monce, 9 W R 288 (1868) Collector of Dacca t Lamaia
- Lant, 2 W R 33 (1865), Collector of 24 Per gannahs t Wilkinson 12 W R 444 (1869), Government t Sanoola, 3 W R 23 (1865), Shunt Buksh v Lalla Nund, 11 W R 48 (1869)
- (II) Bunwaree Lall v Chowdhry Drup Singh, 19 C 179 (1885)
- (12) Sri Dantuluri v Surappa Razu, 3 M H C R 143 (1866), Moshingan v Mozari
- H C R 113 (1866), Moshingan v Mozari Sajad, 12 C 271 (1885)
- (13) Chanasham Nilkant e Moroba Ramchandra, supra

rule of law that a successful party is entitled to his costs (1) The word "event" may, however, be read distributively, and where there are distinct causes of action the general costs of the cause follow the judgment, but the easts of the particular issues should be taxed in favour of the party who has succeeded on them (2) And the same rule is commonly applied in all cases where several issues are rused, and the party fails as to some and is successful as to others

The same general principles apply in the case of appeals (3) though the east of an appeal may be severable from the general costs of the suit (4) It is a general, but not a nunversal rule, that the discretion of the Court below as to costs is not altered when there is no substantial alteration made in the decree itself (5) The respondent will not be deprived of costs on the dismissal of the appeal on the ground that the appellant had no previous notice of the preliminary objection which has prevailed (6) In his appeal from the Judge's order passed in favour of the plaintiff, and disallowing his own claim for costs, a defendant unnecessarily made a co defendant a respondent As this respondent could not be injured in any way in the appeal, it was held by Sir Baines Peacock (Mitter, J, dissenting) that although the appeal was dis missed, the ee defendant was not entitled to costs simply hecause he had been present watching the ease (7) When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be included in the decree (8) A decree for "usual costs and interest" means all costs which the successful party has incurred from the commencement of the suit until the date of the final decree with interest at (now) 6 per cent from the date of the decree (9) A direction in a decree that "the respondent should pay to the appellants the costs incurred by them in the Lower Court" means the costs specified in the decree appealed against as the costs incurred by the appellants (10) Where a decree under which costs have been recovered is set aside in appeal an express order is not needed for a refund of the costs with interest (11)

The same principles are applied in appeals to the Privi Council where

⁽¹⁾ Bishen Dayal : Bank of Upper India

¹³ A 290, 295 (1890) (2) Myers : Defrice, 5 Fx D 180, Ellis v De Silva 6 Q B D 521, Goutard v

Carr. 13 Q B D 598 n , Lund v Campbell, 14 Q B D 821, Hawke : Brear, 1b, 841

⁽³⁾ See Mohendro Chandra v Ashutosh Gangult, 20 C 762 (1893), Parmanandas v Venayekrao, 7 B 19, 33 (1878), Monohur Dass v Romanauth Law, 3 C 473, 484 (1678). Ghanasham Nilkant t Moroba Ramchandra 18 B 474 (1894) In Ramji Morarji e Standard Oil Co , 20 B 167 (1895), it was held that the assignce of a decree who was made respendent in an appeal from it, but had taken no steps actively to support it, ought not to be ordered to pay costs

⁽⁴⁾ Mohen iro Chandra : Ashutosh Gan

guli supra (5) Parmanandas t Venayekrao, supra (6) Imtiaz Bano : Latafat un nissa Il

^{328 (1889)} (7) Collector of 24 Pergunnals : Wilkin

son, 12 W R 444 (1869)

⁽⁸⁾ Shaikh Mahomed v Ram Kant Chow dbry, 16 W R 266 (1841)

⁽⁹⁾ Broughton v Perhlad Sem 19 W R 152 (1873), see Madhublal Ishan : Noyan

ghose, 6 C L R 231 (1880)

⁽¹⁰⁾ Ram Chunder Sen t Durga Nath Poy. 1 Shome, 143

⁽¹¹⁾ Dorab Ally Ishan v Abdul Azers, 4 C 229 (18"8), Watlans : /ohooroo l leen 1 C W N exevu (1897)

the successful appellant is, as a rule, entitled to his costs (1). But where an appeal was aftirmed upon wholly different grounds from those relied upon by the Court below, the dismissal was ordered to be without costs (2). And where a partial alteration was made by the Appellate Court in the decree of the Court below, as to the rate of interest awarded, but in other respects the decree was affirmed, both parties were directed to pay their own costs of appeal (3). No costs have been given where the parties maintained pleas far in excess of their respective legal rights, (1) or where the appellant has failed as to part of his appeal, (3) or where the appellant has failed as to part of his appeal, (5) or where the appellant has used forged documents (6). Costs occasioned by the introduction of unnecessary and irrevelant matter into the legal of the production of the parties of the

A Court may, however, direct that costs shall not follow the event, but if it does, it must be for good cause, and its reasons must be stated in writing . a provision enacted both to occure a proper exercise of discretion and in order that the Court of Appeal may be in a position to control the order. It is not nossible to define what is good cause. The rule laid down in Cooper a Whittingham (8) that "where a plaintiff comes to enforce a legal right, and there has been no miscouduct on his part, the Court cannot take away his light to costs." has been adopted in this country (9) and by the Court of Appeal in England But the same Court has held (10) that unscended was not necessary to constitute good cause for depriving a successful plaintiff of costs "Everything which increases the litigation and the costs, and which places upon the defendant a burden which he ought not to bear in the course of that litigation, is perfectly 'good cause' for depriving the plaintiff of his costs "(II) The Court may consider not merely the conduct of the party in the actual litigation, but may take into consideration matters which led up to it (12) Where a defendant has by his mis statements made under circum stances imposing au obligation on him to be truthful brought higgation on humself, and rendered an action against him reasonable there is good cause for depriving him of his costs (13) If the action is frivolous or vexatious tho

- (1) Kali Krishna Lagore i Scirctary of State, 15 I A 186, 194 (1888)
- (2) Fischer v Kamala Naicher, 8 M. 1 A 170 (1860), s.c., 3 W R P C 33
- (3) Mirtunjoy Chuckerbutty t Cochrane, 10 M. I A 229 (1865)
- 10 M. I. A. 229 (1865)
 (4) Ramcoomar Ghoso ; Kali Krishna
 Tagore, 13 I. A. 116, 122 (1886) , s. c., 14 C.
- 99 (5) Maharam Rajroop Kour & Syad Abul Hossein, 7 L A, 240, 249 (1850), a. c. 6 C
- Hossein, 7 L. A. 240, 249 (1880), a. c. 6 C. 394 (6) Coomari Rodeshwar : Mauroop koer,
- 13 I A 20,21 (1885), sundarly a respondent guilty of fraud got no costs Bhubaneswara Debt t Adkomul Lahiri, 12 I A 137, 141 (1885), s c 12 C 18.
- (7) Bishenmun Singh t Land Mortgage Bank, 12 I & 7 (1884), s. c., 11 (244,

- Rajah of Pittapur v Rajah Row Buchi, 12 I A. 16 22 (1884)
 - (8) 15 C D 501
- (9) Kuppuswami Chetty : Zamindar of Kalahasti, 27 M. 341, 342 (1993), where the passage, which explains the meaning of mis conduct, will be found cited.
- (10) Forster v Farquhar, 1893 1 Q B 564
- (ii) Huxley t West London Extension Ry Co, If tpp Cas. 32, per Halsbury, LC See also judgment of Lord Watson at p 33
- (12) Per Lord Russell, C.J., Bostock r Ramsay Urban Datrict Council, 1900, I.Q. B 360, 1900, 2 O. B 616
- (13) Par Fry, L.J., Sutchiffe r Smith, 2 limes It SSI

planutiff may be deprived of costs (1) If the Court thinks that the suit is a vexatious one and that no real damage has been sustained, it may give nominal damages to the plaintiff and award costs to the defendant, as in substance in such a case the defendant succeeds (2) Costs have been dis allowed where a party acted with malice and malevolence, (3) as distinguished from mere hardness, in exciensing a civil right, (1) and where the defence was found to he false and unscrupulous (5) A party has been refused costs where he induced plaintiff to sue him; (6) or did not raise the plea of jurisdiction ou which he succeeded until special appeal (7) It has been held that the fact that a defendant has, previously to a suit heing filed, admitted that the money sued for was due was not a ground for depriving plaintiff of his costs (8) This would be so if, though making an admission, a defendant was unwilling or refused to pay But if not so, aliter, for the Court may deprive a plaintiff of costs where his suit is needlessly launched (9) See also cases cited ante in connection with appeals to the Courts of this country, or the Privy Council It is not possible to formulate any precise rules As has heen well said, "We can get no nearer to a perfect test then the enquiry whether it would be more fair as between the parties that some exception should be made in the special instance to the jule that the costs should follow upon success "(10)

Separate Costs.—Where the interests of the parties are separate and distinct and they have different defences, separate costs should be allowed to oach (11), as where the defendants are zemindar and patnidar, whose defences wers not necessarily identical, (12) or where, in a suit to recover possession of land, one of the defendants pleaded successfully that he had nothing to do with the land, and the other defendants claimed title, and also succeeded in their

(1) Macgregor v Clay, 4 Times R 715

(3) Kalco Pershad v Ram Pershad, 18 W R 14 (1872), sed qu the defendant having been found entitled to do what he did

(5) Ram Gopal : Bhoohun Mohun, Cory ton, 126 (1864-a)

- (6) Bhugwan Doss v Syed Akbar, 1 Ind.
- Jur N S 300 (1867) (7) Nobeen Kishen v Shib Pershad, 7 W
 - R 490 (1867) (8) Kuppuswami Chetty v Zamindar of
- Kalahasti, 27 M. 341 (1903) (9) Parshram v Dorabji, 2 Bom L R 201,
- 256 (1900), where without contest a plaintiff obtained a declaratory decree, but was ordered to pay the defendant s costs
- (10) Per Bowen, L J, in Forster t Far quhar (1893), 1 Q B 569
- (11) As appears to have been the case in Konella Kocr v Behari Patuck, 12 W R 70 (1869), and see Chooneo Lal : Gopal Chunder, S D N W (1859), p 1, where the defendants represented separato interests and lived so far from each other that it could not be expected that they should em loy the same pleader

(12) Gohmdnath Roy Bahadocr t Luch mee koomarce, 11 W R 36 (1803)

⁽²⁾ Futcek Parooee v Mohender Nath Mozoomdar, 1 C 385-388 (1876) In England the fact that only a farthing s damages is given, though not conclusive, is primd facie good cause . Moore v Gill, 4 Times Rep 738 . Myers v Financial News, 5 Times Rop 42, O Connor v Star Newspaper, 68 L T 146 Similarly as to smallness of damage and recovery of small sum upon a large claim, Wood v Cox, 5 Limes R 272, Lorster v Farquhar (1893), 1 Q B 564 In Mt Bibee Moscehun v Mt Bibee Munoorun, 24 W R 69 (1879), a plaintiff who secured nominal damages was given his costs

⁽⁴⁾ Muddun t Alopeedeen, S D N W 1861, p. 569, cited in Olymenty, C P C. notes to s 220

defence (1) or where the defendants were charred with falsely misanuroprinting property and some of them might have failed in their defence and others succeeded (2) But where the interests of the defendants are the same. as is ordinarily the case with rount holders . (3) or several representatives of the same criemal mortgaces. (1) or persons are sued for damages on a cause of action common to all . (5) in short, where the defences are common and identical and not separate, or from any cause defendants file separate defences nunecessardy (6) only one set of costs should be awarded

Calculation of Costs - In the High Courts, rules exist under which there is a regular scale of costs and the parties' costs are taxed according to this scale Pleuders' fees must also be calculated according to the rules govern ing them (7) The seile on which costs should be awarded to a defendant depends on what the plantificlams against him . (8) and so where in a suit for partition two widows who had a claum for maintenance only were made parties their pleaders were held entitled to percentage only on the amount claimed by them for maintenance (9) When a suit contains several distinct claims against separate defendants, the amount of costs to be allowed to each depends on the claims against him (10) Where co-sharers were made defendants in order to plaintiff obtaining a complete decree the plaintiff must, it was held hay costs sufficient to cover expenses of appearance (11) As against his own chents, in the absence of any rule or express agreement a pleader is only entitled to reasonable remuneration for his work and labour (12) Costs in an application for revocation of probate have been assessed as in a miscellaneous proceeding (13) The costs which a defeated plaintiff should be required to pay are those necessarily incurred by the successful party in the defence in the suit Costs cannot be deemed necessary if by reasonable diligence on the part of the defendant or his pleader the expenditure of them could be avoided (14) Among items which have been allowed are salary of accountant (15) expenses in

- (I) Ram Chunder Gossam t Mutty Lall Bagchce, 11 W R 19 (1869)
- (2) Nilkanth Surmah v Sooscia Debia 6
- W R 324 (1866) (3) Brindabun Chunder t Ram Coomar
- Chowdhry, 1 W R 139 (1864)
- (4) Shah Makhun Lall t Sree Kissen Singh, 12 M. 1 A 157, 201 (1868)
- (5) kaseo Nauth Roy : Hullodhur Roy, 2 W R 60 (1864)
- (b) Francisco do Assis v Anjos 17 W R
- 188 (1872), Juggu Lall v Beharee I all S D N W, 1859, p 349 Bhup Sing v Zam ul Abdin 9 A. 205 at p 210 (1886)
- (7) Amirtouath Jha Roghoonath v Pershad, 6 W N Misc 35 (1866) [urespective of any private arrangement between pleader and chent 1
- (8) Kasheenath Sem : Chunder Monce,
- J W R 288 (1868)

- (9) Ramchandra Parsharam : Bhagabat.
- 21 B 42 (1895) (10) Rajah Roodur Naram v Coomar
- Naram Patnack, 13 W R 320 (18"0)
- (II) Ramputty Accer : Kalce Churn Singh, 14 W R 94 (1870)
- (12) Mt Ameeroonissa : Chapman, 6 W R 108 (1866) [pleader employed by soveral defendants in same interest not entitled to separate fee from each]
- (13) Pratap Chandra Shaha v Kali Bhanjan Shaha, 4 C W N 600 (1900), Garabini Dasi : Pratap Chandra Shaha,
- 4 C W N 602 (1900) (14) Secta Patta v Suryudamma, 18 M. 128 (1891), so it was held that plaintiff should
- not be saddled with the costs of three pleaders if two were sufficient, Sukcena Bibce v Usud Ah, S D N W, 1861, p 333
 - (15) Macnair v Hogg, 2 Hydo 5J (1864)

connection with attachment of defendant's property when suit is dismissed (1) and stamp for plaint (2)

Execution for Costs -The portion of sect 220 as relating to execution is omitted. See now sect 36. If the order for costs forms part of a decree such decree is executed in the ordinary way. Where, in a partition suit, the plaintiff, after decree, took no steps, but the estate was partitioned at the instance of one of the defendants, it was held that he must first obtain an order for payment, and if payment he not obtained then apply for execu tion (3) If the order does not form part of the decree it may be executed as if it were a decree for the payment of money But such an order is not a decree (4) A mamlatdar has the same power to levy costs decreed by the High Court as he has regarding costs decreed in his own court (5) No separate suit hes for the recovery of costs awardable under the Code, a nemedy in execution being given (6) But where a Court is not entitled to order costs and costs are incurred, they may be made the subject of considera tion in a subsequent suit (7) If it can order costs and does not do so, no separate suit will be (8) An objection as to costs is a matter which should he raised in the shape of an application to amend or review the origina decree, and failing that, by way of regular appeal against the decree, but no objection can be raised in execution of it (9) A summary remedy for paymen of costs against his chent has been given to solicitors, but they cannot under the rule of Court so giving it enforce payment against the chent's repie sentatives (10)

Set off of costs -O XX r 6 enacts that "The Court may direct that the costs payable to one party by the other shall be set off against the sum which is admitted or found to be due from the former to the latter" This rule, which is a re-enactment of sect 221 of the last Code, is one of those section in which the general equitable principle of set off is recognized Bec not to O VIII 1 6, post A mortgagor is entitled to set off or ded, w amount of costs payable to him under the decree against or from the m debt payable by him (11) The section has been applied by analogy, of

(7) Ib, and sec Venkata Vigaya v

⁽¹⁾ Sewa Ram v Landv, S D N W 1856,

p 514 (2) Madhub Chunder : Ram Lochun, 14 W R 143 (1870) It does not, however, appear why the plaintiff was required to pay

this amount in (3) Brojo Lall Sen v Mohendro Nath Sen,

mayva Pantulu, 22 M. 314 (1898) [St recover money advanced to guardian ad for costs 1

⁽⁸⁾ Referred case, 3 M H C R 3 (1867)

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deduction of costs from the purchase money in pre countion suits (1) A setoff cannot be allowed for costs not actually awarded, and a decree which is increable of being enforced cannot be set off against a decree which is abye (2)

Interest on costs —Interest cannot be allowed up costs where the decree itself is silent on the point, unless submission is made by the parties to the discretion of the Court (3) Tho view once taken that sect 222 and sect 200 of the last Code did not affect the special provisions as to allowance of interest in the Transfer of Property Act (1) has been descented from and overruled (5)

Appeal as to costs.-It was proposed to enact in sect 26, vost, that " No oppeal shall be on a matter of costs only where by law such costs are left to the discretion of the Court, except by leave of the Appellote Court, obtained on on application accompanied by a memorandum of appeal" As, however, objection was taken the clause has been omitted with the result that the matter is still regulated by the previous case law. Under the Code of 1859 it was held that a regular appeal would be on a more question of costs, although as the lower Court had a discretion in the matter, any interference with its order ought also to be excressed with discretion. Though, however, an improper exercise of discretion might be matter of regular appeal, no special appeal would he unless the award of costs was contrary to law (6) A similar rulo was laid down (7) under the Code of 1877. Under the last Code first appeals vero given not merely from decrees but also from any part of the decrees, (8)

- (1) Ishri t Gonal Saran, 6 A. 351 (1884). sco notes to Rule 120
- (2) Huro Pershad t Foolkishere, 16 W. R 368 (1871) [As where (in regard to the first point) a decree of the High Court gave the successful appellant costs of that Court and of the lower Appellate Court, but omitted and the costs of the first Court 1
- 3) Bhoza Rughbur t Bhoza Raj, 3 A H (1) R. R. 319 (1871), Forester : Secretary of techoate, 41 1 137 (1877), s c, 3 C 161

(3) (4) Amolal Ram : Lachms Naram, 13 A

(1896)

(3) (5) Achalabala Bux t Surendro Nath Dey. bo.24 C 766 (1897), Subbaraya t Ponnusami, (4 21 M. 364 (1897), Maharajah of Bhartpur t Ram Kanno, 23 A 181, 191 (1900) P C

(6) Gridhari Lal Roy t Sundar Bibi. B L, R Sup. vol. F B 496 (1866) [lor carlier cases, see Doucett 1 Wise, 1 W R 322 (1864), Collector of Dacca & Kamala kant, 2 W R 33, 34 (1865), Choonee Lal v Patroo, 6 W R 19 (1866)], Futcel. Parooco : Mohender Nath Mozoomdar, I C 385, 387 (1876), Desaji Lakhmaji t Bhava nidas \arotamdas, 8 B II C R 100 (1871), 1 C J So the P C refused to interlere on a matter of discretion. Mt Acemen t Luchman Das, 5 W R P C 59 (1837) In

Sri Dantuluri : Surappa Razu, 3 M. H. C. R. 113 (1866), the Court interfered in second appeal as a question of principle was involved. as the lower Court made a defendant pay costs to a plaintiff whese suit was dismissed for want of cause of action. In Shunt Bulch . Lalla Nund. 11 W R 48 (1864), the Court interlered as a person, unnecessarily made a party, had been deprived of his costs, and in Ram Chunder Gossain a Mutty Lall Bagchee, 11 W R 19 (1869), where the lower Court disallowed separato costs to the delendants. As to carly cases on second appeals, see Khoda Bux v Mowla Bux, 14 W R 255, 766 (1870), Ooma Churn : Gursh, 25 W R 22 (1875). Achumbit t Kanhaya Lal, 7 W R 208 (1867), Beer Pershad v Doorga Pershad, W R 215 (1864) Amir Saheb v Jamshedji, 4 Bom H C R A. C J 941 (1867), Mt Bibco Mosechun t Mt Bibee Munoorun, 25 W R

(7) Balkissen Das v Lutchmeeput Singh, 8 C 91, at p 94 (1881)

(8) Therefore, that part which relates to costs is appealable if the decree is appealable See Vasudev : Bhavan, 16 B 241 (1891). Balkissen Dasa Lutchmeeput Singh, 8 C 91, 94 (1881)

and necessarily therefore against the part of the decree awarding costs. But such an award was then, as before, a matter of discretion, and the Court of Appeal would generally only interfere where a matter of principle was involved, (1) whether in first appeal from a decree (2) or order, (3) or in second appeal (4). The Court has also held its interference justifiable in first appeal where, though strictly speaking no question of principle is involved, there has either been misapprehension as to facts of no real exercise of discretion at all (5).

The Bombay High Court, (6) eiting certain English decisions, has held that the principle to be deduced from them is that Appeal Courts should interfere with the exercise of discretion by the lower Courts as to costs when there has been any violation of any established principle, (7) misapprehension of facts, (8) or where there has been no real exercise of discretion at all (9). These principles will be of general application in first appeals and appeals from orders. In the case of second appeals it must be shown that the order complained of comes within the provisions of sect. 100

(I) Secretary of State v Marium Hossein Khan, II C 359 (1885), Amirul Hossain v Khairunnessa, 28 C 567 (1901), Moshingan v Mozari Sayad, 12 C 271 (1885) [where successful defendant was ordered to pay plaintiff s costs], Bunwari Lall v Chowdhry Drup Nath Singh, 12 C 179 (1885) [where the plaintiff had no cause of action against appellant, and sought no rehef against him and therefore could not receive costs]. Ranchordas Vithaldas v Bai Kasi, 16 B 676. 682 (1892), Kushal Sadashiv v Punam chand Justupii, 22 B 164 (1897). Bishen Dayal v Bank of Upper India, 13 A 290, 295 (1890) [where a successful party was with out cause deprived of his costs], Parshram v Dorahu, 2 Bom L R 254, 255 (1900). Pratan Chandia v Kali Bhanjan, 4 C W N 600 (1906) [costs whether allowable as for suit or miscellaneous proceeding), in Tara Prosunno v Satish Chandra, 4 C W N 90 (1896), the question does not appear to have been one of 1 rinciple but of the propriety of the order, see hamat t Kamat, 8 B 369 (1554)

(2) Secretary of State : Marjum Hossem Islam, supra

(3) Moshingan v Mozari Sayad, supra that is appealable orders, an ai peal lying from that part of the order relating to costs Balkisson Das v Luchmesput Singh, 8 C 91 Sivra), 16 B 241 (1891)
(4) Bunwari Lall v Chowdhry Drup Nath
Singh, supra

(5) Ranchordas Vithaldas v Bai Kasi, 16 B 676 at p 682 (1892), foll Kushal Sadashv t Punanchand Jusrupi, 22 B 164 (1897), Parshrain t Dorabji, 2 Bom L R 254, 255 (1990)

(6) Ranchordas Vithaldas i Bai Kasi, 16 B 6:6 at p 682 (1902), foll. Kushal Sadashiv i Punamehand Justupji, 22 B 164 (1897)

(7) The English cases are numerous, see Morgan and Wurtzburg s Costy, .66 Ann Practice, Notes, O 65, r 1, p 963, vol il p 467, Parshram v Dorabji, 2 Bom. L R 251, 255 (1900)

(8) Inra Galbert 28 C. D 54J. Robertson
 Robertson, 6 P D 119, Parshram t
 Doraby, 2 Bom L R 251, 255 (1900)

(9) As where costs have been awarded arbitrarily Daulat Runne Durg, Praesd, 15 1.333 (1893) Though the Court will assume that the Judge has exercised his discretion, unless satisfied that he has not done so. Bew 18 bey (1809), 2 Ch. 407, foll in Parshram to Dorahy, 2 Bona. L R. -91, 200 (1909), R. Hunt, W N (1901) 144 C \ 1, Cnd Service, Security of S Assugation Co. (1993) Z K. Il 760, where the Judge dicaled on grounds not upon to him, see Ann. Ir is p. 167

⁽¹⁸⁹⁸⁾ The Court can hear an appeal as to costs although that portion of the appeal not relating to costs has been abandoned at the hearing Vasudev Ramehandra : Bhavan Sivraj, 16 B 241 (1891)

PART II.

EXECUTION.

GENERAL.

36 The provisions of this Code relating to the execution of decrees shall, so far as they are applicable, be deemed to apply to the execution of orders

Orders—This section replaces and supersedes the first paragraph of sect 649 of the last Code, the second paragraph being incorporated in the next section. By virtue of sect 617 (now 111) and seet 649 of the Code of 1882, it was beld that an order obtained from a Judge in Chambers by an attorney against bis client for payment of costs might be executed under Chapter XIX of the Code of 1882, corresponding with the present Part (1). By virtue of seet 649 of the last Code, execution might have been had of a judgment entered up under sect 86 of the Insolvent Act (2).

Execution—Execution is the enforcement by process of Court of its Chapter in the last Code was held to mean the enforcement of the decrees of Courts by process of execution only, viz the different kind of execution dalt with in the Chapter for compelling the judgment debtor to obey the order of the Court (3). Process in execution must always be granted by the direct act of the Court itself. And as parties cannot invoke the process do noto either by agreement or by their conduct so meither can they extend the relief which the Court has chosen to award (4). Primd Jaces it is the right of every litigant to call on the Courts to take such action as may be requisite to secure the execution cannot impose terms which are not in the favour, and the Court of execution cannot impose terms which are not in the decree (5). Procedure in execution

⁽¹⁾ In re Prempi Trikumdas 17 B 514 (1853)
(2) In re Bhagwandas Hurjivan, 8 B 511

⁽²⁾ In re Bha, wandas Hurpvan, & B 511 (1884)

⁽³⁾ Sreenath Roy: Radhanath Mookerjee, J.C. 773, 776 (1882) [as regards the question decided, an order directing an account is now a decree. See s. 2, unit].

⁽¹⁾ Lekowro Sm₀h v Bijoynath Chatter jee, 13 W 21 H (1870) is to dierce menjable of executi n₁ see he helibina 14ta v Sm₀ara Chanar, 4 M 213 (1881); Rama magra bir₀h v Ramyal bir₀h, 6 t Ji. R 170 (1873)

⁽⁵⁾ Nawab Mir Sadrulin i Nawab Nurudin, 19 B 79 (1994)

ought not to be conducted in a shipshod and slovenly fashion, as if it were an unimportant branch of the work they have to do in the administration of justice but it ought to be conducted with as much care as the procedure in suits because of the difficulties which so frequently arise. The Courts are bound to look to the Code for the procedure they should follow in these execution proceedings (1)

"Provisions of this Gode"—This Part, together with O XXI, replaces Chapter XIX of the Code of 1882. The provisions relating to execution have been divided into two portions, viz. those contained in the present Part, and those contained in the Rules of O XXI, which must be read with it. These Rules refer to minor points of procedure. The arrangement and numbering of this Part has been very materially altered, and sections appearing in it have been taken from other portions of the old Code. Further, the sections of the Code reproduced have been added to, and made the subject of important amend ments, which, for the most part, embody or have been suggested by previous case law. A considerable number of the sections or portions of the sections are entirely new.

The general scheme of the Part is as follows -

Firstly, the Code is declared applicable to decrees and orders, and a definition given of the term "Court which passed the decree" (sects 36, 37) [transfers of decrees to the Collectors for execution are dealt with in sects 68-72 and the Third Schedule] Then follow provisions relating to the Courts by which decrees may be executed, and the jurisduction of such Courts (sects 38-46), thirdly, the questions to be determined by those Courts (sect 47, formerly 244), fourthly, the limit of time for execution (sect 48), fifthly and sixthly, transferces, legsl representatives, and procedure in execution respectively (sects 49-51), seventhly, the mode of execution, whether by arrest, attachment, or sale (sects 55-72), eighthly, payment and distribution of assets (sect 75), and lastly, the resistance to execution (sect 71) Other provisions concerning these matters are contained in the 103 when 50 N.XVI.

The main alterations to be noted in the sections are as follows—the introduction of piecepts (sect—16), and of sects 53, 61, and amendments of sect—241 (now sect—47), and of the sections corresponding with sects—51, 55 (1) (2) 62, 64, 73—As regards sects—68 et seq. dealing with execution by Collectors, the provisions, as they deal with a special matter, and are not of general application, have been placed in the Third Schedule

The alterations in the rules are cited under O XXf

The chief omissions in the sections are of clauses (a) and (b) of the former sect 244 (see notes to seet 17) and of seet 288 of the last Code, which it was considered might be omitted, having regard to the provisions of Act XVfII of 1850 Sect 257A of the last Code has also been omitted it was first enacted by Act XII of 1879, with a view to protect the interests of judgment debtors against unidue pressure by decree holders. The Select Committee stated that the section had given rise to conflicting decisions and as interpreted by the injority of the High Courts, was found in practice to be of hittle service to judgment debtors. Moreover, sect 16 of the Indian

Contract Act, as amended, was considered to afford adequate protection where it is required. As, however, the section remains in force until the coming into operation of the present Code, and some cases decided under it have a relation to sect 258 (now O XXI r 2), the following notes on the section are more:

Object of section 257A of last Gode, now omitted —The Legislature considered that the power of executing a decree placed the holder of it in a position to exercise undue pressure over the judgment debtor and enabled him to obtain terms too favourable to himself from the latter, whose interests needed protection at the hands of the Court which passed the decree (I) The object is to avoid inconvenience and delay in executing the decree and its being held in terronem over the debtor, and to afford protection against unfair arrangements, which protection is insured by the necessity for sanction (2)

"The Court"—It was held under the last Code that the Court to which a decree had been transferred for execution could not pass an order under this section and that sanction could be given only by the Court which passed the decree (3)

"Shall be void"—Under the last Code an agreement of the nature stated was declared to be void, and a question arose whether it was void in tole and for all purposes or for the purposes of execution proceedings only, and was enforceable by a fresh suit (4). It is not easy to reconcile all the decisions on the point. There is no absolute probabition against such an agreement. The section, however, forbids the enforcement of an agreement entered into in contravention of the section, while a decree is subsisting and enforceable. If that be so then the decree must be enforced by execution and not by separate suit, and in such execution an unsanctioned agreement will not be recognized. If however an agreement is such that it adjusts and puts an end to the decree which thus ceases to be enforceable no question of or in execution arises, and the substituted agreement may be made the subject of a fresh smit (5).

"Every agreement"—The agreement referred to to give time is an agreement to pay the judgment debt with a supulation that it shall not be

(1) Heera Nema t Pestonji 22 B 693 697, 693 (1898) See as to thus and sect 258, now O XXI r 2 G C Whitworth s "Decrees in Bar of Contracts

(2) Bank of Bengal v Vyabhoy Gangui 16 B 618, 625 (1891) where it was also held that an unsanctioned agreement could be enforced where it formed part of the consideration of a bond and had been enjoyed by the obligo Govind i Sakharam as B 383, 391 (1901), Venkata Subramania Vysar v Koran Kannan Ahmed 26 M. 19 28 -6 (1902)

(3) Gandharaj Singh e Sheodarahan hingh 12 4, 5-1 (1890) Paramananda Das t Mahabur Dessii 20 M. 375 (1890) (4) Lalpi Singh i Gaya Singh 25 A. 317, 329 (1903) and case there cited Venkata Subramania Ayyari Koran Kannan Ahmed, 26 M. 19 26 (1902) Gopalsahu i Brij Kishore Pershad 32 C 917 (1301)

(3) See cases cited in last note. In Govind Arishna v. Sakharam 28 B 353 (1994) these cases were not referred to. In Venkata Subramama Ayyar Koran hannan Ahmed, 26 V. 19 (1902) at p. 26 it was pointed out that in Hindum Chand Iswal r. Taharunissa Biha. 16 C. 501 (1859) there was no sgreement by the judgment-reclutor to surreclude thisma, bits under the decree, and that being so the case was, upon the principles above stated, wrongly decided.

payable at the time when under the decree it became payable. An agreement to give time for the satisfaction of a judgment implies cx vi termini that there has been no actual satisfaction but merely a stipulation for future satisfaction Therefore an agreement under which there is an actual and present satisfac tion of the judgment replacing it and putting an end to the decree is not within the section In other words, the agreement to which the section relates is one which suspends and does not destroy the rights of execution consequent on the decree (1) The last clause presupposes the existence of a judgment debt, for the sum paid eannot he applied in satisfaction unless there is a subsisting judgment to which it can he applied. Where the judgment deht is extinguished in whole or in part by the substitution for it of a contract, such a contract cannot be regarded as an agreement to give time for the satisfaction of a judgment debt, since the latter, to the extent to which it has been extinguished, is no longer in existence. The agreement in such a case is only an adjustment of the decree under O XXI r 2, which, if not certified, will not prevent execu

as regards another,(3) tions are not part and 1

one from the other (4) The section did not apply to agreements by persons who are not parties to the suit in which the original decree was made (c) Persons who have nothing to do with a decree cannot fall within the mischief struck at by the section But the same consideration cannot apply where a person is substantially bound by the decree though not proforms a party to it (6) It was held that an agreement was none the less void because one of the parties to it, who was the legal representative of one of the judgment dobtors, had not been one of the parties to the suit in which the decree was obtained (7)

Enforceable—It was held under the last Code that the section must be deemed to relate to judgment debts which are still enforceable (8)

Raichand : Naran, 28 B 310 (1904)

⁽¹⁾ Ful aram v Anantbhat, 25 B 252 (1900), s c, 2 Bom L R 1012, in which the previous decisions are reviewed Venkata Subramania Ayyar v Koran Kannan Ahmed, 26 M 19 (1902), where, however, the opera tion of the decree was only suspended, not extinguished, Gopal Sahu & Brit Kishore Pershad, 32 C 917 (1905), [ref to Hur Kissen Das Scrown t Nibaran Chander Banerjee, 6 C W N 27 (1901), as a case in which tho judgment debt was extinguished] I alp Singh t Gaya Singh, 25 A 317, 325 (1903), diss from Dhaurain Raghot Ganpat Sadashir, 27 B 96 (1902) , s c , 4 Bom L R 872, which practically refused to follow the case first mentioned

⁽²⁾ Lalji Singh t Gaya Singh, 25 A 317 at p 328 Sco Ram Doyal Bannerjee t Ram Ifuri Pil, 20 C 312 (1892)

⁽³⁾ Bhagchand : Radha kisan, 28 B 62 (1993), s c, 5 Bom L R 673 foll

Govind v Sakharam, 28 B 363, 386
 Judy Davlatsing v Pandu, 9 B 176 (1884).
 Vishnu Vishwanath v Hur Patil, 12 B 499
 Chatru v Kondaji Vithal, 38 B 219
 Judy Davlatsing v Kondaji Vithal, 38 B 219

⁽⁵⁾ Ramji Pandu v Mahomed Walli, 13 B 671 (1889), Yelia Chetti v Munisami Reddi, 6 M 101 (1882), Hur Kissen Dass Serowjeo v Aibaran Chandra Banerjee, 6 C W N 27, 30 (1991)

⁽⁶⁾ Govind Lyishna : Sakharam, 28 B 383, 391 (1901)

⁽⁷⁾ Venkata Subramania Ayyar t Koran Kannan Ahine I, 26 M 19 (1902)

⁽S) Shrijatrao : Govind Varayan, 11 B 390 (1883)

"Sanction'—Where no formal sanction had been recorded it was held that under the circumstances sufficient had been done to satisfy the requirements of the section (1). As regards time for sanction see below (2) and as to the effect of want of sanction see as to the effect of want of sanction see as to the effect of want of sanction see as to the effect of want of sanction see as to the decree in the case (3). The parties could not resile from the agreement so sanctioned and if there was irregulantly in the sanction not amounting to want of jurisdiction the compromise must take effect until the order sanctioning it is set aside (1). An order passed under this section being one relating to the excention of the decree was a noncalible (5).

"Decree Order '-For the meaning of these terms, see note to sect 2 ante

What decree may be executed.—The rule my shortly be stated to be—the decree of the Court of first instance until appeal and after that the decree of the Court of last instance. Whether the decree of the appellate Court is for reversing or for affirming the decree against which the appeal is preferred it is, in either case, the final decree in the cause and as such the only decree which is capable of being enforced by execution after it is once pronounced. If the decree of the lower Court is reversed it is absolutely dead and gone, if it is affirmed or modified it is equally so though in a different way namely by being merged in the decree of the superior Court which takes its place for all intents and purposes (6). It it is aftered by the Court of first instance execution cannot issue (7). But where the appellate decree is not complete in itself reference

⁽¹⁾ Krishna : Vasudev, 21 B 503 (1896) and see Lakshmanna : Sukiya Bai 7 M. 400 (1884)

⁽²⁾ Nam Kole v Chima Bhosle 13 B 54

⁽³⁾ Sita Ram t Dasrath Das 5 1 492 Sham Karan e Pian 5 1 596 (1883) Champat Rai v Pitambar Das 6 1 16 (1883) Makund Ram t Makund Ram 6 A. 228 (1884) Nuhammad Sulaiman v Jhukki Lal 11 A 228 232 (1888) Tlakoor Dyal Singh v Sarju Pershad Viss r 20 C 22 (1892) but see Ramlakhan Ras v Bakhtaur Rai 6 A 623 (1884) Prior to the enactment of this section the only decree which could be executed was the original Ram Runjun e Jowhurujumah 23 W R 129 (1874) Madhub Chunder v Madhub Lal 15 W R 542 (1871) and see also Ameerumssa Khatoon v Meer Mahomed 2 C L. R 143 (1878) Debi Ran t Golul Prasad 3 A 585 (1881) Kh doo v Kalee Sahoo 12 W R 71 (1869) Dinonath Sen v Gooroo Churn Pal 21 W R 310 (1874) Pllat : Pillat 21 A 219 (1875) Bishto

Chun ter : Woomanath Roy 15 W R 459

⁽⁴⁾ Muhamma l Sula man t Jhukhi Lal 11 1 2'8 (1888)

⁽⁵⁾ Rangu v Bham 11 B 5" (1886)

⁽⁶⁾ Mul ammad Sulaiman Khan : Muham mad larkhan 11 A °67 (1888) P B Ram Claran Basak v Lakhi Kant Banneri 7 B L R 701 (P B) at 1p 709 714 (1871) Nourang Ral t Latif Clou ll uri 13 A 394 (1891) Slol rat Singl v Br dgman 4 A 3 C (188.) Vana Vikraman v Unn cappan 15 VI 1 0 171 (1891) So though an order of the P C may confirm a decree of the Court below that order is the paramount decis on which must be executed Luchman Persad v Kushun Persad 8 C 218 (1882) A different view from those above expressed was taken in Vir Apmudd n v Mathura Das 11 B H C R at p 215 (1874) As regards appellato decrees which coincided with the or ginal decree see notes to O XX r 6 and sect 149

⁽⁷⁾ Muhammad Sulaiman Khan v Fatima, 11 1, 314 (1889)

may be made to the prior decree (1) The decree however which is executed is the appellate decree. Where a decree was compromised by agreement made by the parties and communicated to the Court which passed the decree, held that the effect of the decree was extinguished by the agreement which could only be enforced by a fresh suit and not by an application for execution of the former decree (2). When a decree contains a direction for payment and creates a charge and default is made, the decree cannot be at once executed the proper course for its enforcement is not to apply for execution, but to apply for either an order for an account and sale or to institute a suit for enforcing the charge (3).

From which Court execution may be had -See the notes to sects 37, 38, 68-72, and Third Schedule The general jurisdiction of such Courts is dealt with post Seets 43, 44, 45 deal with execution of decrees passed by British Courts either in places to which this Part does not extend such as those scheduled districts to which the Code or this portion of it has not been extended execution of decrees passed by Courts of Nativo States, and issue of precepts to certain British Courts in foreign territory The Courts, therefore, by which execution may be given are Courts in British India executing either their own decrees or the decrees of other Courts in British India or Courts in British India executing the decrees of British Courts in foreign territory (ect 43) or Native Courts of such territory (sect 44) There remains the question of execution of decrees of British Indian Courts out of British Indian territory As regards this, the general principle is that Courts of British India have no authority to send their decrees for execution to Courts not in British India (4) An exception to this rule exists (sect 45) in the case of British Courts in foreign territory, Pro vided that such execution is authorized under the notification of the Governor general (5)

Jurisdiction of Court executing decree —The following section was proposed as regards this matter —

"(1) Save for the purpose of rateably distributing assets realized by sale or otherwise in execution of a decree by a Court of competent jurisdiction, no Court shall execute a decree which, by reason of the value or the nature of the suit at the time of its institution, it would have been incompetent to pass

(2) The Court which passed a decree for the enforcement of

⁽¹⁾ Gobardhan Das v Gopal Ram 7 A 366 (1885), Himayat Husain v Jai Devi, 5 A 589 (1883), Bihari Lal t Khub Chand 6 A 48 (1883), Ram Saran v Perudhar Rai, 10 A 51, 54 (1887) Seo further as to decree of simple affirmance incorporating mandatory part of triginal decree, Noor Ui v Koni Meah, 13 C 13 (1883) See notes to O XX r 6 and seet 149

⁽²⁾ Hari Raghunath t Krishnaji mant Joshi, 19 B 746 (1894)

⁽³⁾ Chundra Mont t Mutty Lall Mullich, 2 G W N 33 (1897) and qu as to first of the two alternatives See Aubhopessuren Date to Gouri Sunkur Panday, 22 C 859 (1894) Matangun Dassee t Chooneymoney Dassee, 22 C 903 (1894)

⁽⁴⁾ Kastur Chand Gujar : Parsha Malar 12 B 230 (1887)

¹² B 230 (1887) (5) Ratan Mahanti : Khaloo Sahoo 29 C 400 (1902)

a mortgage or charge against immoleable property included therein or subject thereto, shall have power to order the sale of any such immoleable property, wherever the same may be situate

(3) Where, after the passing of a decree in a suit for the enforce ment of a mortgage or charge, the whole of the immoveable property included therein or subject thereto falls, by transfer of jurisdiction, within the local limits of the jurisdiction of another Court, the decree may be executed either by the Court which passed the decree, or by the Court within the local limits of whose jurisdiction the immoveable property falls by such transfer

(4) Save as provided by this section and section 158 [dealing with attachment of salary] no Court shall have power to execute a decree in which the subject matter of the suit or application for execution is property situate entirely outside the local limits of its

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(5) Where immoreable property attached in execution of a decree for the payment of money forms one estate comprised within the local limits of the jurisdiction of two or more Courts, any one of such Courts may order the sale of the entire estate upon such conditions as it may consider reasonable and necessary for the prevention of conflict of orders

Explanation—For the purposes of this section, a Court, which would have been competent to pass the decree, shall not be deemed to be incompetent to execute it merely because, by reason of the amount of rent or mesne profits ascertained for a period subsequent to the institution of the suit, the pecuniary limits of the

jurisdiction of such Court are exceeded '

This section would have cleared up several points which have been the subject of Judicial decision. The Court executing the decree referred to is as appears from sect 38 either the Court which passed the decree or the Court to which it is sent for execution. (lause [5] with some modifications has been embodied in O NI r 3. The other clauses have not been enacted as however they have reference tapreceding case law they are here reproduced and commented upon.

Clauso (1)—There has been a conflict of lection on the question whether the Court executing a transferred decree was restricted to the perimary limits of its jurisdiction (1). In application for the execution of a decree liowever is in application in the suit in which the decree was obtained and juestions arising in the execution of decrees are for juently as important as the

(No.) and in the injutite Naradayja r Venhata Arishnayva 7 M. 37" (1991), Narimga Lillar e Lamanathan Chetti 1, M. 203 (1973). Ch. helu r. Vikrishna, Lu M. 345-34" (1914).

⁽¹⁾ See is the after after (kul hetel Chund r e Aukhil (hun'i r Chatkrye 10 G. 407 (1881) Durya (Taran M jumdar r Li atara (ujta 10 (405 40 (1881) cf Shit S I alwar r Sits Hastar L. II. L.

questions in issuo in the suit. The proposed clause adopted the principle of those decisions which held that a Court had no jurisdiction to execute a decree sent to it when the decree had been passed in a suit, the value or subject matter of which was in excess of the pecumary limits of its ordinary jurisdiction and that the power to send a decree to "another Court" meant another Court having junisdiction, and competent to execute that decree, having regard to the amount or value of the subject matter of its ordinary jurisdiction. The words "at the time of its institution" were introduced to declare beyond doubt that a Court having jurisdiction to grant a deerce has also authority to execute it, even though the pecuniary limits of its inrisdiction may be subsequently exceeded by the operation of incidental eauses, such as a rise in the value of property or the gradual accumulation of interest (1) With this Clause should be read the Explanation, which was intended to give effect to the undermentioned decision (2) This Explanation was confined to cases of rent or mesne profits but, as stated, the principle is one of general application, and has been applied in cases of interest also

Clauses (2) and (3)—These both refer to suits on mortgages and charges, and form an evection to the general principle onacted in the fourth Clause of the proposed section. They embody the result of the decisions noted (3) in which it was held that it would be impossible to apply the provisions of the Transfer of Property Act relating to sales in accordance with the decree passed in a suit on a mortgage if it were necessary to apply to different Courts to obtain realization of the mortgaged dobt by sale of the properties hypothecated. It was, however, pointed out that the Court passing the decree is not alone competent, for in some cases it might be more convenient that sales of various lots mortgaged should be held in the Districts in which they are situate (4). Moreover, a sale under a mortgage decree is not in its proper sense a sale in execution, being a sale directed by the decree itself (5).

Clause (4)—If at the time a suit is brought a Court has no tenitonal jurisdiction over the subject matter, then it has no jurisdiction to execute such decree. Sect 16 indicates that the object of the Code is to limit the territorial jurisdiction of the Courts in regard to the property they are entitled to deal with, and as execution is only a continuation of the suit a Court in the letter stages of a suit has no greater powers than it possessed at its institution Voiceover (and this applies to all cases whether the decree is that of the Court

Shamrav Pandoji v Niloji Ramaji, 10
 200 (1885)

⁽²⁾ Rameswar Mahton v Dilu Mahton, 21 C 550 (1891)

⁽³⁾ Masejk t Steel, 14 C 661 (1887) Im which the earlier decision, Sliuroop Chunder t Ameerunnessa Khatoon, 8 C 703 (1882), is referred tol, hartuk Nath Pandoy v ilukh lari Lall, 15 C 667 (1888) [transfer of juris hiction], Goji Mohan Royt Dojbah, van lun, 19 C 13 (1811), Incourt Debya t

Shib Chandra Pal, 21 C 639 (1894), Jagernath Sahatt Dip Ram Koor, 22 C 571, 375 (1895), Jahar v Kamum Deb 28 C 238 (1900), 5 C W N 150 (It being held that the provisions of s 64) (now 108) wife

permissive]
(1) Jagernath Sahai : Dip Rani Koer,

⁽⁵⁾ See Masoyl, 1 Steel, 16 C 661 at 11 664, 668 (1-87)

executing it or not), territorial jurisdiction is a condition precedent to a Court executing a decree (1)

Clause (5) —This is a provision inserted for convenience it being obviously undestrable in many cases, and in others not practicoble, that an entire estate should be sold otherwise than as a whole (2). An estate forming one revenue-paying unit but extending over more than one District, may be regarded as situate in the District where the whole revenue is paid or where the Court holding the sale has jurisdiction. This clause therefore forms another exception to the general principle upon which the fourth chuse is based, in so far as authority is given to sell beyond local limits in execution of a simple money decree (3) which authority may be exercised upon reasonable conditions by any Court of competent pecuniary jurisdiction within which any portion of the estate is situated. With some verbal alterations and the omission of the words "attached in execution of a decree for the payment of money" this clause has been retained and appears as 0 ANI r 3

Who may apply for execution —A decree holder or his representative a joint decree holder or his representative (O XXI r 15) and the transfered of either of such decree bolders where the transfer is by on ossignment in writing

position of an The applica

O I r 12 each of several plaintiffs or defendants may authorize any other to appear and act for him (6) In the case of execution by a representative of a deceased decree holder, see sect 4 of the Succession Certificate Act (VII of 1889) (7)

Against whom execution may be had—The judgment debtor his legal representative (sects 50, 52) and sureties for the performance of the decree or the other matters referred to in sect 145 post

Questions to be determined in execution —See notes to sect 47 post Nature of execution —See notes to sects 51 et seq, post and O XXI

Digambar 15 B 307 (1830)
(5) As to all plications under a defective power see Mitra's Lin tation Act. 4th cl

power see Mitra's Lin tation act 4th c.: 1159 (6) See Ambaram Himatsingh 2 B H

(6) See Ambaram Himatsingh 2 Is 11 C R 103 (1865)

(7) Some cases on this point will be found collected in O kinealy s C. P. C. notes to β 230 and more in Mitra s I imitation, 4th ed. 1155, 11ω.

⁽¹⁾ Prem Chand Dey v Mokhods Debs, 17 C 693, 703 (1890) and see Othhoy Churn Coomdoo v Golam Un 7 C 410 (1881) 9 C L R 361, Dakhuna Churna Chattopadbya s Bidash Chunder Roy, 18 C 526 (1891) and so the High Court must execute its decrees through the intervention of the Volumi Courts 1 Hyde 136 (1892)

⁽²⁾ See Gunga Narain Gupta : Annanda Moyce 12 C. R. Add (1883) where shares an a single entire estate were sold and Unnecool Chunder Chowdhry : Hurry Nath Koondoo 2 C. L. R. 334 (18") [sale of portion of toilal. outside) jurisdiction to ol] Ram Lall Motra t. Bama Sundari Debia. 12 C (1884) dist. last case.

⁽³⁾ That is only when the property attached

forms one estate S.e. Maseyk i Steel 14 C.
661 at pp. 668-609 where the distinction is
pointed out between mortgage (t. anle,
clauses (2) and (3)) and money decrees
(4) Daksbina Volum Roy i Sm. Basumati
Defin 4 C. W. N. 474 (1900) Larvata v.

37 The expression "Court which passed a decree," or pennition of Court words to that effect, shall, in relation to the which passed a decree. execution of decrees, unless there is anything repugnant in the subject or context, be deemed to include,—

(a) where the deeree to be executed has been passed in the exercise of appellate jurisdiction, the Court of first

instance, and

(b) where the Court of first instance has ceased to exist or to have jurisdiction to execute it, the Court which, if the suit wherein the decree was passed was instituted at the time of making the application for the execution of the decree, would have jurisdiction to try such suit.

"Include"-This section corresponds with the second paragraph of sect 649 of the last Code as amended by Act XII of 1879, which explained the meaning of the expression the "Court which passed the decree does not exclude the Court which originally passed the decree as being a Court in which an application for execution should be made, but merely includes another Court (1) In clause (a) the expression "Court of first instance been substituted for "Court which passed the decree from which the appeal was preferred," the reason being that as a matter of practice, the Court of inter mediate appeal never executes a decree passed on second appeal The meaning of the words " ceased to exist or to have jurisdiction to execute it " are explained in the under mentioned cases (2) The terms of clause (b) are general and draw no distinction as to the nature of the cause which puts an end to the jurisdiction (3) It was held under the last Code that the Court to which a decree was transferred for execution, if it had ceased to have territorial jurisdiction might either of its own motion or when applied to under sect 223 of that Code, transfer it for execution to the Court which had territorial jurisdiction, (4) and that a comparison of that section with the last paragraph of section 649, corresponding with this section, indicated that term torial jurisdiction is a condition precedent to a Court executing a decree (5) I his is so now

⁽¹⁾ Latchman Pundeh v Maddan Mohim 6 C 513 (1850) Kartick Nath v Thukhdari Lail, 15 C 667, 669 (1888) Sheil Jafar v Kamalan Debi 5 C W N 150, 152 (1900), B c, 28 C 238, but see Zaumdar of Vallur

v Admarayuda, 19 M 445 (1896)
(2) Latchman Pundeh v Maddan Mohun,
6 C 513 (1880), in particular, see indgment

of Field, J., Hurro Proshad v Bhupendro harain 6 C 201 (1880). Vishnu v Krishna Rao, 11 B 163 (1887). In Kalo Podo v Dino Nath 25 C 315 (1897) it was held that

the Court had not ceased to exist or to have jurisdiction referred to in Sheikh Jafar t Kamalim 5 C W N 150 Panduranga t Vythilinga 30 M 537 (1907) s c, 17

M I J 417
(3) Ganakha : Abdul Ropkha 17 B 162

<sup>(1892)
(4)</sup> Girendro Chunder v Jarawa Kumara

²⁰ C 10- (1891)

⁽⁵⁾ Prem Chan 1: Mokhod : Debr, 17 6 at p. 703 (1890)

COURTS BY WHICH DECREES MAY BE EXECUTED.

38. A decree may be executed either by the Court which court by which decree may be executed. passed it, or by the Court to which it is sent for execution.

Courts of Execution .- Under sect 223 of the last Code also a decree might have been executed either by the Court which passed it or by the Court to which it was transferred for execution under the circumstances mentioned in that section by the former Court. According to this procedure, the Court which passed the decree was after transfer virtually deprived of control until the decree was returned, and to all intents and purposes execution was everywhere in suspense except in the particular Court which happened to have the decree on its file. The Court to which the dicree was transferred had seizin of the execution proceedings, and carried them on until as far as passible execution was obtained. The decree might then have been transferred tu another Court, and the process repeated until full execution was had the legality of concurrent execution has been recognized,(1) both under the Cades of 1559 and 1877, as well as that of 1882, in practice it was not generally The Court to which the decree was transferred could not, after executing it as far as it could, transfer it directly to a third Court It had to send it back to the Court which passed the decree, which might then transfer it to a third Caurt, a procedure which was cumbersome and caused delay (2) It was at first considered in Committee that the results of the transfer system, which semausly affected the chances of realization and added greatly to the expenses eventually to he home by the judgment debtor, were not justified by any compensating advantage. Excess in realization which the farmer system was primarily intraduced to prevent, could, they cansidered, he quite as effectively uhreated by reserving the puwer of ordering attachment or sale tu the Court which passed the decree and which would not issue a precept for either of these purposes unless, looking to the amount of assets obtained from all sources, it cansidered such action to be necessary. Special limitations were later placed on this power. It was proposed that the Court which passed a decree should be responsible throughout for seeing it enforced and the Court to which the precept was assued should have jurisdiction only to entertain objections not affecting the legality or propriety of the precept or the right It was thus proposed to effect an important simplificato exceute the decree tion of procedure by substituting execution by precept for the former procedure by transfer of the decree This would have involved two results, viz, firstly, concurrent execution as opposed to the former practice under which there was only one Court at one time carrying out the execution of a decree, and, secondly, execution by one Comt (that to which the precept is given) under the direction of another Court (or that which passed the decree) as

⁽¹⁾ Saroda Prosad 1 Luchmeeput Suzg, 14 C L J 315 (1995)

N I A 529, 538, 539 (1872), 17 W R 289. (2) See Dhunput Singh v Wooma Sunkeree,
kristo Kishoro Dutt v Rooplall Dass SC 687 21 W R 337 (1874), Shib Naraun Shaha v
(1882), Bajnath Gocaka v Kolloway, 1 Repin Behary Bawas, 3 C 572 (1878)

opposed to the former practice under which the Court in which the execution proceedings were pending had control of thom The Court passing the decree might thus have executed the decree itself, and might at the same time have issued precepts to another Court or to two or more Courts directing simul taueous execution of the deerce The conduct of the execution would have remained in the hands of the Court passing the decree, which might from time to time give such directions as it thought fit regarding the execution to the Court to which the precept is issued, whose powers were stated and limited The adoption of the precept system would of necessity have abolished the elaborate conditions of transfer embodied in sect 223 of the last Code The Select Committee, which, however, considered the Draft Bill imme diately prior to its introduction, considered that the difficulties in the existing system arose not so much from the machinery of execution itself as from the defective manner in which it was worked. They therefore stated that they were unable to accept the proposal of the Committee of 1902 in relation to the execution of decrees by precept They were, however, so far in accord with the view expressed by that Committee as to have been able to insert sect 16, post, onabling the Court which passed the decree to issue a precept to any other Court to attach property of the judgment dehtor pending execution in the ordinary course Beyond this they stated they felt they could not safely go With this exception, therefore, the general system of execution viz, by the Court passing the decree or by transfer has been maintained

The section provides that a decree may be executed by the Court which passed it, and it was held that where a Court passed a decree for sale of property, and the place where such property was situate was transferred to the jurisdiction of another Court, the former Court might still execute the decree (1) It has been held that the provisions of this section read with those of the next section plainly indicate that as a general rule (to which there are sundry exceptions) no Court can execute a decree in which the subject matter of the suit or of the application for execution is property entirely outside its local

jurisdiction (2)

39 (1) The Court which passed a decree may, on the application of the decree-holder, send it for execution to another Court.—

(a) if the person against whom the decree is passed actually and voluntarily resides or carries on business, of personally works for gain, within the local limits of

the jurisdiction of such other Court, or

(b) if such person has not property within the local limits of the jurisdiction of the Court which passed the decree, sufficient to satisfy such decree and has property within the local limits of the jurisdiction of such other Court, or

⁽¹⁾ Pandurano 4 t Vythilinga, 30 M 537 (2) Beog Dunlop t Japannath 11 C L J (1307) 228 (1911) See notes to sect 17

(c) if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it, or

(d) if the Court which passed the decree considers for any other reason, which it shall record in writing, that the decree should be executed by such other Court.

- (2) The Court which passed a decree may of its own motion send it for execution to any subordinate Court of competent jurisdiction.
- 40. Where a decree is sent for execution in another province,

 Transfer of decree to court in another province, it shall be sent to such Court and executed in court in another province.

 Transfer of decree is sent for execution in another province, it shall be sent to such Court and executed in force in that province.
- 41. The Court to which a decree is sent for execution shall [s. Result of execution proceedings to be certify to the Court which passed it the fact of such execution, or where the former Court fails to execute the same the circumstances attending such failure.

Transfer of decree.-As sect 38 embodies the first paragraph of sect 223 of the last Code, sect 39 embodies the second and third paragraphs, sect 41 the fourth paragraph, and O XXI rr 4 and 5 the fifth and concluding paragraphs of that section See notes to sects 36-38, ante, and to the last-mentioned rules in O XXI, post To make the provisions relating to the transmission of decrees applicable, it is necessary that the provisions of the Code should regulate the procedure of both the Courts (1) Where a decree has been transferred by a Court which passed it to another Court for execution, the original Court, it has been held, does not thereby completely lose all jurisdiction in respect of execution thereof (2) As to orders sending certificates for execution under the Public Demands Recovery Act, see case cited (3) Where in different districts different modes of execution are prescribed, and where the question is how a decree passed in one, but of which execution is sought in another of such districts, is to be executed, the executing Court must be guided by the rules in force in its own district (1) It has been held under sect 233 of the last Code that an application for transfer of decree is an application to take a step in aid of execution within the meaning of Art 182 of the Limitation Act of 1908 (5)

Prabhu Naram Singh t Saligram Singh,
 576 (1907) , 11 C W N 622.

⁽²⁾ Baij Nath Goenka t Holloway, I C. L. J 315 (1905)

⁽³⁾ Girish Chandra Changdar t Golam Karim, 33 C 451 (1996)

⁽⁴⁾ Martand Trimbak Gardo r Vinayak Khaszivale, 31 B 5 (1900)

⁽⁵⁾ Todar Mal v Phola Kunwar, 35 A. 389 (1913), following Chundra Nath Gossami v Gurroo Prosunno Ghox, 22 C. 375 (1895).

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42 The Court executing a decree sent to it shall have

Powers of Court in executing such decree as the decree shall be punishable by such Court in the same passed by itself. All persons disobeying or obstructing the execution of the decree shall be punishable by such Court in the same manner as if it had passed the decree. And its order in executing such decree shall be subject to the same rules in respect of appeal as if the decree had been passed by itself.

Limitation of Powers—The powers of a Court are subject to other sections of the Code, which may affect them. So the section corresponding to this in the Code of 1882 was held subject to the special provisions of the section corresponding to O XXI r 16 post (1) Under the Code of 1882, the Court to which the decree was sent was, by virtue of the provisions of sect 225 (now O XXI r 7), held cuttled to enquire into the jurisdiction of the Court which passed the decree (2) And if the Court to which the decree was sent held that there was no jurisdiction, then its lands were stayed and the parties had to go back to the Court which passed the decree, the Court to which the decree was sent having declined to become the executing Court within the

of the decree was baried by limitation or not, (4) but not where a Court made an order for execution of the decree and then transmitted it (5). It has been held that an order for the transmission of a decree for execution to another Court is not an order for the execution of the decree, nor is the application for the transmission an application for execution (6).

As illustrations of the limitation on its powers, the following decisions under the earlier Codes may be referred to as being in force under this Code. The executing Court cannot question the validity of the decree or any portion of it. Its duty is to enforce it and not to determine whether it was illegal.

⁽¹⁾ Amar Chundra Banerice v Gur Prosunno Mukerjee, 27 C 488 (1900)

⁽²⁾ Bhagwantappi v Vishwanath 28 B 379 (1904) see Mohah lahwar v Haku Rufa, 4 B 638 (1880). Hap Musa v Purmanand Nuney, 15 B 216 (1890), at p 219 [but this was a case of a foreign judgment, and fraul was alleged], Im lad Ah v Jagan Lal 17 A 475 482 (1835) [Leccution Court can enquinto jurisdaction unless the decree itself precludes that question] contra, Choga Lall v Truman, 7 B 481 (1883), where, however it was hold that the executing Court impleates proceedings to enable an application to lend of the Court passing the decree]

⁽¹⁾ Bhagwantappa v Vishwanath, 28 B

^{378 (1904)}

⁽⁴⁾ Leake v Daniel B L R 1 B 970 (1868), Choir Lall v Maniel Cliand 7 A H C R 116 (1875), Nurang Doyal v Hurrylair Saha, 6 C 897 (1890) Srihary Mandal v Murart Lhoudhry, 13 C 257 (1880), Chotay Lal v Puran Will, 23 C 39 (1847) [dissenting from Soomust Dass v Bhoobum Lall, 21 W R 292 (1874)] Toutf 41th v Keerut Chand 21 W R 130 (1874) Ranno Ran v Dayal Singh 16 4 390 (1837)

 ⁽⁵⁾ Husem Uhmad v Saju Mahamad, 15 B
 28 (1890), d stinguished in Jeewandas t
 Rancholdas, 35 B 103, 103 (1910)

⁽⁶⁾ Jeewandas : Ranchoddis, 35 B 103, 103 (1510)

or not,(1) or wrong or defective (2) And it cannot go behind it, but must execute it as it stands (3) nor can it question the propriety or correctness of the order directing execution (1) So it should not refuse execution on the ground that the plaintiff had been improperly allowed to muntain suit, (b) or that the decree had been obtained by fraud . (6) or that questions are raised between the parties that cannot be properly dealt with in execution, (7) or that property directed to be sold by the decree is unsalcible (8) Nor can it entertain any question of the right of a transferee, whose name is on the record, (9) nor of the right of the person isking for execution (10) The executing Court cannot alter or add to the terms of the decree or extend its scope, (11) or go behind it for the purpose of entertaining equitable considerations which appear to render further enforcement of it unfur or improper (12) or correct errors, (13) or execute before the period fixed in the decree,(11) or allow instalments not directed by the deerce (15) or enquire whether the bilance certified to be due on the decree is correct (16) Its duty is to execute it according to its terms (17) But if a decree is improperly altered behind the judgment debtor's back, tho

(I) Ambaram Harvallab Dis i linnat Singh Adiani), 211 H C R 103 (1860) [where singh Adiani), 211 H C R 103 (1860) [where the executing Court beld that the award of interest in the decree after its date was illegal]. Bechardas Tobunn Das i Gokalia Bhagla, Bom P J (1852), p 379 cited in 8 B at p 195 [held Court executing decree ordering sale of mortgaged property could not raise question whither property could not raise question whither property could solid). Arunachellain i Murigarps, 12 W 603 (1889) [objection that compromise entered into without leave of Court not binding on minor]. Chintaman Vithola v Chintaman Bajaji 22 B 47 (1890)

(2) Rajerav Chandrarao :

Krishna, 11 B 528, 532 (1887)

- (3) Appa Rao t Arishna Ayyangar 20 M 037 (1901), or question its validity, Chhota Narain v Rameshwar Koer 6 C W N 796 (1902)
- (4) Ram Lall t Reedhoy Lal 7 1 330 (1885) or transferring the decree for execution Vulla Abdul v Salhinaboo 21 B 456 (1896)
- (6) Subramanian v Panjamms, 4 M 324 (1881), though the Court added that if raud was discovered it would be competent to stay Proceedings to enable aggreed party to apply for review or to set as le dicree As to fraud, see Haji Musav Priman and Mursey 15 B 216 at p 219 (1880) [foreign judgment fraud]
- (6) Parvata : Digambar, 15 B 307 (1890) See last note
 - (7) Rajerav Chandrarao z Nanarav

Krishna, 11 B 528 (1887)

(b) Sadashiv Lalit v Jayantibai 8 B 185 (1883)

(1883)
(9) Ram Chunder : Mohendro Nath Bosc,

21 W R 141 (1874) (10) Wt Dhunesh Koereov Oolfut Hossem, 21 W R 219 (1874)

(11) Hurro Durga Chowdhran r Surut Soondari Debi 91 A. (1881) 8 O 332, Rao Oonrao v Jutun Lall, 1 A. H C R 168 (1869) Fortster v Secretary of State, 3 C 161 (1877), 41 A 137, Sadasiva Pillai v Ramalinga Pillai, 2 I A 219 (1875), Mahant Ishwargar v Chudasama Manabbai, 13 B 106 (1883) [catension of period of redemption], Subbana v Irrahna 16 B 644 (1811) [the same], Sheo Pershad v Shiva Ram 2 A H C R 59 (1870)

(12) Ramphal Ras v Ram Baran Ras, 5 A 3 (1882)

(13) Nilkamal Roy v Rohmeo Dossia, 13 W R 330 (1870) [a decree wrongly drawn up must be corrected by the Court passing it], Rao Oomdao v Jutun Lall, I A H C R 168 (1869)

- (14) Har Dayal v Chadamı Lali 7 A 194 (1884)
- (1831) (15) Shee Pershad v Shiva Ram 2 A. H. C. R. 59 (1870)
- (16) Arshub Chunder v Khelat Chunder, J W R 361 (1868)
- (17) Krishto Kishore Dutt : Rooplall Dass, L C 687 (1882)

latter may object that the decree sought to be executed is not the decree of the Court to be executed (1)

"Same powers"—While the functions of an executing Court are confined to effecting execution, and to matters arising out of the proceedings in execution (2) and are subject to the limitations above mentioned they are judicial and not merely ministerial functions (3) So a Court to which a decree has been sent has jover to make orders in execution of the decree to deal with obstruction to execution, to investigate claims of third parties to attached property, and the like—It may generally be stated that the Court to which a decree is sent has the same power as those which were possessed by a Court to which a decree was transferred for execution under the Code of 1882

Execution of decrees pasted by a Civil Court established in any Execution of decrees part of British India to which the provisions in places to which this relating to execution do not extend, or by any foreign territory of the Governor General in Council in the territories of any foreign Plince or State, may, if it cannot be executed within the jurisdiction of the Court by which it was passed, be executed in manner herein provided within the jurisdiction of any Court in British India

Decrees of British Courts where provisions do not extend—The sist part of this section was enacted because formerly a decree obtained in scheduled District to which the provisions of Chapter XIX of the Code of 1882 had not been extended, could not be executed under the Code (4) It was determined therefore to revert to the provisions of sect 234 of the Code of 1859, which placed such decrees on a footing as regards execution with these obtained in a foreign Court

Or into the section referred to in this section (5)

Execution passed by Courts of Annu Council may, by notification in the Gazette of India declare that the decrees of any Civil or Revenue Courts situate in the Katue States

alliance with his Majesty and not established or continued by

⁽¹⁾ Abdul Hajai Khan v Chuna kuas 8
A 377 (1880) Muhammed Salaman v
(4) Kashi Mohun Borai i Bishnoo Ira
latina, 11 A 314 318 (1853)
(2) Jidu Roy v Farrell 6 B L R alp 66
(4) Sv Jadab Chan ira v Dinanath Das
(4) R. B 131 (1870)

⁽³⁾ Cound Hari Walckar v Shidram

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the authority of the Governor General in Council, or any class of such decrees, may be executed in Butish India as if they had been passed by the Courts of British India.

"May be executed."—This section, it was held, did not remove the decree
of a Native State falling within its purview from the category of foreign
judgments. A Court in British India, though it may, is not bound to, execute
the foreign decree, and will not do so if it is shown to have been without
jurisdiction or obtained by fiaud (1). The judgment of a foreign Court on a
decree obtained in British India is no bar to the execution of the original
decree (2). As to foreign judgments generally, see sects 11-13, onte. proof (3)
and execution (4) of foreign decrees, cases eited

45. So much of the foregoing sections of this Partis.

Execution of decrees as empowers a Court to send a decree labeled territory.

for execution to another Court shall be construed as empowering a Court in British India to send a decree for execution to any Court established or continued by the authority of the Governor General in Council in the territories of any foreign Prince or State to which the Governor General in Council has, by notification in the Gazette of India, declared this section to apply.

Execution of decrees in foreign territory.—This section was inscrted in the Codo of 1882 by sect 24, Act VII of 1888. The tributary Mohals of Orissa do not form part of British India, and therefore in the absence of a prior notification in the India Gazetto as specified in this section, it was held that no decree by a Court in British India could be sent for execution into a territory such as Mayoorbbuny which is a tributary Mahal (5). An instance of a Court "established or continued" within the measuring of this section is the Court of the Political Agent at Sikkim (6).

46. (1) Upon the application of the decree-holder the Court which passed the decree may, whenter it thinks fit, issue a precept to any other Court which would be competent to execute such decree to uttach any property belonging to the judgment-debtor and specified in the pricept.

(2) The Court to which a precept is sent shall proceed to attach

⁽I) Haji Musa v Purmanand Nursej, 15 B, 216 (1890)

⁽²⁾ Fukuruddeen Mahomed Issan r Official Trustee, 7 C 52 (1551)

⁽³⁾ Ganoo Mahomed Sarker : Tarant Charan Chuckerbutts, 14 C 540 (1897)

⁽⁴⁾ handasami Pillai r Wordin, 2 M. 337 (18-0), Hukum Chanl Aswal r Gamen kr

Chunder Lahm, 14 C 570 (1887) In Prablia Naram Sungh e Salingara Sungh 34 C 570 (1907), the action was held margh also family domains of Maharajah of Benareh

tamily doughes of Maharajan of Retains). (5) Ratan Mahasti e hhatoo Sahoo, 23 * 400 (1 %2).

^{(* 400 (1 * 2))} (6) &amil Alim dir Maharaya of Saak 2)

³⁵ C ~ (1011), 15 C. W. 5 502

the property in the manner prescribed in regard to the attachment of property in execution of a deerec

Provided that no attachment under a precept shall continue for more than two months unless the period of attachment is ex tended by an order of the Court which passed the decree or unless before the determination of such attachment the decree has been. transferred to the Court by which the attachment has been made and the decree holder has applied for an order for the sale of such property.

Precepts -Sec as to this section the notes to sect 38, ante As regards this section the Report of the Select Committee states -"Though a system of execution based on precepts is, in the opinion of the Committee open to grave objection, they think the idea may be utilized for the purpose of enabling a decree holder to obtain an interim attachment when there is ground to appre hend that he may otherwise be deprived of the finits of his decree for this purpose introduced clause 46 into the Bill They think it expedient to fix a time limit for the continuance of this interim attachment, but at the same time they have empowered the Court to extend the period to meet the oxigencies of particular cases After careful consideration they have come to the conclusion that not with standing attachment under a precept re attachment on the ordinary application for execution will still be necessary Though at first sight it may appear a better course to provide that re attachment shall not be necessary when the issue of a precept is followed by the ordinary applica tion for execution after careful consideration they have come to the conclusion that it will be safer to require re attachment having regard to the agency by which execution is carried into effect ' The section, therefore, originally contained a third clause as follows -"Notwithstanding anything contained in this section, it shall be incumbent on the decree holder to apply for execution as though no precept had been issued ' This, however was later in Council struck out

Appendix I No 1 gives form of certificate of result of proceedings in precepts

QUESTIONS TO BE DETERMINED BY COURT EXECUTING DECREE

(1) All questions arising between the parties to the suit in which the decree was passed, or their Questions to be deter representatives, and relating to the execution, mined by the Court exe discharge or satisfaction of the decree, shall

be determined by the Court executing the decree and not by a separate suit

(2) The Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under this section as a suit of a suit as a proceeding and may, if necessary, order payment of ann additional court fees

(3) Where a question arises as to whether any person is or is

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not the representative of a party, such question shall, for the purposes of this section, be determined by the Court.

Explanation.—For the purposes of this section, a plaintiff whose suit has been dismissed and a defendant against whom a suit has been dismissed, are parties to the suit.

History and Scope of Section.—The provisions of this important [section are designed to prevent multiplicity of suits and to secure that all matters which can be decided in the suit should be se decided. The subject-matter has heen repeatedly considered hoth by the Legislature since it was first statutorily dealt with in sect. 11, Act XXIII of 1801, amending the Code of 1859, as also by the Courts, which have given numerous and often cenflicting decisions on points which have arisen with reference to it. The tendency hoth of the Legislature and, on the whole, of the Courts has been te enlarge as much as possible the scope of the proceedings before Ceurts charged with the execution of the decree. With this view the statutory law has been amended from time to time. Sect. 11 of Act XXIII of 1861, which referred expressly only to parties and not representatives, and not to discharge, satisfaction or stev, ran as follows.—

"All questions regarding the amount of any mesne profits which by the terms of the decree may have heen reserved for adjustment in the execution of the decree, or of any mesne profits or interest which may he payable in respect of the subject-matter of a suit hetween the date of the institution of the suit and execution of the decree, as well as questions relating to sums alleged to have been paid in discharge or satisfaction of the decree or the like, and any other questions arising between the parties to the suit in which the decree was passed and relating to the execution of the decree, shall be determined by order of the Court executing the decree and not by separate suit, and the order passed by the

Court shall be open to appeal "

This enactment was fellowed by the Code of 1877 (Act X) This Code expressly referred to representatives, and was in its terms the same as those of the Code of 1882, as the latter was first published, except that the words "discharge" and "satisfaction" appeared for the first time in the Code of 1882 (Act XIV) The latter Code was amended by Act VII of 1888 Sect 26 of that amending Act substituted a new clause (c) for that which appeared in sect 244.of that Code prior to this amendment. The amended clause (c) included cases of stay of execution as to which there had been some difference of opinion whether, as suspending execution, it was a matter relating to execution Act VII of 1888 also added the last clause of sect 244 of the former Code which corresponds with subsection (3) of the present Code Though the latter has been amended.

It will be observed that the present Code effects several amendments. In the first place clause (a) of sect 241 of the last Code has not been remarked. That clause ran (a) "questions regarding the amount of any mesne profits as to which the decree has directed unquiry. All reference to mesne profits has now been omitted. This omission is due to the recognition of the principle that inquiries into the amount of mesne profits are properly not a matter for the execution department but should be treated as an integral

deceased party and not the separate property of the representative(I) Question regarding the appointment or removal of a receiver appointed by decree in an administration suit, (2) the appointment of a person as head of a religious cudowment in execution of a dierce, (3) an order declaring party entitled to Lhas possession, (1) an order holding that a party was not entitled to a greater quantity of land than that sued for, though given by a consent decree, (5) a question as to propriety of execution of a ient decree by sale and as to suppression of sale proclamation, (6) or as to sale of an occupancy holding not transferable by custom in execution of a decree for arrears of rent obtained by a co sharer landlord, (7) objection by a person dispossessed under compromise decree to which compromise she was not a party, (8) the question whether the defendant is entitled to a right of occupancy or non saleable tenuno, (9) all questions regarding liability to attachment and sale, whether anising under the Code or other Act being within the section (10) An order requiring the decree holder to give security, (11) a question as to the amount of security required in granting stay of execution, (12) an order relating to the stay of execution, (13) an inquity into a disputed question as to

- (1) Beni Prosad Kunwar v Lukhna Kun war, 21 A 323 (1899) [suit not maintainable] Upendra Bhatta t Ranganatha Bhatta, 17 M 399 (1893) [competency of Court] See notes to 'Arising (2) Mithibai v Limji Nowroji, 5 B 45
- (1880) [the management of the estate being in this case a matter relating to the execution of the decree, order appealable]
 (3) Guana Sambade V.
- (3) Gaana Sambanda v Visvaliga, 13 M. 338 (1890) [order appealable], Ponnambala Tambiran v Sivagnana Desika, 17 M 343 (1894), P C [same], 21 I A 71
- (4) Najhan v Mahomed Taki Khan, 9 C S72 (1883) [suit not maintainable], as to whether delivery of formal possession gives cause of action for firsh suit, see Shama Charan Chatterji v Madhub Chander Moo lerji, 11 C 93 (1881)
- (5) Mohibullah v Imami, 9 A 229 (1857) [suit barred]
- (6) Jagan Nath Gorai v Watson, 19 C 341 (1892) [suit barred]
- (7) Durga Charan Mandal v Kali Prasanna Sarkar, 26 C 727 (1899), 3 C W N 586 [competency of execution Court to entertain a) pheation]
- (8) Sankarayadayanımal t kumarasamya, 8 M 173 (1880) [order aj pealable]
 (9) Ram Good e kiyak Very (b. 140
- (9) Ram Gopal v Khiali Ram, 6 1 148 (1881) [sunt barred], Janla Singh : Allakh Singh, 6 1 JoJ (1881) [same of jection on ground that land not hable to sal], Busti

- Ram v Tattu, S A. 146 (1886) [sut barred] In Bardee Presad v Juthan Ram 27 \ 684 (1995), the Court held that the plea whether the property was saleable should have been
- rused in the original suit
 (10) Basti Ram v Fattu supra at p 148
 [foll. Sheikh Nurullah v Sheikh Burullah
 9 C W N 972 (1905)], Arishnan t Arms
 chellum 16 M 417 (1892)
- (11) Lutchmeeput Singh + Sita NathD 3 8 C 477 (1882) [unders 548 of Code of 1877, order appealable]
- (12) Mahant Ishwargar t Chudusama Ma nathar, 12 B 30 (1887) [order appealable] But see Saraswatt Barmania v Golap Das Barman 41 C 100 (1913) [order for security

Buksh 7 A 73 (1884) [same] Kassa Mal 1
Gopi 10 A 789 (1888) [same] Kristomohny
Dosate v Rama Churi Nag 7 C 733 (1881)
Musaayi Yakulla v Damodardas, 12 B 2:9
(1888) [same], Steole Ichamoy c Chowdhau
13 C III (1880) [same] contra Nihal Claud
v Rameshiri Dassee, 9 C 214 (1883) in 2
far as it held that the matter does not relate
to execution is no longer law, the section
havin, been amended in this respect in 1883
though the question whether there is an
apped is another matter depending of
whither the ord r is a decree— {held no
apped in another matter depending of
whither the ord r is a decree— {held no
apped in another matter depending of
whither the ord r is a decree— {held no
apped in another matter depending of
alpeal]

the transfer of a decree , (1) a claim for refund of proceeds of execution sale on ground that decree satisfied , (2) a suit for the purpose of having it determined that execution is harred . (3) the adjustment of a decree the question being one relating to its satisfaction (4) An application for restitution of amount which had in execution been realized in excess (5) An order under sect 87 of the Transfer of Property Act, (6) or under sect 89 of the same Act, (7) the setting aside of a sale as being in contravention of sect 99 of the same Act, (8) a suit to recover possession after failure to execute decree for possession , (9) a statement of amount received under a decree for possession on an usufructuary mortgage (10) A suit to set aside sale on ground that defendant had purchased without permission of Court, (11) an agreement before decree hy the decree holder not to recover costs which the decree might award, (12) an order for payment of surplus salo proceeds, (13) a suit to restrain a decree holder from executing his decree when the decree has been satisfied hy an agreement out of Court and such satisfaction has not been certified, (14) the question whether the deeree is capable of execution, (15) or whether there

- (1) Dwar Buksh Sircar v I atik Jah, 26 C 250 (1898) [competency of Court to entertain application]
- (2) Synd Velayet Hossein v Synd Wulco Ahmod, 23 W R 207 (1875) [competency of execution Court]
- (3) Nojabut Alı v Shukh Moha, 11 B L. R 42 (1873) Soo Zumoer Sirdar v Asseo moddoen Sirdar, 23 W R 257 (1878) (4) Rangii v Bhail. 11 B 57 (1836)
- (5) Harnam Chandar v Muhammad Yar Khan, 27 A, 485 (1900)
- (0) Kedar Nath v Lalji Sahat, 12 A 61 (1889) F B [order appealable] Baussidhar v Gaya Prasad, 24 A. 179, 183 (1961) [s 74 of samo Act Suit barred, dist in Tufail Fatma t Bitola, 27 1 400 (1901)
- (7) Oudh Behari Lai y Nageshwar Lai, 13 4 278 (1800) [competency of execution Court], Valikarjunadu z Lungamurti 25 Vi 24 (1900) [order appealable], contra Ajudha Pershad z Baldeo Singh, 21 C 818 (1894) [application not ono lor execution], followed in Jehangir Cowași z The Hope Mills Ltd., 31 B 273 (1902)
- (8) Mayan Pathuli e Paluran 22 M. 317 (1898) [sut barrel], Sonu bugh e Behari Singh, 33 C 233 (1905) The first case was dast in Muthu e harrupan 30 M 313 (1907) IX L. J. 103, Abntoch Sidder & Behari Lal hutums 11 C W N 1011 (1907), a. c., 35 C. 61 F B, and see Sabadu Manaya the Dulya Jaba 14 Bom L. R. 24 (1914)
- (J) Lunganasary r Shallum 5 M IL C. I.

- 375 (1870) [sus barrod], Kasan Naudram v Anandram Bachaji, 10 B H C R 433 (1873) [samo], Fakirapa v Pandurangapa, 6 B 7 (1881) [samo], when a decree was declara tory and theo gave consequential relief, is was held that though execution for this might be barred, it did not follow that plaintiff a declared title could not be inforced by a sit Jagan Nath v Balgobind I A H C R 154 (1869), but a decree which is not declarated; only can be enforced in exception. Madhay
- (16) Golam Russul v Kuhen Mohun, 23 W R 156 (187°) (competency of execution Court!

rao v Ramrao, 22 B 267 (1896)

- (11) Vitaraghava r Venhata 10 M 257 (1832) (suit barred at p 280 the Court which did the erroneous act that is which put the defendant into possession must und it and that is the Court exicution the decree 1
- (12) Laklas Navandas V Kishordas Devidas, 22 B 463 (1896) F B [compitting of Court], sed qu. Diss, from in Hassan Mi t. Gausi Mi Mr. 31 C 179 (1893)
- (13) Hurdwar Singh t Bhawam I crahad 2 C. W N 4-9 (1897)
- (14) Execute Match Lal Sahu, 21 C 437 (1893) [sunt barred], Banerjue J., disa., obsering at p. 460, on the case of Makand Harshet i Harshas Ahum 17 B 23 (1892), Data in Issae Chandra Datte Harse Chandra Datt 25 C 715 (1858), 2 C W N 247
- (lo) Imdad ilir Japan Ind, 18 1, 478, at p. 452 (1830)

is anything due on it, (1) questions as to part satisfaction of a decree (2) Suit by judgment debtor against auction purchaser to recover property sold in execution, on the ground that being a tenant's right it is not saleable (3) When a prior mortgageo has been made a party in a puisne mortgagee's suit, and the puisne mortgagee has obtained a decree for sale on his mortgage, the pror mortgagee can have his rights settled in execution-proceedings by an application under this section (4)

What a decree means is a question relating to execution, and a suit therefore which asks the Court to construe a decree and ascertain plaintiff's rights is baired, notwithstanding that other parties against whom no relief is claimed are added (5). So also is an objection to a partition made by a Collector, (6) an order refusing a representative of a deceased decree holder his claim to continue the execution proceedings, (7) an order declining to enlarge the time fixed for redemption (8)

It is to be observed (and this is not always understood) that an order may be, none the less, an order under this section because it is also passed under some other of the sections of the Codo relating to the execution of decrees. So orders under the following sections of the last Codo have been held to be also orders under sect. 224 of that Codo corresponding with the present section —sects 318 and 334, (9) sect. 310 1, (10) sect. 287, clause (8), (11) sect. 294, clause (2), (12) sect. 294, last clause, (13) sect. 243, (14) sects. 332, 234 (15). In such cases the matter is one ordinarily and from the nature of the case relating to execution within the meaning of this section. If it is further one between the pairtes

⁽¹⁾ Shoo Narain v Chunni Lal 22 A 243, at p 247 (1900)

⁽²⁾ Kristo Mohinee Dossee v Kaliprosono Ghose, 8 C 405 (1882)

⁽³⁾ Basti Ram : Fattu, S A 146 (1886) [suit barred]

⁽⁴⁾ Bhojo Hari v Gajendra, 14 (W N 672 (1909)

⁽⁵⁾ Nowtojec Nusserwanji v Bapaji Dos subhai, 5 Bom L R 1036 (1903) [consumdecree declaring defendant owner, option to plaintiff to purchase failure of plaintiff suit by latter to have determined his nights under decree]

⁽⁶⁾ Krishnan Narayan v Damodar Para shram, 5 Bom L R 648 (1903) [under s 265 of last Code, suit barred]

²⁰⁵ of last Code, suit barred]
(7) Jeshankar Mancharam v Pandya 1 ilia
2 Bom L R 887 (1900) [order appealable

und therefore no revision]
(8) Rango v Bomshetti, 3 Bom L R 554
(1901) [orders appealable]

⁽⁹⁾ Kasinatha Ayyar v Uthamansa Row than, 25 M 523 (1901), Sandhu Iaraganar r Hussain Sahib, 28 M 87 (1901), Pita z Chimlal, 31 H 207 (1906)

⁽¹⁰⁾ Manikka O by ni r R sjagopala Pillai,

³⁰ V 507 (1907), but see Mahomed Mossis v Habil Mia, 6 C L J 749 (1904), Phall Chand Ram v Nursingh Pershad Misser 28 C 73 (1899), Kripa Nath Pal t Ram Lakshim Dasy, 1 C W N 703 (1897), Vurlidhar v Anandrao, 25 B 418 (1909) [at p 42], 'where the dispute old not fall within the terms of s 244 (e) no appeal would be J Panduran, Govund Purandaro v Krishnaba 18 Bom L R 74 (1899), Murlidhar v Anandrao, 25 B 418 (1904), Luthilare Anandrao, J Bom L R 100 (1900) ketter Mall Seu t Uma Charan, 6 C W N 57 (1904), Intuaca Begain v Dhuman Begain, 29 A 275 (1907), in Amir Rat v Basdoo Singh 5 C L J 204 (1906), the nauton purchaser

was a third part; (11) Ganga Prasad v Raj Coomar Smgl, 30 C 617 (1903)

⁽¹²⁾ Makka v Sri Ram, 24 A 108 (1301)
(13) Duri a Sunwar v Balwant Singh, 2

⁽¹³⁾ Durga Kunwar v Balwant Singh, -3 1 478 (1901) (11) Steel v Ichamojo Chowdhrain, 13 (

^{111 (1886).} Lingum Krishnabhupati : Kin d da Swaramayya, 20 M 366 (1896)

⁽¹⁵⁾ Badri Narain t Jai Kishen Das, 10 1 183, at p 130 (1891)

or their representatives, within the meaning of this section, then the order also falls within it and there is an appeal, otherwise not

The following have been held to be within the section -

An order disallowing objection that the value of property specified in sile proclamation was madequate. (1) an order determining whether an alleged transfered from a decree holder or his legal representative is the representative of the decree holder. (2) or refusing to stay sale for under valuation. (3) or refusing to enforce execution on the ground that applicant is not transferce or representative or on ground of himitation, (1) or refusing delivery of possession of jewels retained by Court in course of execution though not subject matter of decree; (5) a suit to set aside sale on grounds that property not legally saleable, and that the real purchaser was the decree holder who had not obtained leave to bid (6) An order refusing to set uside a sale to a decree holder purchaser, the decree in which suit has been set ande . (7) a suit for recovery of lands taken by decree holder in excess of terms of his decree, (8) a suit by decree holder to recover purchase money, (9) an application for mesuo profits by way of restitution,(10) or on the same grounds to recover possession of property, (11) an order refusing to determine the question whether an occupancy holding is transferable according to custom or usage and is therefore saleable.(12) or erroncously holding that the same can be attached and sold (13) or an order refusing to set aside on appeal an order dismissing objections for default of appearance,(11) or an order setting aside a sale on the ground of fraud , (15) an application to recover from a decree holder the proceeds of a sale in execution such sale baying been set aside, (16) or an order refusing to enlarge timo presembed in a decree for redemption, (17) an application for restitution of

- Ganga Prosad : Rajcoomar Ghose, 30
 Ol7 (1903) [order appealable]
- (2) Ganga Das Seal v Yakub M. Dohashi, 27 C 670 (1900)
- (1) Siyasami Naickar i Ratnasami, 23 M 568 (1900) [order appealable], contra Sira sami Acht i Subrahmania, 27 M 259 (1903) (41) Rath Nasama Indiaban 36 A 483
- (t) Badre Narain t Jackesben, 16 A 483 (1894)
- (5) Appa Rao i Venkataramanayamma, 23 Vi 55 (1899)
- (6) Daulat Singh t Jugal Kishore, 22 A 103 (1899) and in Sitanath Chatterpee it Atmaran har, 4 C W N 571, 572 (1909) [objection on ground that property not hable to attachment and sale], Cohar Khable Bipan v Kasimuddi Jamadar 4 C W N 5.7 (1899), 27 C 415 [question of sale ability of occupancy holding]
- (7) Umedmal v Srmath Roy 27 C 810, s c 4 C W N 692 (1900)
- (8) Biru Mahata v Shyama Churn Kliawas 22 C 483 (1895)
- (9) Rahim id din : Rain Lal, 27 1 175 (1904)

- (10) Collector of Meerut : Kalka Prasad, 218 A 665 (1906)
- (11) Sheodehal Sahu v Bhawani 29 A 348
- (t2) Majid Hossem v Raghubar Chowdhry 27 C t87 (1899), Gahar Khaiqia Bipari i Kasimuddi Jamudar, 27 C 415 (1899), s.c.,

a C W N 557

- (13) Sitanath Chatterjee : Atmaram 4 C
- W N 571 (1900)
- (14) Lalnaram Singh v Vahomed Rafi uddin 28 C 81 (1900)
- (15) Mommohim Dosseo t Lakhinaraun Chandra, 23 C 116 (no second appeal hes avnone of the questions under s 153 of the Bengal Tenancy Act was decided) Sadho Chandhir * Abbenandan Prasad, 26 A 801 (1993) and see notes on ' Yraud
- (16) Collector of Jaunpur 1 Bithal Das, 24 291 (1902), in which it was generally laid down that the section applies as well to a dispute arising after decree has been executed as it does to a dispute arising previous to execution.
 - (17) Rango: Bhomsetti, 26 B 121 (1901)

money realised in execution of an ex parte decree in a suit in which decree set aside and which is subsequently dismissed, (1) or an order made on an applica tion arising out of purchase by mortgagee holding decree for sale of portion of mortgaged property subject to mortgage, (2) a sunt for a declaration that a decree has been satisfied and for an injunction restraining decree holder from ovecuting it, (3) or an order refusing delivery of possession of pio perties sold to a decree holder in execution of his decree, (4) or an order declaring the amount due under a mortgage decree under sect 88 of the Transfer of Property Act,(5) or an order refusing an application by judgment debtor for recovery of the amount paid in excess of the decretal amount (6) or an order setting asido a sale, or refusing to set aside a sale (7) or dealing with a question relating to discharge or satisfaction although no formal application for execution may have been made, (8) a suit to set aside a sale in execution of a decree on the grounds that the real purchasers were the decree holders who had not obtained leave to bid (9) or on the ground that a compromise alloged to have been entered into, whereby the sale was confirmed after judgment dehtor s objection, was invalid (10) Proceedings for delivery of possession to auction purchaser after sale as where the legal representative of the judgment-dobtor resisted application for possession by the auction pur chasor, alleging that portions of the properties belonged to him and not to the judgment dobter (11) A suit by a decree holder at whose instance a receiver has been appointed to realize and pay off the decretal amount for a declaration that a lease alloged to have been executed by judgment debtors after the appoint mont of the receiver was invalid, (12) and a suit for recovering of possession of properties by a person in whose presence a decree was made although ho was a minor, his remedy if he could object to the sale under the decree, heing by an application under this section, (13) the question whether there was an agreement before decree by the decree holder not to recover costs which the decree might award, (14) an objection by the judgment debtor to auction purchaser s application to be put into possession on ground that

⁽I) Saran v Bhagwan 25 1 441, at p 442 (1903)

⁽²⁾ Erusappa i Commercial I M Banl,

^{23 1 377 (1899)}

⁽³⁾ Deno Bundhu Nundy t Hari Mali Dassec, 31 C 480 (1994), s c, S C W N 39 (4) Kashmath Ayyari Uthermana 25 W 29 (1991), Kattayal Pathumay t Raman Menon, 26 M 740 (1992), Shoo Naram t

Nur Muhammad, 30 A 72 (1907)
(7) Aryan Bank + Kamma Venkata, 26
M 237 (1902).

⁽⁶⁾ Dhan Kunwar i Mahtab Singh, 22 1 79 (1899), Saran i Bhagwan, 25 1 441, 412 (1.803)

⁽⁷⁾ Makka i Sriram, 24 \ 108 (1901) (8) Ram Isami «sari r Sakhan Singh 7 (W N 172 (1904)

⁽⁹⁾ Durga Kunwar : Balwant Singh 23

⁽¹⁰⁾ Adhar Singh: Sheo Prosad 24 \ 209 (1898)

⁽¹¹⁾ Madhusu lan : Gobinda Pra Chow dhuran 27 C 34 s c 4 C W N 417 (1899) Sadashir : Narayan 35 B 452 (1911) dissenting from Bhagwati : Banwari, 31 A 82 (F B) (1908)

⁽¹²⁾ Mathewson : Color than Trile h, -5 C 492 (1960)

⁽¹³⁾ Ram Chan Ira Bannerjee i Rannt Sugh, 2° C -12 s c 4 t W \ 400

<sup>(1899)
(14)</sup> Lallas Naran las a Kashordas 22 B

^{163 (1896)} dist, in Lei ole Lal Lakrasli i Brojen Ira humar Salia 2 i C 810 at p 412 (1902)

salo was invalid, (1) an application to allow execution proceedings to be re opened, (2) a suit by surety for declaration of non liability as to portion of decree (3)

A case is not within the section if it is a question which does not relate to, and is not directly connected with, the execution of the decree, even though hetween the same partness(4) that is, if it is not a question in respect to the furtherance of or hindrance to or the manner of carrying out the execution of the decree, (5) or does not arise between the parties to the suit in which the order was passed. (6) or its a question whole cannot he properly determined in execution, (7) or if it is an order not in execution, such as an interlocutory order pending suit appointing a commission to make partition subsequently to a prehimmary decree (8) or if it indirectly and remotely relates to the execution of the decree, (9) or the decree has been satisfied, (10) or if an order is made not in execution of decree but after execution and when such proceedings have come to an end, (11) or the question is one not under but outside the decree, such as assessment of damages for excessive execution, (12) or for damages for injury to property after it had vested in him on the confirmation of the sale (13)

The section does not apply where the decree has passed beyond the stage of execution and the Court is functus office. So it does not apply to a suit by one of two judgment-debtors who has been compelled to satisfy the decree against the other judgment debtor for contribution, (14) nor where a person

 Mohim Chandra Bhattachargee: Ram Lochan Dey, 7 C W N 591 (1903)

(2) Adratan Ahasnobish v Ram Rutton Chattery, 5 C W N 627 (1903)

(3) Lingu Red ly t Hussain Reldy, 28

M 117 (1904)
(4) Roy Nundolal Bose v Mir Abu Syed,
5 C L. R 45 (18°6) hashee kishori Roy Chowdhry v Noor hhan, 7 W R (Cw R)
46 (1857) [claim for damages in respect of injury sustained by goods while under attachment in execution of a decree which was afterwards set asside], Sita Ram v Vahipal 3 A 533 (1881), hrishina Roy v Jawahr Singh.
20 C. 250 (1892), Annoda Prasad Basieryee
1 Nobo hissore Roy, 9 C W N 932 (1990.)
guit on unwaisfied order of insolvent Court]

(suit on unsatisfied order of insolvent Court)
(a) Haragobind Das Koiburto i Issuri
Dasi, 15 C. 187 (1887)

(6) Kethlamma 1 Kelappan 12 M 228 230 (1887)

(7) Gopi Narain Khauna t Bansidhar, 27 1 325 (1905)

(b) Jogodishuri Dibea t Kailash Chundra Lahin 24 Cal. 725 (1897)

(9) Berham Deo Prasal : Fara Claud) C W N 959 (91 (190) (10) Raja Pudmanund Singh Baha loor t Doorga Pershad Doobey, 4 C W & 39 (1899) [execution easo dismissed for non payment of process fee—not appealable]

(II) Har Prasad t Sheo Ram 20 1 506. 508, 509 (1898) . Ram Adhar v Narain Dat. 24 A 519 (1902), Bujha Roy : Ramkumar Pershad, 26 C 529, s. c 3 C W N 374 (1899) [amending sale certificate], Saddo Kunwar : Bansi Dhar 23 A 4"6 (1901) [ib], Jotindra Mohan Tagoro v Mahome l Basir Chowdhry 32 C 332 (1904) [right of auction purchaser to refund of purchase money when auction sale set aside | Bhimal Das r Mt Ganesha Koer 1 C W Y 658 (1894) Ghulam Shabbir e Dwarka Prosad. 18 A. 36 (1895) [an order directing delivery of possession to an auction purchaser, not appealable] Contra Muttia r Miasami, 13 M 501 (1890)

(12) Deno Nath Bankya : Ram Kumar Chuckerbutty 6 C. L. J. 527 (1:04)

(13) hol stanta r holistanta, 17 M L, J 543 (1907), a.c. 31 M 3°

(14) Ramsaran Pande t Ianki Pand , 18 4, 100 (1895)

cannot as transferee execute the decree, in which case of necessity he must sue (1) Where a decree is executed by delivery of formal possession a cause of action exists against a defendant who remains in occupation of the premises (2) A question relating to execution pre supposes a person against whom execution is sought and cannot arise between decree holder and a complete stranger (3) And the section does not apply when the question is not between parties to the suit in which the decree was passed, but between parties who both claim to be representatives of one of such parties, (4) or the question is one which forms no subject of enquiry in the suit and could not form the subject of enquiry in execution of decree (5) A dispute between two judgment-debtors as to the right to property sold in execution is not within the section (6) The question whether the decree itself is valid is not one relating to execution (7) The section does not apply when a previous suit is com promised and dismissed, defendant agreeing to do something and on his failure plaintiff sues to enforce it, there being no direction in this respect in the former decree (8) A question as to whether there has been an adjustment of the decree which has not been certified cannot be raised under this section (9) A charge for maintenance created by a decree is not enforceable in execution (10) An application by purchaser to set aside sale of immoveable property sold by the sheriff in execution of a decree or for compensation on the ground of deficiency in the area of the land sold is not within the section, (11) nor is the question of the right of an auction purchaser to a refund where the sale has been set aside (12) A suit has been allowed to recover properties not included in a mortgago though inadvertently mentioned in the plaint and the decree (13) Any questions that arise as to an order absolute for sale or foreclosure of mort gaged property are not within the section (14) Nor is an order in proceedings

(1) Pasupathy Ayyar v Kothanda, 23 M. 64 (1904)

(2) Hassan Raja Chaudry v Katlash Chandra Singha, S C W N 19 (1903), following Shama Charan Chatterji t Madhab Chandra Mookerjee, 11 C 93 (1884) Contra Madhu Sudan Das v Gobinda Prija 27 C 36, s c. 4 C W N 419 (1899)

(3) Nagamuthu v Savarimuthu, 15 M

226 (1891)

(4) Gour Mohun Gouli v Dino Nath Karmakar, 25 C 49, s c, 2 C W N 76

(1897)
(5) Hanmant v Surbabhat, 23 B 391 396
(1898) And it does not apply to an order

that the plaintiff may be allowed to execute the decree if he fulfilled certain conditions at different stages of the proceeding, Srinivas ; Kesho (1911), 14 C. L. J. 489

(6) Kastura Kunwar : Gaya Prasad, 29 \ 207 (1906)

(7) Arunachallam t Murugapps, 12 W

203 (1899) (application to set as le a decree passed with the consent of the miner's guardian but without the sanction of the Court rejected—no appeal hea), Dhaniram Mahta: Luchmeswar Singh, 23 C 639 (1890) Cobjection that the person who was said to have consented to the decree had no authority

(8) Chumlal Dutt : Hiralal Dutt, 7 C W

N 158 (1902)

(9) Ramdoyal Banerjeo v Ram Huri Pal, 20 C 32 (1892), but see as to separate suit, Deno Bundhu Nundy v Harimati Dassec,

31 C 480, at p 485 (1903)

(10) Matangineo Dasseo v Chooney Money Dassee, 22 C 903 (1895), see also Arunachala t Zamindar of Sixagur, 7 M 328 (1893)

[decree charging impartible Zamindari]
(11) Ram Narana Duari a Nath Khetira,

(11) Kam Narain's Dunis A: (C W X 13 (1899)

(12) Joindra Vohun Lagero v Vahomed

Banr Chowdhry, 32 C 332 (1901) (13) Ram Chander a Kondo 22 1 112

1900) (11) Ud unmass Bilee : Rooglel Dis

C 133 (169') [dissenting from Ke lar Nath

before Cents of Revenue under Act XII of 1881 (1) or an order passed in exercise of inherent powers to parish for contempt (2) or exses an irgunder Act X of 1859 (Landlord and Tenant Act) (3). Where formal possession has been given under a final foreclosure decree but the mortgagor has continued in actual possession the remeds is by suit (1). An application under sect 3% of the last Cole (or an appointment of a Commissioner is not within the section (5).

Frand.—It was well settled law under sect. 211 of the last Code that when circumstances affecting the validity of a sale in execution had been brought about by the fraud of one of the parties to the suit or the auction purchaser and give rise to a question between these parties such as apart from fraud, would be within the provisions of that section a suit would not he to impeach the validity of the sale on the ground of such fraud (6)

r Lal_H Sahai, 12 U. 61 (18-9). Oudh Bilasi Lal r Nigeshuar Lal, 13 A 278 (1891)]. Tarapado Gheie r, Kamini Dasse, 29 C. 618 (1901); Hatem Ab Khundkar r Alelol Gufar, 8 C. W. N. 102 (1902)

 Masik ulla Khan r Majidunnisas, 26
 A. 149 (Paul) [all heation for refund in consequence of the reversal or modification in appeal of a decree under above total separate and heat

neberate ant nea

- (2) Gody Ram e Suraj Mal, 27 A. 350 (1901) (and an order not a decree and no appeal). But where there is a genuine dispute between the parties as to execution, it should be deals with under this section, and not on a motion for contempt. Jameely 1 kasheen also said that an executing Court has no indicern power to commit for contempt bankaralings Reddi r. Kandasami Teran, 17 M. L. 3 331 (1907) etting hochappa v. Sachi Devi, 25 M. 491
- (3) Damoodar : Iswar, 15 C W A 78 (1910)
- (4) Jagan Nath : Milap Chand, 28 1 522 (1906). Wilayati Begam : Nand Kishore, 30 1 231 (1908)
- (5) Jatia i Madepalli, 17 M. L.J. 114(1909).
 (6) Mohendro Naran Chatura) : Gopul Mondul, 17 C 769(1890) F. B., Rajoni Kant Bagchi : Hossan Uddin Ahmed, 4 G. W. N. 258 (1899) [fraul of a naction purchaser].
 Prosunno Kumar Sanyal v. Kali Das Sanyal, 16 C 683 (1892) P. C. Tho Allahabal High-Court [Durga Kumar v. Balwant Singh, 23 A 478, 480 (1901)] have treated the question as concluded by authority of a tong string of cases in the Calcintta, Madras and Bombay

High Courts. See Saroda Churn Chuckerbutty r Mahomed Isuf Meab, 11 (376, 378 (1585) . Halladels 4 Anady, 10 C 110 (1884) for this case the matter had been ileast with in execution], Siva Pershad Maity i Nundo Lall Kar Mahapatra, 18 C 139 (1850), Jagan Nath Gorair Watson & Co , 19 C. 341 (1572) . Bhubun Mohun Pater Nundo Lal Dey, 26 C 324 (1899) , Moti Lal Chakerbutty : Russick Chandra Burage, 26 C 320 (1896). Hira Lal Ghose : Chundra Kanto Ghose, 26 C 539 (1899) Im this case application was under a 241), a c. 3 C W V 403, Brojo Gunal Sarkar : Busirunnissa Bibi, 15 C. 179 (1857) (in this case it was lickl a suit would lie because a 244 of the Code had no application to proceedings in execution of a decree under 1ct A of 1859]. Viraraghava t Venkata charyar, 5 M 217 (1882) [referred to with approval in Amshnan : Arunachellam, 16 M 447 (1592)]. Rama tyyan t Sreenitasa Pattar, 19 M 230 at p 231 (1895) , Subbant Sunnasce, 2 M 264 (1880), Paranipe # Kanade, 6 B 148 (1882), Sakharam t Damodar, 9 B 468 (1885). Adhar Monco Dassi t Monmotha Nath Boso, 6 C W N 279 (1901), Mathura Das : Lachman Ram, 24 A 239 (1902) Kokal Singh v Edal Singh, 31 C 385 (1904) As to what constitutes fraud vitiating the sale, see Sm. Sarat Kumari v Nomai Charn Dey, 5 C W N 265 (1900) . Rojoni Kant Bagchi t Hossain Uddin Ahmed. 4 C W N 538 (1899), Gaya Prasad Misr v Randhir Singh, 28 A 63t (1906), and see Asaban Banu : Ananda, 14 C. W N 823 (1909) (effect where there is compromise and no sale), Akhil Prodhan v Vanmotha Natli. 18 C L J 616 (1913) (fictations sale)

This rule was, of course, subject to this, that the other conditions of the section existed, viz, that the question was one arising between the parties to the suit or their representatives. So it was held that as between a party to the suit and a stranger, the provisions of sect 312 of the former Code did not debar the person aggreeved from instituting a suit, if he could establish that a material error in the sale had its origin not in mere irregularity but in fraud (1) So also in the under-mentioned case, (2) while the suit was held to be barred as regards those plaintiffs who were parties to the suit the sale in which was sought to be set aside, it was held to lie at the instance of the other plaintiffs who had been no parties to such suit.

It was held that when a decree or purchase was made benami, sect 244 did not apply, and a suit would he, as the section could not be applied on the footing that the persons really interested were parties to the proceeding (3) and that the auction purchaser could not be regarded as a party to the suit (4) Though this case was not referred to, it must be taken on this latter point to have been overruled (5) by the decision of the Privy Council, that when a question relating to execution has arisen between the parties to the suit in which the decree was passed, the fact that the purchaser, who is not party to the suit, is interested in the result is not a bar to the application of the section (6) A judgment-debtor was held entitled by an application under seet 244 to have an execution sale of his properties set aside if he alleged and proved fraud on the part of the decree holder, though no fraud was alleged or proved against the auction-purchaser, who was a stranger to the suit. The auction-purchaser was of course entitled to have the purchase money paid by him refunded by the decree-holder When during the pendency of an application under sect 244 to set aside a sale the sale in confirmed, such confirmation was held to be no bar to the maintenance of the application even though the auction purchaser was a stranger to the suit (7)

Raja Peary Mohun Mulerice, 3 C W N

LYAL (1899), Doyamoyi Dasi : Sarat

⁽¹⁾ Viraraghava v Venhatacharyar, 5 M 17, 219 (1882)

⁽²⁾ Jagan Nath Gorat v Watson & Co , 19 C 341 (1892)

⁽³⁾ Mohendro Narain Chaturaj v Gopal Mondul, 17 C 769, 777 (1890), in which case it was held that the question did not arise

between "parties" (4) Ib at p 778

⁽⁵⁾ Bhubun Mohun Pal : Nundo Lal Dey, 26 C 324 (1899) [see Mot: Lal Chakerbutty 1 Russick Chandra Bairagi, 26 C. 326 (1896), Durga Kunwar : Balwant Singh, 23 A 479 (1901), Kherode Sundars Debs : Juanendra Nath Pal Chaudhuri, 6 C W N 285 (1901)]. which dealt with the objection that the auction purchaser was not a party Whether such purchaser is real or nominal makes no difference Quare whether the case of a benami decree holder, which was also dealt with by the F B decision, is still open

⁽t) Prominio Kumar Sanyal t Itali Dan

Sanyal, 19 C 633, 639 (1892), followed in cases cited in fast note and in Hira Lal Ghose Chundra Kanto Ghose, 26 C 539 (1899). in which it was also held that an appeal would he at the instance of the auction purchaser Nemai Chand Kanji i Deno Nath Kanji, 2 C. W N 691 (1898), Bhubun Mohun Pal

Chandra Wojumdar, 25 C 173, 177 (1897) (7) Kherode Sundar: Debi v Juanendra Nath Pal, 6 C W N 283 (1901), Hungsha Marillya : Lincouri Das Karmakar, S C W N 230 (1903), dist Mohesh Chandra Bagchi 2 Dwarks Nath Mitra, 21 W R 260 (1875) [in which it was held that however fraudulent the conduct of a plaintiff in a suit may be, if

the purchaser is not implicated in the frant the validity of the sale is not affected, but pointing out that the different rule hells go wh where not only the decree but the auch n

proceedings are franchiscrit)

An appleation to set aside a sale on the ground of fraud may be made even after the sale has been confirmed (1)

Where a judgment dehter applies to have an execution sale set aside and alleges circumstances which, if found in his favour, would amount to fraud on the part of the decree holder or auction purchaser the application was held to come under sect 244, something more being alleged than a material irregularity in publishing or conducting the sale within the meaning of sect 311 of the last Code (2) But a mere allegation of fraud without any attempt to substitution to was insufficient (3)

In order, however, to determine whether a case in which fraud is alleged comes within this section or may be made the subject of a separate suit, it is necessary, apart from any other conditions annexed to the section, to accertain whether it is the decree or the execution proceedings under the decree which are alleged to be fraudulent. Proceedings under this section presuppose the existence of a valid and binding decree (4). The section was held not to apply to a case where the judgment debtor tried to set aside the effect of a decree, but it referred to proceedings in execution based on the decree as if it were perfectly good and vahid (5). Under this section the questions to be decided in execution are questions relating to the execution, discharge, or satisfaction of the decree. A question whether the decree itself was obtained by fraud or collusion was held not to be one which relates to the execution, discharge, or satisfaction of the decree, but which affects its very subsistence and vability (6). The question whether the decree sought to be executed was obtained by fraud.

⁽¹⁾ Wahid un Nissa v Girdham, 27 A. 702 (1905), and cases there cited

⁽²⁾ Nemai Chand Kanji : Deno Nath hang, 2 C W N 691 (1898), Bhubun Mohun Pal v Raja Peary Mohun Moolerne 3 C. W N LXXA (1899) As to these two sections, see judgment of Ghose, J. in Mohendro Naram Chaturaj : Gopal Mondul Γ B 17 C 769 (1890), in which the learned Judge was of opinion that an application to set aside a sale for fraud was not provided for in the Code cither in s 244 or 311, that the executing Court had, however, inherent power to set aside a sale before confirmation. but that after confirmation the Court of execution was functus officio, and that the matter could only be dealt with by separato suit. At one time it was not clearly under stood that after a decree had been fully executed the Court could re open the matter under s 244 and set aside a sale already con firmed, but the law was subsequently settled as stated in the text, that an at plication lay under s. 244 whether before or after confirms tion of the sale, see Jagan Nath Gorai : Watson & Co , 19 C 311 at p. 311 (1892), and

the F B case ented See also Golam Ahad Chowdhry v Judhistir Chandra Saha, 7 C W N 305 (1902), s c, 30 C 142

⁽³⁾ Umahanta Roy v Dino Nath Santal, 28 C 4 (1900)

⁽⁴⁾ Ram Naram Tewari + Shew Bhunjan Roy 27 C 197, 200 (1899), the terms valid and binding were hero cited with reference to fraud It has been held that where there was no subsisting decree the matter was yet within a 214 Doyamoyi Dasi v Sarat Chunder Mojumdar, 25 C 175 (1897), also when the decree did not warrant a sale at all but provided for satisfaction out of money in Court Jagan Nath Gorait Watson & Co. 19 C 311, 341 (1892), also where it was con tended in a mortgage suit that there had been no decree absolute directing the sale Sita, Pershad Marty : Nundo Lall Kar Mahapatra, 18 C 139 (1890), Harshar Kanta r Rama Pandn, 33 B 693 (1909)

⁽⁵⁾ Khetra Pal Singh Roy r Shyama Prosad Barman, 32 C. 265 (1904)

 ⁽⁶⁾ Sudindra r Bhudan, 9 M. 80, 83 (1885),
 Dhaniram Mahta r I uchmeswar Singh, 23
 639, 611 (1896)

was thus held not to be within the scope of seet 244 (1) and could only be raised hy a separate suit (2) When, therefore, both the decree and in consequence the sale thereunder were impeached on the ground of fraud, the remedy lay by separate suit (3) But, as already stated, if the decree was not impeached for fraud but only the execution proceedings thereunder, the question had to be raised in those proceedings and a separate suit would not be An objection, therefore, to a sale of property in execution of a decree on the ground of fraud is a question to be determined exclusively under this section, even though the purchaser was no party to the decree

"Court executing the decree "-That is, either the Court which passed the decree or the Court to which the decree has been transferred The provisions of this section govern the procedure of both such Courts (4) The words must be interpreted to moan the Court executing the decree at the time when the application is made, and they do not include the Court which has executed the decree and has thereby become functus officio (5) The section is limited to Courts executing the decree, and therefore an order refusing to stay execution by a Court which is not executing the decreo is not appealable (6)

"And not by separate suit"-A separate suit ought not to be insti tuted unless all questions between the parties or their representatives cannot bo decided in the original suit, (7) and all questions which can possibly he deter mined in the execution proceedings should be so determined (8) The existence however, of a decree cannot bar a fresh suit between the parties in respect of rights which cannot he worked out without additions to the decree which the Court of execution has no power to make (9)

It has been held that this section does not absolutely bar a suit, but pio

hibits in a separate suit between the same parties to a decree, any relief being

⁽¹⁾ Mot: Lali Chakerbutty v Russicl Chandra Bairagi, 26 C 326, 328, 332 (1896), Tallapragada v Boorngapalli, 28 M. 402 (1907), Debendra Nath Bhattacharjee : Prasanna Kumar Chakravarti, 5 C L J 328 (1907)

⁽²⁾ Sudindra v Bhudan, 9 M 80, 83 (1885) (3) Abdul Mazumdar v Mahomed Gazi Chowdhry, 21 C 605 (1894) [dist in Keshab v Durga, 1 C W N exl, in which the decree had already been set aside but not on the ground of fraud], Ram Naram Iewari : Shew Bhunjun Roy, 27 C 197 (1899) [m. this case the decree, which was ex parte, had already been set asido and not on the ground of fraud, which, however, the plaintiff by his suit desired to go into], Moti Lall Chaker butty t Russick Chandra Bairagi, sujra, Sudindra t Bhu lan, supra, Preo Nath R by t Mohesh Chandra Mortra, 24 C 546 (1537) . Kedar Nath Mukerjeo i Prosunno Kumar Chatteries 5 C 11 \ 5 1 (1901) \ \co

question of fraud and hability for fraud discussed in Chitambar v Arishnappa, 26 B 543, 547 (1902) Debendra Nath Bhatta chargeo v Prasanna Kumar Chakravarti, 5 C L J 328 (1907)

⁽⁴⁾ Ghazidin v Fakir Bulsh, 7 A 73 (1984), Oudh Behari Lal : Nageshwar Lal, 13 A. 278 (1800)

⁽⁵⁾ Fakaruddin Mohamed v Trustee, 10 C 538 at p 510 (1881)

⁽⁶⁾ Ramchandra v Balmukund, 29 B 71 (1304), discussed in Srinivas i Kesho Prosad 14 G L J 489, 496 (1911)

⁽⁷⁾ Jogemoya Dassi t Thakomani Dassi 21 C 473 at p 187 (1896) In Chaulri Ahmad Baksh t Seth Raghubar Dayal, ... 5 1 1 (190a), the P C held that the suit wis not barred

⁽³⁾ Iogemoya Dassi i Thakomani Dassi, at 3: 412

⁽i) 6 11 Narain Ishanna e Babu Ban sidhar, 9 C W N 577 (1505)

granted which interferes with the conduct of the execution proceedings of the Court executing a decree (1). In considering whether the scope of any suit coince, within the section, regard must be bad both to the cause of action and the rehe claimed. Thus the question of an uncertified adjustment may be a matter relating to execution, and no suit is permissible which has as its object to restrain the execution of the decree on this ground, but it may be that a suit would he for other rehef which had as its subject-matter such uncertified adjustment (2). Further, this section differs from sect. It which bars the trial of an issue. This section bars a suit brought for the determination of certain questions specified therein, but does not bar the trial of any issue involved in those questions if the issue is raised at the instance of a defendant in a suit brought against him (3). Where theorecution proceedings are closed, a separate suit will he, as the section is then no longer applicable (4).

"Arising."—It has been said (5) that this word should be read as "directly arising," otherwise the most remote enquiries would be possible in the execution department. Probably, however, it is best not to import words into the section and to determine in each case whether a question does arise which is dealt with by this section.

The following considerations establish that for the purposes of this section an objection made by a party to the decree or his representative against whom execution is applied for to the effect that property is held by him by a right or title not rendering it hable to attachment in execution of such decree, is a question arising between the parties. The provision formerly in force corresponding to sect 244, namely, sect 11 of Act XXIII of 1861, was bruted in its operation to questions arising between parties to the suit, and the question arcse whether the term "parties" applied to persons who had not been made parties before decree but against whom execution was sought as herrs of the judgment-debter upon his death after decree In the last Code the words " or their representatives" were added and applied to persons against whom, or against the property in whose hands, execution was sought, on the ground that they were the heirs of a judgment debtor who has died after decree As regards the kind of questions intended in sect 244 of that Code the matter was fairly elear from the provisions of seet 234 Under that section (now 50) the representative could have been made hable "to the extent of the property of the deceased which has come to his hands and has not been duly disposed of " So that two kinds of property could be attached First property of the ancestor found in the hands of the heir, second the property of the heir, from whatever source derived to the extent to which ho bad wasted the assets that had descended

Azizan v Matuk Lal Saha 21 C 456
 (1893)

⁽²⁾ Ib, at pp 456 459

⁽³⁾ Bhiram Ali Shaik v Gope Kanth Shaha, 21 C 355 (1897), foll, in Vil Kamal Mukerjee t Jahnabi Chowdhuram, 26 C 946 (1899)

⁽¹⁾ Ramanadan Chettir Kunnappu Chetti, 6 M. H. C R 304 (1871), Fakaruddun

Mohamed v Official Irustee, 10 C 538 (1884), Rash Behary Mondal v Rakhat Churn Wondd, 1 C W N 708 (1897) See Haragobind Dass Koiburto v Issuri Dassi, 15 C 187, at p 194 (1889), Girdhari Lal t khushali Ram, 31 A 364 (1999)

⁽⁵⁾ Per Duthort, J in Ram Ghulam i Duarka Rat, 7 1 170, at p 174 (1884)

to him without satisfying the debts of the deceased. Where property is said to be hable to execution in the hands of heirs as assets inherited from their aucestor, in such a case the question that ordinarily arises is whether the property has so descended or not. That is a question in which the parties interested are the judgment-creditor on one side and the alleged heir himself ou the other. The persons interested would be the same if the property against which execution was sought were the property of the heir himself which it was sought to charge on the ground of his having wasted the inherited assets. The provision in the former seet 234 for taking an account made this plain

An examination of the decisions led to the same result. The eases fell into two classes. The first class consisted of cases in which a person is originally made a party in a representative capacity, or is subsequently made a party in consequence of the death of an original party before decree In this case it was clearly settled that such a person was a party to the suit within the meaning of sect 244, and that a question between bim and the decree helder, as to whether property had come to him as the representative of the judgment debtor, and so was hable to be taken in execution of the decree against him as such iopresentative of on the other hand belonged to himself alone and not in such representative character, was one that must be decided in the execution proceedings, and not by suit. The governing authority on the subject was the decision of the Privy Council in Chowdry Wahed Ah v Jumace, (1) and it was followed and applied in the sense indi cated in several subsequent cases in this country (2) The second class of cases consisted of those in which the representatives had not been made parties to the suit before decree, but in which, in consequence of the death of the judgment debtor after decree, a question alose as to the rights of the decree holder to execute the decree against the representatives or the property said to have descended to them Under Act XXIII of 1861 it was held, both by the Madras (3) and Calcutta (4) High Courts, that representatives proceeded against in execution of a decree against the person they represented were parties to the suit within the meaning of the section corresponding to sect 211 of the last Code That question no longer arose under the Code of 1882, hecause in sect 214 of that Code the representatives were expressly mentioned In both of those eases and in a series of subsequent cases it was held in accordance with the analogy of the other class of decisions aheady mentioned that questions arising between a decree holder and the representatives of the judgment debtor as to whether property had come to the representatives as such, and so was hable to be taken in execution, or was their own property derived from any other source, and therefore not so hable must be decided in the execution proceeding and not by sut (5) There were other eases in which

^{(1) 11} B L R 149 (1872), Oscenumnissa Khatoon t Ameeroonissa Khatoon, 20 W R 162 (1873), Arundadhi Animyar t Natesha Ayyar, 5 M, 391 (1882)

^{(2) \}imba Harishet : Sitaram Parap, 9 B

⁽³⁾ Buddu Panaya t Venkaya, 3 M H C 1, a63 (1866)

⁽¹⁾ Interunnista Khatoon t Mozuffer Hossem Chowdhry 12 B L R 65 (1873)

⁽a) Kurijah t Majan 7 M 255 (1883), Rain Ghulam t Haziret Kuve, 7 A 517 (1885), Sita Rain t Bhagwan Das, 7 A 734 (1884)

the decisions turned upon considerations which did not apply to the case mentioned. They were cases in which it was held that a claim either by the judgment debtor or by his representatives to property attached in execution, made not in his own right but as a trustee,(1) did not fall within sect. 211 of the list Code (2)

Two propositions were then established under the previous case law firstly, that where in execution of a deered for a deht due by n deceased person, property in the hands of his representative was intached, a claim by the representative to have the property released on the ground that it was his own private property fell not within sect 278 of the last Code but within the section corresponding to this (3). Secondly, however, if the judgment-debtor objected to attachment, not on the ground that it property was his private property but set up a justeriu, namely, the right of third parties not hefore the Court as parties to the saut or their representatives, then the matter fell within sect 278 of the last Code and not this section (1). This where the judgment debtor alleged that he was in possession only as shebut of a deity to whom the property had been dedicated, it was held that the case fell within sect 278 read with sect 280 of the last Code, and not within sect 214 of that Code, now represented by this section (5)

Questions arising between whom —Questions may possibly also between a party on one side and a party on the other side, or between a party on one side and the representative (i.e. heir, executor, administrator or transferred within the meaning of the term hereafter stated) of a party on the other side, or between a party or his representative.

(2) Rajrup Singh v Ramgolam Roy, 16 C 1 (1888)

(4) Shankar Dial v Amir, 2 A 752 (1880) [objection by judgment dehter that he held on account of an endowment). Nath 'llal

Das : lajammat Husain, 7 A. 36 (1880) [objection by same that he was in possession as Mutwallil, Roop Lall Dass v Bekani Meah, 15 C 437 (1888) [samo] foll, in Murigeya : Hayat Sahob, 23 B 237 (1898) , Bhajahari Pal v Ram Lal Das, 6 C W N 62 (1901) [objection that property debuttur] , Ramanathan Chettiar t Lovvai Marakavar, 23 M. 195 (1898) F B [claim to hold as trustee where it was held that the claims of third parties whether put forward by them selves or by a party to the suit must be dealt with under ss 278-283 and not under s 244 of the last Code] The decision in Beg Raj Marwati v Kundali Debva, 8 C W A 353 (1902), and a dictum in Upendra Bhatta v Ranganatha Bhatta, 17 M. 399 at p 400 (1893), appear to be against this view. In Ram Indomati t Jageshar, 28 A, 644 (1906). it was held that there was nothing to compel an objection under + 2"8, Budrudeen t Abdul Rahim, 31 M. 125 (1908)

(5) Kartick v Ashutosh, 39 C 298 (1911),
 16 C W N 26, F B Cf Jogendra v

Gobinda, 3. C 361 (1905)

⁽¹⁾ Shankar Diat 1 Amir Haidar, 2 1 752 (1850), Nath Mal Das 7 Tajamid Husam, 7 1 36 (1855) The case of Bahert Lal 1, Gauri Saha, 8 A 626 (1856), in which to facts were very peculiar, was decided by one at least of the Judges before whom it came on the ground that it fell within the same principle, tude post

⁽³⁾ Ib., Punchanun Bandopadhya ir Raha Bib, 17 C 711 (1800) F B., Scth Chand Mai v Durga Den, 12 A 313 (1889) [foll. Kalı Charan v Jewat Dube, 28 A 51 (1905)], Mungeshar Kuar v Jamoona Prashad, 15 C 603 (1889), Beni Frasad Kunwar v Lukhua Kunwar, 21 A 323 (1809), Vengapayyan v Mahahnga Bhat, 26 M. 501 (1902) [question raised as to whether improvements attached in execution were property of deceased judgment debtor or of his representatives in their own right]

on one side and the auction purchases or his representative on the other. It has been held that the section does not cover a question between a party to a suit and his representative (1)

Parties —I'his means parties to the suit and on the record (2) It means parties who have properly been made parties in accordance with the provisions of the Code —Thus where a Mahomedan infant was represented by his lathers brother (who has disqualified because his interest was adverse) it was held that the minor had never been a party (3) —Where a decree is passed against one who represents others, all persons whom he represents are parties, as in the case of a Larnavan and members of the tarwad (4)—If the question arises between parties the

suit (5) A In a suit for

In a sun for and a decree obtained in the terms thereof In execution S was dispossessed, and presented a petition to the Court objecting that the decree was not binding on her It was held that she was a party and entitled to appeal (7) Defen dants not joining in compromise on which decree was passed were held not to be judgment debtois (8) It was held that where a decree or purchase was made benams sect 244 did not apply, it being said that it was not necessary to apply that section on the footing that the persons really interested were parties (9) But this case, in so far at any rate as it held that the matter did not come within the section as far as the auction purchaser was concerned, must be taken to have been oversuled by the Privy Council (10) It was held that the Collector, and, in proceedings relating to the enforcement of an older under sect 412 of

⁽¹⁾ Magan Lal Mulp v Doshi Mulp, 25 B 631, 635 (1901)

⁽²⁾ See Dutio v Gonesh, 5 Bom L R 952 (1,003), in which the section was held in applicable as the plaintiff was not a party to the provious suit. In Bishen Dyal Singh is Sagar Singh, 2 C W N 311 (1896), a person obstructing the decree holder at the instigation of the judgment debtor was held not a party. Increase, and the instigation of the judgment debtor was held not a party. Increase, and in Sankarahinga Reddi is kandasami Feran, IT N. L. J. 334 (1407), it was held that the section was not applicable where the person violating the rights of the attaching decree holder was not a jurty to the original suit, and consequently a suit for damages will be acaust him.

⁽³⁾ Rashid un Arsa t Muhammad Ismail khan, 36 f t, 163, 175 (1909), s e, 13 C W 1152, Natura, t t Jah, 15 C L J 3 (1311), Purno Chandra t Bejoy Chand, 18 (L J 18 (1913), Kumwar Partab Sungh t Blabutt Sungh, 17 C, 18 C 1 J J 31 (1913)

⁽⁴⁾ Manvittil v Pathram, 30 M 215 (1996), and consequently an objection to attachment was hold to fall under a 278, Mathu t Paramaswaran, 17 M L J 377 (1996)

⁽⁵⁾ Kristo Wohineo Dosseo v Kaliprosomio Ghose, 8 C 102 (1881), and see Nowrojce Nusserwanjee t Bapuji Dossubhar, 5 Bom L II 1036 (1903)

⁽⁶⁾ Mutta v Appasam, 13 M 501, 507 (1890), Kasmatha Ayyar v Uthumansa Rowthan, 25 M 529, 532 (1991), Sadashi t Aarayan, 35 B 402 (1911), dascenting from Blagwati v Banwiri, 31 N 83, 1 B (1998)

⁽⁷⁾ Sankarayadiyammal t Kumarasamya,

⁸ M. 173 (1885)
(8) Jathavedan r. Kunchu, 30 M. 72

<sup>(1906)
(9)</sup> Wohendro Naram Chaturaj i Goj d

Mondal, 17 C. 769 777 (1850) (10) Bhuhun Mohun Pal : Nun lo Lall Dev. 46 C 321 (1853)

the sud Code against a next friend, the latter, was not a party (1) If tho rights of parties are transferred before decree, and if the transferee is made a party to the suit before deerce, then be comes within the words "parties to the suit "(2) A person who is sucd in one suit in his personal capacity is in law a different person when suring in a subsequent suit in the capacity of shebait or trustee (3) In a recent ease it was held that where a judgment debtor claimed property not in his personal capacity but as a mutwalli who was not a party to the suit, the easo did not come under this section (4)

The words " parties to the suit" are not now himted to judgment ereditors and judgment dobtors (5) The case of rival decree bolders has been held not to be within the section, (6) nor a third party objecting to the sale of attached property, (7) nor is a person who becomes a surety for the appearance of a party himself a party to the suit (8) In an order made under an appheation under O XXXIII r 12 for payment under O XXXIII r 10 or 11, Government is deemed to be a party to the suit, and such an order is therefore under this section and appealable (9)

The Official Assignee is the representative of an insolvent debtor within the meaning of this section. (10) A Court has no jurisdiction in execution to reopen the question as to whether certain persons brought on the record as representatives of the deceased plaintiff, and as such made respondents in an

appeal, had been properly joined as parties to the suit (11)

"Representative "-This refers to all persons by or against whom the decree may be executed (see as to this notes to sect 36, ante) The term used is not "legal representative" but "representative". The former term means

- (I) Collector of Trichinopoly v Suarama Krishna, 23 M. 73 (1899) (no appeal) Similarly as regards Collectors, see Collector of Rathnagur, 6 B 590 (1882) [no appeal, Collectors seeking Court Fees under sect 412 of Code of 1877], Collector of Kanara t Hedge, 15 B 77 (1890) [samo revision], contra Janks : Collector of Allahabad 9 1 64 (1886), Sceretary of State : Bhsgwants Bibi, 13 A. 326 (1891)
- (2) Kameshwar Pershad : Run Bahadur
- (3) Ram Krishna Mahepstra e Mohunt Padma Charan, 6 C W V 663 (1902)

Singh, 12 C 458, 463 (1886)

- (4) halı Prasanna Ghose t Rahman, 17 C W N celv (1913), Kartick Chandra t Ashntosh Dhara 16 C W N 26
- (5) Ramaswami Sastrulu waramma 23 M, 361 at p. 366 (1899)
- (6) Ram Chunder : Hamuran, H C W A 433 (1906), Mzaloonissa Begum : Parbutty Koonwar, 2 W R. Misc 41 (1865) [dispute in respect of proceeds of property sold no appeal], Misree Lower : Buksh Singh March 527 (1564) [dispute as to distribution

of assetal, Deen Dyal Sahoo : Radha Muddun, 9 W R 223, 227 (1868), Sanjivi Ramasamt, 8 M 494 (1585) [incompetency of Execution Court), see Lakshmi Ammah Ponnassa Venon 17 VL 394 (1893) [no contest between the decree holders order under sect 231 of last Code is one relating to execution and appealable)

(7) Luchmeeput Singh t Lakraj Roy, 2 W R Misc 56 (1865), see Raghu Nath Das e Badri Prasad, 6 4 21 (1883) Sevu c Wolfmann 10 M 53, 54 (1886)

(8) Sikooram Agurwallah r Komolokant Dry, 2 W R 05 (1865), as to surety a right of appeal see Sheik Suleman t Shivram Bhilan, 12 B 71 (1887) Ghoreo Lai Jha (Sheo Naram Singh, 8 W R. 24 (1507)

(9) Secretary of State c Narayan, 35 B 448, 450 (1911)

(10) Miller t Lukhamani Debi, 28 C. 413

(1.01). a.c. 5 C. W A 761, contra Kashi Presad r Miller, 7 A. 752 (1885)

(III) Venkatachala Reddi r Ventatarama Reddi, 20 M. o65 (1.01).

an heir, devisee, executor, or administrator of a party, or more strictly the last two persons only (I) But a person it was held might be representative within the meaning of this section who is not a legal representative in the sense stated (2) The Courts in India did not confine the term to its primary meaning of executor or administrator, but have included heirs, executors before probate, persons in possession of property of the deceased (3) and persons taking joint property by survivorship (4) A further extension was given to the term so as to include representatives in interest, such as assignees from a mortgager of mortgaged property in proceedings for the execution of a decree against the mortgagor for sale of the mortgaged property (5) It was held in an early case (6) under the Codo of 1882 that the word "representative" meant only persons who succeeded to the rights of any of the parties to the suit after the decree was passed. In this case it was held that Run Bahadur was (a) not a legal representative as he inherited not from Rance Asmedh Koci but from ber husband, (7) (b) that he was not a representative under sect 244 because the transfer to him was not after decree, (c) that he was not a party as the suit was dismissed as against him This latter ground would not now be sustainable by reason of the Explanation As regards the second ground, it is to be observed that the Ekrarnama referred to was not merely before deeree but before the suit. It is, bowever, incorrect now to say that only those who take the interests of parties after decree are representatives. A person who is a transferce within the meaning of the cases cited is equally such whether the transfer took place pending the suit before decree or after decree (8) There is no distinction between the position of legal representatives added to the suit before and those added after decree (9) A person attaching decree is representative of decree-

holder (10)

For the purposes of this section, the word "representative" when used in relation to a party includes the transferce of any interest who so far

⁽¹⁾ Ishan Chunder Sirkar v Beni Madhab birkar, 24 C C, 71 (1890), distinguished in Kali i Misrijan, 16 C. W N 711 (1911), Bidri Narain t Isahen Das, 16 A, 483, 157 (1891), in Faundro Deb Raikut t Ram Jugudshwar, 14 C 316 (1886), I B, the heir was held not to be the legal representative of the executors on the will being set

⁽²⁾ Madho Das i Ramji Patak, 16 1 286 at p 201 (1894)

⁽³⁾ Badri Naram i Kishen Dis, supri (4) Peary Lal Sinha i Chandi Charui Sinha, II C W N 163 (1906)

⁽⁵⁾ Badri Naram t Kishen Das sipra (6) Kameshwar Pershad t Run Bahadur

Sinoh, 12 C. 403 (1880) In this case as in Hashbehary Mookhopadya t Wilaram Surnomovec 7 C 403 (1881), the as gament was before and

⁽⁷⁾ See as to this notes to sect 50
(8) See Sheo Narain v Chunni Lal, 22 A
243, 240 (1900), and notes, post In Purma
nandlas t Vallablas, 11 B 500 (1887)
Ramehandra Isolathar, Mahadaji bolatkar,
9 B 141 (1881) [thes from in Behari Lal t
Ganpat Ran, 10 N 1 (1887)], the assignments
were pending suit, and see also Ar_oar th
v Asaboddin Kazi, 9 C W N 134 (1901).
Gopi Nath Chattoj adhya t Sajani Kanta
Sungt, 10 C W N 210 (1900.)

⁽⁹⁾ Seth Chard Mal v Durg v Det 12 A 313 (1883). Shiverun v Sakharam, 33 B 33 (1998)

⁽¹⁰⁾ Peary Mohan Chowdhry e Romesh Chun her Nundy, 15 C 371 (1888), Sah Man Mull e Kanag sabajathi, 10 M ±0 (1892), Krishnan e Venkatajathi, 21 M ±18 (1995)

as such interest is concerned is hound by the decree (1) The following have been held to be such transferees an execution-purchaser of the judgment-dehtor's interest, provided that he is affected by the decree, such as the purchaser at an auction-sale of the equity of redemption in mortgaged premises, (2) a lesseo of the judgment-dehter of attached property, (3) a mortgagee of the judgment dehter; (4) a second mortgagee taking his mortgage during the pendency of a suit on the first mortgage, (5) any person who at the time of the execution of a decree is a transferce of the same within the meaning of sect 232 of the last Code (now O XXI r 16), the term "representative" in the former section heing held to include both subsequent transferees as well as those who purchased directly from the person who obtained the decree: (6) the purchaser of plaintiff's interest in property in suit , (7) the purchaser of property which was at the time of the purchase under attachment in execution of the decree, (8) the assignce of decree of Appellate Court (9) The transferee must, however, be bound by the decree, and on this ground the purchaser of the interest of a tenuro from the judgment-debtor was held

(1) Ishan Chunder Sirkar t Benimadhub Sirkar, 24 C 62 (1896) [competency of Execu tion Court], followed in Umeshanda v Mahandra, 14 C L J 337 (1911), Ganga Das Seal t Yakub Alı Dobashi, 27 C 670 (1899) [order appealable], Dwar Buksh bircar t Fatik Jali, 26 C 256 (1898) [com petency of Execution Court], Badra Naram v Jankishen Das, 16 A 483 (1891) [order appealable], Mathewson v Gobardhan I'ri bedi, 28 C 492 (1900) [suit harred], Para mananda Das v Mahabeer Dony, 20 M. 378 (1896), Minakshi Achi v Chinnappa Udayan, 24 M. 689, 692 (1961) [competency of Execution Court], Shoo Narain : Chunni Lal, 22 A. 243 (1900) [suit barred], Kası natha Ayyar v Uthumansa Rauthan, 25 M. 529 (1901) [order appealable] See cases cited in Gulzari Lal v Madho Ram, 26 A. 417 (1904) Madhe Das v Ramji Patak, 16 A. 286, 291 (1894), distinguishing case of simple money decree [in which case suit maintainable] See as to this case, Gur Prasad v Ram Lal, 21 1 20 (1838), a pur chaser pendente lite is as much bound as a purchaser after decree, Shee Naram t Chunm Lal, 22 A. 243, at p 246 (1900), Radha Kishun Marwari t Hem Chandra Bose, 11 C. W N 495 (1307), Pears Lal Singh r Chandi Charan Singh, 5 C. L. J 50 (1906), a.c., 11 C W A 164 As to transferces of partial interests, see Pasupathy : Kothanda, 28 M. 64 (1904), Haradhan a Girish, 13 C. W 3 95 (1305)

- (2) Ishan Chunder Sirkar: Benmadhub Sirkar, supra, Kasimatha Ayyari Utbumanisa Rauthan, 25 M 521 (1901), ref to Sandhu Farayanar v Hussain Sahib, 28 M 87 (1904), Suarama t Somasundaru, 28 M 119 (1904) (3) Mathewson v Gobardhan Tribedi, 28
- C 492, a c, 5 C, W N 654 (1990)
 (4) Paramananda Das t Mahahur Dossji,
 20 M 378 (1896)
- (5) Sheo Naram t Chunni Lal, 22 A 243 (1900) [suit barred], and Vendeo of Vortigagor, Janh Praysad t Ulfat Ah, 16 A 281 (1891), and see Tara Prasanna Bose t Admoni Ahn, 41 C 448 (1913), distinguishing kommuneri Appaya t Mangela Ransayya, 31 M. 419 (1905)
- (6) Ganga Das Scal t Yakub Mi Dobarli, 27 C 650 (1900), Dwar Buksh Sircar t Tatik Jali, 26 C 250 (1898), Badir Narain i Jui hishen Das. 16 A. 483 (1994)
- (7) Menakshi Acha v Chinnaj ja Udayan, 21 M. 689, ob2 (1901), the report says, "plantiff's interast sed ya., judgmentdebtor. The plantiff was seeking to attach the projectly, and the petitioner was claiming that it was subject to attachment. His report does not state by hom the projectly was sold. Gulzari Lai v Madho Ham, 26 h. 447 at p. 1-50 (1904).
- (8) Gur Prasad r Ram Lal, 21 A, 20 (1893), fold. Lalji Mal r Nund Kucker, 10 A, 322 (1890), huj pana r Kumara, 34 M 450 (1910), (2) And claiming resitution. Jamini Nath Roy r Dharma Das Sur, co C 857 (1994).

not to be a ropresentative of the judgment debtor (1) Where property was purchased subject to an attachment, but the decree under which the attachment was levied was subsequently set aside, it was held that the purchaser was not the representative of the judgment debtor within the meaning of sect 244 of the last Code (2) A person who has purchased a putth holding at a sale in execution of a money-decree, but has not had his name registered in the landlord's register, is hound by a subsequent decree for arreirs of rent obtained by the landlord against the registered pathidar and by the sale in execution of that decree, and is therefore a "representative" within the meaning of the section, (3) as is also a person to whom a transferable occupancy holding was mortgaged before its sale in execution of a rent decree, (4) as is also (where the landlord of an occupancy-holding obtains a decree for rent against his recorded tenant) an unregistered transferce of the tenant into whose hands a portion of the holding had previously passed (5) and a mortgage from the judgment dehtor after attachment (6)

Auction-purchaser—1 distinction must be kept hetween the ease of an auction-purchaser who, purchasing property affected by the decree, such as the purchase of the equity of the redemption in a mortgage suit, is a reputant to the party whose interest is so purchased, within the meaning of the eases cited in the last paragraph and other cases, such as the auction purchaser in execution of a simple money decree. The position of the latter was the subject of some conflict of opinion under the preceding Code. It was in some cases held that such an auction purchaser was not a party nor the representative of a party to the suit (7). On the other hand it was held

of the rulament debtor In Naram Scharge

⁽¹⁾ halu Saha : Bhagabati Debya, 6 C W N 127 (1901) Sed qu whether it made any difference that the purchase was prior to decree See also Ram Narain : Dwarka Nath khettry, 27 C 264 (1893) where distinguishing sales by sherif from sales by the Registrar of the H. C, the Court pointed out that the purchase was not of an interest affected by the decree, and further the applicant did not represent the judgment debtor because their interests were adverse.

⁽²⁾ Ghafur ud din 1 Hamid Husam, 32 A 123 (1903) 1 or right of 1 ossession of pur chaser at a putni sale, see Srimati Krishna Promoda Dassi i Dwarka Nath Sen, 17 C W N 1032 (1913)

⁽³⁾ Surendra Narain Singh : Gopi Sundari Dasi, 32 C 1031 (1905)

^{(1) 5}m. Nissa Bibi i Radha kishore, 11 C W N 312 (1906)

⁽⁵⁾ Gopi Nath Chattoradhya i Sajani Kanta Singh, 10 C W N 210 (1905), Azgar Mi i Asabodin Kazi, J C W N 134 (1901)

⁽⁶⁾ Nar reanasannu v Scalepp myer, 17 M L. J 321 (1907)

⁽⁷⁾ Vishvanath Chardu Nail, t Subraya Shivappa, 15 B 290 (1890), Hira Lal Chattern . Gourmoni Debi, 13 C 320 (1886) . Shivram Chintaman v Jiva, 13 B 34, 37 (1888), Gour Sundar Lahiri t Hem Chunder Chowdhury, 16 C 305, 360 (1889), Sabhajit 2 Sri Gopal, 17 A. 222, 224 (1894) [otherwise if he was a transferce within the meaning of sect 232 (now 122) See, however, contr., Gulzari Mal : Madho Ram, 26 1. 117 (1901)], distinguished in Wilayati Begant Nand Lishore, 30 A. 231 (1908), Mahabir Presad t Partab Chand, 22 1 100, 101 (1909) | in this case the parties to the suit were parties to the proceedings, added to them was the purchaser, not as a repre sentative of one of the parties, but as a looker on interested in the result 1, Gobird han Rat : Bishun Prusad, ad 1 110, 117 (1900) [distinguishing between private sile and Court sale! In Mann Lal t Doshi Mulp, 20 B 631, 635 (1901), it was said that the auction purchaser was certainly not the representative of the decree holder, and it was doubtful whether he was a representative

that when a question are e within this section the first that the purchases who was no party to the sunt was interested in the result was no bir to the applie ation of the section (1). This decision of the Priva Council was sometimes understood as laying down that the auction purchaser was a party or a representative. But this was not so, all that was held was that his interest in the result did not prevent the question being one between the parties (2). It was also held that the provisions of sect. 211 prohibited a suit by a party or his representative against an auction purchaser the object of which was to determine a question which properly aroso between the parties or their representatives relating to the execution of the decree (3).

of the cases eited in the last paragraph) is not a party or a representative of a party

The purchaser of an undivided share must sue for partition by separate sunt (1) An unrecorded co sharer in a tenane; is not a representative in interest of the recorded tenant within the meaning of this section (5)

Sub section (2)—This is a very just provision intended to remedy mero technical defects. Where a suit is instituted in the same Court as has juris diction to execute the decree, the fact that the question has been made the subject of a separate suit in that Court instead of being determined by an order under this section is not a matter affecting jurisdiction but of procedure only (6) and an objection on this account has been held not to be ground of appeal (7). The

Chowdhry t Gregory, 8 W R 204 (1867), Mahabur Singh t Ram Bhagowan Chowbay, 11 C. 150 (1884) the sale appears to have been under another decreo than that under which the question arese In Anandu t Ajudha, 30 t. 379 (1908) it was held that an auction purchaser is the representative of the judgment debtor, not of the decree holder (see Bhagwatı v Banwarı 31 A 82 (1908)) In Mahadoo t Darsan, 51 C W 522 (1911) it was held that an anetson purchaser who sets up an antagonistic title is not a representative of the judgment debtor

(1) Prosunno Kumar Sanyal t Kah Das Sanyal, 19 C 683 689 (1892) P C, appled in Pita t Chumbal 31 B 207, 215 (1996)

(2) Maganlal v Doshi Mulji 25 B 631 at p 025 (1901) follo ved in 'mir Rai v Bardko Singh, 5 C L J 204 (1906) In 'Manikka Odayan v Rajagopala Pilla, 30 M 507, 509 (1907) the proposition appears to be laid down in such general terms This case was discented from in Nadamuni v Veerabhadm, 34 M 507 (1910) See also Narayan 43 M 507 (1910) See also Narayan 5

Umbar 35 B 275 (1911) and Krishna Satapasti t Sarasvatula 31 VI 177 (1908)

(3) Balsı Ram v Fattu, 8 A. 146 (1880) b B Dhanı Ram v Chaturbhu, 22 A. 86 (1899) Daulat Singh v Jugal Kishote, 22 A. 108 (1899), Surendra Mohini v Amarash Chandra, 39 G. 687 (1912)

(4) Yelumalar v Srimvasa 29 V 294 (1906)

(5) Joytara v Pran Arishna 13 C L J 257 (1910), 15 C W N 512

(6) Purmessuree Pershad i Jankeo Koer 19 W R 90 (1873) Anzuddin Hosseni v Ramanugra Roy, 14 C 900 (1882) Biru Mahata i Shyama Churn khawas 22 C 483 (1893) Ram Saran Pando i Janh Pande, 18 A 106, 107 (1894), ct as to distinction between competency and irregularity in execution proceedings. Vishim Sakharam i Krishinarao Walhar II B 133 (1886), Keth Jamma i Kelappan, 12 M 228 (1887)

(7) Purmessureo Pershad t Jankee Koer, supra Aziznddin Hossein v Ramanugra Roy supra, see also khoda Bux t Sadu 14 C L J 620 (1910) Court has therefore considered and treated a planut under the circumstances stated as an application in execution (1) The Legislature has now sanctioned this practice both as regards suits which should have been applications, as also in the converse case.

Where an appeal was erroneously presented to the High Court as a first appeal from an order it refused to convert it into a first appeal from a decree under this section in the old Code road with sect 2 of that Code (2). Where a suit was barred under the provisions of this section but the order of the Court executing the decree was erroneous, the High Court suggested that the latter Court should review its order (3)

Sub section (3),-This sub section corresponds, with amendments, with the last clause of sect 244 of the Code of 1882, which was added to that Code hy Act VII of 1888 The Court executing a decree can go into the disputed question of the transfer of the decree (4) Indeed, the question whether a person is a representative must be decided under this section and not hy separate suit (5) The sub-section refers to a case where there is a dispute between two or more persons as to which of these is the representative of a person who had been a party to the suit. It does not include a case in which there could be no representativo as there was no party to be represented (6) Nor can an application by the assignee of an auction purchaser to he placed on the record be dealt with under this section, as the expression "representative" does not mean the representative of a party to the execution proceedings, but of a party to the suit (7) It was held by the Madras High Court that the amendment noted did not take away tho right of suit at the instance of an assignee of a decree for a declaration as to the validity of his assignment, it heing said to he unreasonable to construo tho phrase "and not by a separate suit" as applicable to the question referred to in the amondment (8) Tho sub section has been amended so as to make it compulsory on the Court to determine the question of representation See anle, "History and scope of section "

⁽¹⁾ Azızuddın Hossein v Ramanugra Roy, 14 C 605 (1882), at p 609, Bern Mahata v Shyama Churn Khawas, 22 C 483 (1895), Jhamman Lal v Kewal Ram, 22 A 121 (1899), Laiman Das v Jagan Nath Singh, 22 A 376 (1900) [the Court refused to interfore in second appeal as the lower Court had not been asked to do sol, Mayan Pathuti : Pakuran, 22 M 347, 349 (1884). Joindra Volian Fagore v Valioned Basir Chowdhry, 32 C 332, 335 (1904), Pasu pathy Ayjar v Kothanda Rima Ayjir, 28 M 64 (1904) , see Nour peor Bapun, 5 Bom L. R 1030, 1011 (1303) the Court refused to d) so as it would not be the proper Court to execute the decree and similarly in Gor Prasad v Ram Lal, 21 1 20, at p 22 (1538) In Sheodihal Salit t Bhawing 29 A. 319

⁽¹⁹⁰⁷⁾ it was held that the Court should

have done so
(2) KodarNathy Lalu Sahar 12 A 61(1889)

⁽³⁾ Mohibullaliv Imami 9A 229,231(1887) (4) Dwar Bulsh Sircar v Tatik Jali 26 C.

<sup>250, 253 (1898)
(5)</sup> Beni Prasad Kunwar v Lukhha kunwar, 21A 232 (1899), in howovor, Vakulab harma v Rangaijan Chetty, 28 M 337 (1904) it was hold not to be obligatory on the Court to proceed under this action where the

right to al ply was already sub j dice
(6) Bent Prasad Kunwar : Mukhtesar Rac,

²¹ A 316, at pp 319, 320 (1899)

⁽⁷⁾ See Nath Ghose a Roma Nath Suites

³ C W N 276 (1808)

(8) Bomicanapati Verrappa t Chlots
hunta Scinivass, 20 M = (4 (1902)

In appeal heaven in a case in which the question is not between the parties to the suit or their representatives, but only between the decree holder and a person eluming as his assigned (1). The effect of this sub-section is to give the right of appeal against an order determining whether a party applying for execution is or is not the representative of the decree holder (2).

A Judge who stayed execution proceedings, pending a suit in which an issue had been ruse I as to the validity of a will under which the applicant for execution claumed, was held entitled to act months determination of that issue

in the execution proceedings (3)

The Code contains no provisions under which a representative of a deceased decree holder can have his name entered on the record when nothing remains to be done under the decree beyond its execution, nor is there any necessity for any such entry, as proceedings in execution do not abate on the judgment creditor's death, and his representatives are entitled to continue them (4).

Explanation,—This Explanation has been added to remove a conflict of decisions under the last Code. It was held by the Calcutta [6] and Allaha bad [6]. High Courts that persons who were exempted from the operation of a decree, by the dismissal, as respects them, of the suit, were theneforth strangers and not parties to the suit and therefore no longer subject to the section. It was considered that as between the party exemerated and the decree holder, no question relating to execution could arise, because as against him there was no decree to be executed. The Madras [7] and Bombay [8] High Courts, however, held on the contrary that a person was a party to an action, although he might have ceased to have any connection with the suit before the decree was passed and would still come under that clause.

The Legislature by this Explanation has now adopted the latter view.

⁽¹⁾ Bommanapati, Vcerappa v Chinta Kunta Srimiyasa 26 M 264 (1902)

⁽²⁾ Krishnama Chariar v Appasami Muda har, 25 M 545 (1901), and see Ganga Das Seal v Yakub Ali Dobashi, 27 C 676 (1899)

⁽³⁾ Bhawanishanker v Naranshanker, 1 Bom L R 36, s c, 23 Bom 536 (1899)

⁽⁴⁾ Jeshankar Mancharam v Pandya Fulia, 2 Bom L R 887 (1900)

¹ Min. 2 Born L It 887 (1900)

(5) Ran Pershad v Jagaanath Ram 30 C

131, s c 6 C W N 10 (1902) Rahmuddi
Sirkar v Loll Meah; 20 C 969 s c, 6 C
W N 726 (1902), Kameshwar Pershad v
Run Bahadur Singh; 12 C 458 (1886) Gour
Kishore Chowdhry v Mahomed Hossen 10
W R 191 (1863) but when an intervenor
had been mude a defendant and exempted
from the operation of the decree, but directed
by the Appliate Court to pay costs, he was
held to be a party to the suit. Haree Aishore

r. Kalce Nashore, 8 W R 114 (1857)

⁽⁶⁾ Jangi Nath : Phundo, 11 A 74 (1889), Mularrab Husain v Hurmat un nissa, 18 A 52 (1895) Halka Prasad v Basant Ram 23 A 346 (1901) [nutv against whom no decree

passed] followed in Sheo Pargash t Nawab Sungh (1910) 32 A 321

⁽⁷⁾ Rumaswami Sastrula v Kameswarama, 23 M 361 (1890) (dissenting from Naga Mutha v kameswaramma 15 M 220 (1891), foll in Vasudova Upadhya v Tirthasvnii, 19 M 331 (1893) where the part of the decree which was being executed was not against the person in question], Sankaradvanimal v Kumara Samya 8 M 473 (1885), contra, Gadecherla v Gadecherla 21 M 45 (1897), though it was held that a p rson against whom the plaintift had abandoned the claim, not being able to serve him with notice, was not a party to the suit. Venkatapathi Naidu s Subraya Mudali, 17 M L J 416 (1904).

⁽S) Gours v Vigueshwar, 17 B 49 (1892) [party to suit though not to appeal]

Appeal—The object of the section being that the Court having the patties (and other persons interested) before it, should decide all questions relating to execution arising between them, in place of allowing one or the other of them to put his adversary to the delay and eost of a separate suit in cases in which, but for this section, it might be possible for him to do so, in order to effect this object completely, without injustice to the parties, an order under this section has been included within the definition of decree in sect 2 of the Code (1)

In order to determine whether an appeal hes, it must he first ascertained whether the case is one which falls within the section. In the first place, the order complained of must he one made by a Court executing a decree (2). If so, the question determined by it must be one relating to execution. If it is not, then, unless an appeal is elsewhere expressly given, there is none (3). In the first place, there is a distinction between acts done in pursuance of a decree and acts done in execution of it. So an order passed in a suit for partition subsequent to the decree appointing a commission to make the partition is not an order in execution (4).

There is no appeal from an order not relating to the enforcement of a decree, such as an order of a Judge confirming the report of the commissioner for taking accounts refusing to require the defendants to give inspection of certain books for such an order is not within the contemplation of the section (5). Nor is an order appealable which is a mere ministerial act such as a direction to a sub-ordinate officer to receive money, there being no question in controvers; finally determined (6). There is no appeal if the matter is one indirectly and remotely relating to the execution of the decree (7). But though the property may not be the subject of the decree, if it has been interfered with in execution to matter relates to execution (8). Where an order absolute for sale or foreclosure of mortgaged property has been made, any question that a uses as to that order has been held not to relate to execution of the decree (9). Nor is there an appear against an order made when no question arises in execution of decree, the decree

process feel

⁽¹⁾ Mohendro Narain Chaturaj & Gopal Mondal, 17 C 769 773 (1890) As to orders under the Agri Tenane, Act see Kharag Singh & Pola Ram 27 A 31 (1904) overruled in Zohltra & Mangu Lal 28 A 723 (1906)

ni Zohhra v Mangu Lal 28 A 723 (1906)
(2) Ramchandra v Balmukund 6 Bom
L R 780 (1904)

⁽³⁾ Nihal Chand 1 Chutto Lai, 9 C 214 (1882)

⁽⁴⁾ Jogodishury : Kailash Chan ira 24 C 725, F B (1897)

⁽⁵⁾ Rustomji Burjorji t Kessowji, 8 B ...97 (1584)

⁽⁶⁾ Hulas Rai r. Pirthi Singh 9 A 500 (1887); as to the distinction between administrative and judicial proceedings, see Sivagani Achi r. Subrahaman, 27 M. 2 3 (1973).

⁽⁷⁾ Raja Pudmanund Singh Bahadoor t Doorga Pershad Doobey 4 C W N 39 (1899 [execution case dismissed for non payment t

⁽⁸⁾ Appa Rao v Venkataramanayamma 23 V 55 (1899)

⁽⁰⁾ Akkunnissa Bibee v Rooplal Das, 2: C 133 (1897) [objection by the representative that she was entitled to a share in the mort gaged property. Separate such lies to determine the question.] Larapade choose t Kamim Dassee, 23 C 611 (1901) [objection that is notice was given before or for al solution for forecoure was mail.], Hattin Virkhoular t. Wholl Gaffur Khan S C W. N. 190-1903) Leightmann t. of deep account of the control of the c

^{(1903) [}adjustment of deer payment lafter decre als lit]

having been already executed (1) A question whether the decree itself is invalid is not one relating to execution (2) Further, the question must be between parties or representatives,(3) and not between a party and his representative (4) or between co decree-bolders (5) See notes on the terms "Parties," "Representatives" and "Auction-Purchaser," ante Again, assuming that the matter is one mentioned in the section, the order must fall within the definition of a decree It must be un adjudication of the right claimed, and the determination must be final (6) It is not every order made in execution which is a decree, otherwise every interlocutory order in an execution-proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable (7) So an order merely determining a point of law arising incidentally or otherwise in the course of a proceeding and not refusing or granting rehef, is not appealable,(8) nor is an order on an application to set aside a sale under O XXI r 9,(9) nor is an order for security in stay of execution, for it does not determine the rights of the parties (10) Nor is there an appeal when it is otherwise excluded, as in

(1) Bajha Roy v Ramkumar Pershad, 26 C 529, a.c, 3 C W. N 374 (1899) [amend ing a sale certificate to correct boundaries] Saddo Kunwar v Bansı Dhar, 23 A 476 (1901) [order refusing to amend a sale certi ficate], Bhimal Das v Mt Ganesha Koer, 1 C W N 058 (1897)

(2) Arunachallam v Murugappa, 12 M 503 (1899) [decree impeached on the ground that though the minor s guardian consented, sanction of the Court had not been obtained],

and see notes to Explanation IV (3) Saddo Kunwar v Bansı Dhar, 23 A 476 (1901), Rashbehary Mookerjee: Mahar ani Surnomoyce, 7 C 403 (1881) [applicants, assignees from judgment debtors before rent decree, which was being executed] Mammod Locke, 20 M 487 (1897) [dispute between ludgment debtor and purchaser only] as re gards auction purchaser, see new clause (b), Ishrı Dutt v Mewalal, 26 A 136 (1903) [order refusing to entertain the objection of the mortgagor, judgment debtor to the sale of the mortgage decree in execution of a mores decree against the mortgagec], Ramadhar t Naram Das, 24 A. 519 (1903) forder disallowing an objection by tho judgment-debtor that more had been delivered to the auction purchaser than was included in the sale-certificate] Gbulam Shabbir v Duarka Prosad, 18 L 36 (1845) jorder directing delivery of possession ander sa 315 or 313 of the last C P Code to an

auction purchaser, application in status as auction purchaser, rel Saddo Kunwar v Bansı Dhar 23 A 470 (1901) which was an application to amend sale certificate] Appd Bhuma Das v Mt Ganesha koer, I C W N 658 (1897) Contra, Muttia v Appasamı, 13 M 504 (1890), Murigeya r Hayat Saheb, 23 B 237 (1898) [clause set up on behalf of third party But see notes to

Explanation III] (4) Maganial Muln v Doshi Muln 25 B

631 (1901) (5) Gyamence : Radharaman 5 (5J2

(1879)

(6) Nihal Chand 1 Rameshwari, 9 C 214 (1882) See Kharag Singh r Pola Ram, 27

A. 31 (1904) [igra Tenanc) lct] (7) Jogodishury Debea t Kailash Chundra

Labers, 24 C 725, at p 739 (1697) followed in Mulhtar Ahmad e Mugarrab Husain, 34 A. 530 (1912), and see Lakshma r

Maru Dava, 37 M. 29 (1914) (8) Beharplal Punditr Kedarnath Mallick.

18 C 469 (1891) [order directing that the question whether the decree had been compromised, and satisfaction entered by the fraud of the jud_ment-debtor, should be trad on its ments under a 214). Dooks Nandan t Bansı Singh, 16 C. W N 121, 125 (1311). (9) Anmuddi r Pran, 15 C W N. 544

(10) Saraswati Barman, r (e lap Das

Barman, 41 C. 160 (1313).

Appeal -The object of the section being that the Court having the parties (and other persons interested) before it should decide all questions relating to execution arising between them, in place of allowing one or the other of them to put his adversary to the delay and cost of a separate suit in cases in which, but for this section, it might be possible for him to do se, in order to effect this object completely, without injustice to the parties an order under this section has been included within the definition of decree in sect 2 of the Code (1)

In order to determine whether an appeal lies, it must be first ascertained whether the case is one which falls within the section. In the first place the order complained of must be one made by a Court executing a decree (2) If so the question determined by it must be one relating to execution. If it is not then unless an appeal is elsewhere expressly given there is none (3) In the first place there is a distinction between acts done in pursuance of a decree and acts deno in execution of it. So an order passed in a suit for partition subsequent to the decree appointing a commission to make the partition is not an order in execution (4)

There is no appeal from an order not reliting to the enforcement of a decree such as an order of a Judge confirming the report of the commissioner fer taking accounts refusing to require the defendants to give inspection of cortain beeks for such an order is not within the contemplation of the section (5) Nor is an order appealable which is a mere ministerial act such as a direction to a sub ordinate officer to receive money, there being no question in centroversy finally determined (6) There is no appeal if the matter is one indirectly and romotely relating to the execution of the decree (7) But though the preperty may not be the subject of the decree of it has been interfered with in execution the matter relates to execution (8) Where an order absolute for sale or foreclosure of mortgaged property has been made any question that arises as to that order has been held not to relate to execution of the decreo (9) Nor is there an appeal against an order made when no question asses in execution of decree the decree

process feel

⁽¹⁾ Mohendro Naram Chaturaj & Copal Mondal 17 C 769 773 (1890) As to orders under the Agra Tenancy Act see Kharag Singh v Pola Ram 27 A 31 (1904) overruled

in Zobhra v Mangu Lal 28 A 723 (1906) (2) Ramchandra v Balmukund 6 Bom

I R 780 (1904) (3) Nihal Chand v Chutto Lal 9 C 214 (1882)

⁽⁴⁾ Jogodishury v Kailash Chandra 24 C

^{725,} F B (1897) (5) Rustomji Burjorji v Kessowji S B

^{287 (1884)} (6) Hulas Rai v Pirthi Singl 9 A 500 (1887) as to the distinction between ad ministrative and judicial proceedings see Sivagami Achi t Silrahmania 27 M 259 (I 303)

⁽⁷⁾ Raja Pudmanund Singh Bahadoor v Doorga Pershad Doobey 4 C W N 39 (1899) execution case dismissed for non payment of

⁽⁸⁾ Appa Rao v Venkataramanayamma 23 M 55 (1899)

⁽⁹⁾ Akıkunn ssa Bibee v Rooplal Das 25 C 133 (1897) [objection by the represental ve that she was entitled to a share in the mort gaged property Separato suit lies to deter m no the question] Tarapado Ghose t Kamını Dassee, 29 C 644 (1901) [objection that no notice was given before order absolute for foreclosure was made] Hatim Ali Khun Lar v Abdul Gaffur Khan 8 C W N 102 (1903) [adjustment of decrea payment before decree absolute]

having been already executed (1). A question whether the dicree itself is invalid is not one relating to execution (2) Further, the question must be between parties or representatives (3) and not between a party and his representative (4) or between co decree holders (5) See cotes on the terms "Parties," "Representatives" and "Auction Purchaser," ante Again, assuming that the matter is one mentioned in the section, the order must fall within the definition of a decree It must be an adjudication of the right elaimed, and the determination must be final (6) It is not every order made in execution which is a decree, otherwise every interlocutory order in an execution proceeding, such as an order granting or refusing process for the examination of witnesses, would be appealable (7) So an order merely determining a point of law arising meidentally or otherwise in the course of a proceeding and not refusing or granting relicf, is oot appealable, (8) nor is an order on an application to set aside a sale under O XXI r 9,(9) oor is an order for security in stay of execution for it does not determine the rights of the parties (10) Nor is there in appeal when it is otherwise excluded as in

(1) Bajha Roy v Ramkumar Pershad 26 C. 529 , r. c., 3 C. W N 374 (15 19) [amend ing a sale-certificate to correct boundaries! Saddo Kunwar r Ransı Dhar, 23 A 476 (1901) [order refusing to amend a sale certs ficate], Bhunal Das r Mt Gancaha koer 1 C W N 658 (1897)

(2) Arunachallam t Murugappa, 12 M 503 (1899) [decree impeached on the ground that though the minor a guardian consented, sanction of the Court had not been obtained] and see notes to I xplanation IV

(3) Saddo Kunwar v Bansı Dhar, 23 A 476 (1901), Rashbehary Mookerjee v Mahar ani Surnomoy ce, 7 C 403 (1881) [applicants, assignees from judgment dobtors before rent decree, which was being executed] Mammod v Locke, 20 \1 487 (1897) [dispute between ludgment debtor and purchaser only] as re gards auction purchaser, see now clause (b). Ishri Dutt v Mewalal, 26 A 136 (1903) forder refusing to entertain the objection of the mortgagor judgment debter to the sale of the mortgago decree in execution of a money acree against the mortgagee], Ramadhar v Naram Das 24 A. 519 (1903) [order disallowing an objection by the judgment-debtor that more had been delivered to the auction purchaser than was included in the sale certificate] Ghulam Shabbir v Dwarka Prosad, 18 A 36 (1895) torder directing delivery of possession under 83 318 or 319 of the last C P Code to an

application in status auction purchaser as auction purchaser, ref Saddo Kunwar t Bansı Dhar 23 1 476 (1901) which was an application to amend sale certificate] Appd Bhima Das v Vt Gancaha Koer, 1 C W N 658 (1897) Contra, Muttia v Appasami, 13 M 504 (1890), Murigoya v Hayat Saheb, 23 B 237 (1898) [clause set up on behalf of third party But see notes to

Explanation III] (4) Maganlal Muln v Doshi Muln 25 B

631 (1901)

(5) Gyamonce v Radharaman 5 (592 (1879) (6) Nihal Chand v Rameshwari, 9 C 214

(1882) See Kharag Singh v Pola Ram 27 A. 31 (1904) [Agra Tenancy 1ct]

(7) Jogodishury Dobea v Kailash Chundra Lahir, 21 C 725, at p 739 (1897), followed ın Mukhtar Ahmad v Mugarrab Husain, 34 A 530 (1912), and see Lakshmia v Maru Devt. 37 M 29 (1914)

(8) Beharylal Punditv Kedarnath Mullick. 18 C 469 (IS91) [order directing that the question whether the deerco had been com promised, and satisfaction entered by the fraud of the judgment debtor should be tried on its merits under s. 244] Decki Nandan v Bansı Singh, 16 C W N 124, 125 (1911) (9) Asımuddı v Pran, 15 C W N 844

(10) Saraswatı Barmanıa v Golap Dıs

Barman, 41 C 160 (1913)

the case of an order in execution of a deerce for possession under sect 9 of the Specifio Relief Act (1)

The following orders have been held to be appealable. An order refusing to allow representative to take out execution until certificate granted under Act XXVII of 1860 (2) An order relating to the fitness of a member of a religious institution to be appointed under a decree,(3) an order under sect 87 of the Transfer of Property Act extending the time for payment of the mortgage decree (4) or refusing to enlarge time in a decree for redemption (5) An order refusing to grant reasonable extension of time to the mortgager judgment debtor to pay in the decretal amount, (6) or declaring the amount duo under a mortgage decree under sect 88 of the Transfer of Property Act, (7) or an order passed upon an application made under sect 89 of that Act.(8) or an order on an application by a mortgager that the mort gagee judgmentcreditor, having purchased a portion of the mortgaged property subject to his mortgago in execution of a simple money decree by a third party, was bound to dischargo his mortgage dcbt, (9) or an order setting aside a sale or refusing to set asido a sale,(10) or refusing to enforce execution upon the application of a transferce on the ground that be is not a transferce or representative, or on the ground of hmitation,(11) or refusing to determine whether an occupancy holding is transferable according to custom or usage and is therefore saleable.(12) or erroneously holding that the same can be attached and sold (13) or an order refusing to set aside on appeal an order dismissing objections to the execution of a decree for default.(14) or refusing an application of the judgment debtor for recovery of the amount paid in excess of the decretal amount, (15) or an order disallowing the objection of a person who has been brought on the record of tho oxecution proceedings as a representative and who sets up a title of his own to the attached proporty, (16) or orders in proceedings for the debvery of possession to the auction purchaser after sale inexecution of the decree (17) or an order refusing

⁽I) Souza v Gulam Moidin, 26 M 433 (1912)

⁽²⁾ Hotilal v Hardeo, 5 A 212 (1882)

⁽³⁾ Ponnambala v Sivagnana, 17 M 343, s c, 21 I A 71 (1894)

⁽⁴⁾ Rahima v Nepal Rai, 14 A

⁽⁵⁾ Rungo v Bhomsett₁ 26 B 121 (1901)

⁽⁶⁾ Note to Hulas Rai v Pirthi Singh, 9 A 500, at p 503 (1887)

⁽⁷⁾ Aryan Bank v Kamma Venkata, 26 M 237 (1902)

⁽⁸⁾ Wallikarjunadu v Lingamurti, 25 M 244 (1902) [order refusing to pass an order absolute for sale] In, however, Pramatha v Khetra, 29 C 651 (1902), it was held that the order was not in execution but in proceedings in continuation of the original suit (9) Erusappa Mudaliur v Commercial

Land Mortgage Bank, 23 W 377 (1899)

⁽¹⁰⁾ Makha v Suram, 24 A 108 (1901)

⁽¹¹⁾ Badrı Narain v Jaikishen, 16 A 433

⁽¹²⁾ Majed Hossem : Raghbar, 27 C 187 (1899), Gahar Khalipa Bipari v Kasimuddi Jamadar, 27 C 415, s c, 4 C W N 557

⁽¹⁸⁹⁹⁾ (13) Sitanath Chatterjee v Atmaram, 4 C

W N 571 (1900)

⁽¹⁴⁾ Lalnarain Singh v Mahomed Rafi uddin, 28 C 81 (1900)

⁽¹⁵⁾ Dhan Kunwar v Mahtuf Singh, 22 A 79 (1899)

⁽¹⁶⁾ Shankar Dutt v Harman, 17 A 245 (189a), following Punchanun Bandopadhya v Rohia Bibec, 17 C 711 (1890), Madhus : dan Dvs v Gobinda Pria, 27 Cal 34, s c 4 C W N 417 (1899) [representative re sisting delivery of possession] logendra v

Gobinda, 35 C 364 (1908) (17) Madhusudan Das a Gobin la Pria

supra

to set aside a sale to a decree holder purchaser, the decree in which suit had been set aside (1) An order setting aside a sale under sect 310A of the last Code (now represented by O XXI r 89), when the dispute is between the decreeholder and the judgment-dehtor, (2) or an order refusing to set aside such sale when the dispute relates to execution (3) or an order determining whether a party applying for execution is or is not the representative of the decree bolder, (4) or an order disallowing objection that the value of the property specified in tho sale proclamation was grossly inadequate,(5) or an order directing delivery of possession of property sold under a mortgage decree, though purporting to be under seet 335 of the last Code, (6) or refusing delivery of possession of properties sold to a decree holder mortgageo or a decree holder in execution of his decree,(7) or an order refusing delivery of possession of jewels not subjectmatter of decree retained in Court (8) or an order refusing to stay sale for undervaluation (9) All orders staying execution of deerces whether passed by tho Court which made the decree, or by the Court to which it is sent for execution (10) An order directing stay of execution of a decree on security being furnished by the judgment-debtor is appealable by the judgment debtor on the ground that the security ordered is excessive (11) So is an order in the execution proceedings whereby the right of a defendant against whom no decreo has been passed is in vaded (12) Or where the judgment debtor alleges fraud in execution proceedings

(1) Umedmal v Srmath Roy, 27 C 810, s c, 4 C W N 692 (1900)

(2) Aripanath Pal v Ram Laksme Dasya, 1 C W N 703 (1897), Phul Chand 1 Aursingh Pershad, 28 C 73 (1899), but see Asimuddi e Pran 15 C W N 844 (1911)

(3) Murlidhar t Ananda Rao, 25 B 418 (1900) Contra, Maganlal v Doshi Mulji, 25 B 631 (1901), when a question arises between a party and his representative

(4) Krisbnama Chariar v Appasami Muda har, 25 W 545 (1891) [application for execu tion by successors of a trustee decree holder who was alleged to have been suspended], Badri Naram v Jaikishen Das, 16 A 483 (1894), Gunga Das Seal v Jakub Ali, 27 C 670 (1899)

(5) Gunga Prosad t Raiccomar Ghose 30

C. 617 (1903)

(6) Rain Narain Salioo i Bandi Pershad, 31 C 737 (1904) [in order to see under what section case coince Court must look into true nature of application not merely to the statement of the partyl, followed in Man, ayya e Surumulu 24 M L J 477 (1913)

(7) hasi Nath Ayyar e I thumansa 20 M

529 (1901), see Lattayat Pathumaryı ı Raman Menon 26 M 740 (1902), in which it was held suit was barred

(8) Appa Rao v Venkataramanajamma 23 V 55 (1899) [on the ground that though the jowels were not subject matter of the decree the property had been interfered with

in course of execution? (9) Sivasami Naickar t Naichar, 23 M 563 (1900) Contra Sivagani Achi t Suhrahmania, 27 11 253 (1903)

(10) Ghazidin v Falir Bakhsh, 7 A 73 (1884) . Musan Abdulla t Damodar Das, 12 B 279 (1888) [order under a 545] Mahant Ishwargar v Chudasama, 12 B 30 (1857) [under a 515] Provided that the order is by the Court of execution Ramehan ira r Balmulund, 6 Bom L. R. 780 (1304)

(11) Udeyadeta Debr Gresson 12 C 626

(1856)(12) Vibhudapriya v Vidiamobi, 22 M 131 (1893) (eqqa) dismissed as no intes in La l taken place]. Ramaswami Astrali v hamsawaramma, 23 M Col (1570) P B Desented from at p. 3.4, 1pl p. 200. Dissented from Kalas Prace le Biaint Ram,

23 L 34. (1 a)1). See alb, at discussed in notes to Fridant on, are

on the part of the deerec holder or auction purchaser (1) An appeal hes in in application to set vside a sile under sect 173 of the Bengal Tenancy Act and 311 of 19th Code where the auction purchaser is the benamidar of the judgment-debtor (2) and from an order upon an application to deposit landlord's fee under the Bengal Tenancy Act and for confirmation of the sale and grant of sale certificate (3) and an order allowing the judgment debtors objection to delivery of possession to the auction purchaser on the ground that the sale was invalid as the landlord's fee in the manner required by the Bengal Tenancy Act was not paid and the sale could not be confirmed (4) But an order under sect 171 of that Act was held not within the section (5) Where a Small Cause Court decree was sent for execution-to the regular Court of the District and an order was passed under sect 244 by that Court (Subordinate Judge), held that an appeal by to the District Judge (6)

The Court can require an appellant from an order made under this section in execution of a decree to give security for the costs of the appeal and of the

original suit (7)

LIMIT OF TIME FOR EXECUTION

48 (1) Where an application to execute a decree not being Execution baired in a decree granting an injunction has been made, certain cases no order for the execution of the same decree shall be made upon any fresh application presented after the expiration of twelve years from—

(a) the date of the decree sought to be executed, or,

(b) where the decree or any subsequent order directs any payment of money or the delivery of any property to be made at a certain date or at recurring periods, the date of the default in making the payment or delivery in respect of which the applicant seeks to execute the decree

⁽¹⁾ Nemt Chand Kanji v Dino Nath 2 C W N 691 (1893) [ss 244 and 311 and second appeal lies at the instance of auction pur chase.] Hiralal Glosh v Chunder Kant 3 C W N 403 2°C 5'39 (1899) but no second appeal lies where none of the questions nuder s 153 of the Bengal Tenancy Act are decided Momeblam Dassi v Lackhunarian Chandra, 28 C 116 (1900) Parashram v Bilmukund 32 B 572 (1908) See cases cited in notes 'Traud

⁽²⁾ Chandmones v Santomones 24 C
707 s c 1 C W N 534 (1897) [second

^{~07} s c 1 C W N 534 (1897) [second appeal] in Roghu Singh t Misri Singh 21 C 825 (1894) there was no appeal as appellant

was not a party to the suit ref to Hara bandhu v Harish Chandra 3 C W N 184 (1898)

⁽³⁾ Krishna Chunder Dutt : Anukul

Chunder 6 C W N 190 (1901)

(4) Mohim Chandra Bhuttacharjee v Ram

Lochan Dey 7 C W N 591 (1903) [second appeal]
(a) Lishou Mohun v Sarodamani, 1 C W

N 30 (1890) foll Sulh Naram : Coroko Persad 3 C. W N 344 (1898)

⁽⁶⁾ Poary Lal Singh ι Radha \ath Singh, II C W N 861 (1907)

⁽⁷⁾ Dagdu : Chandrabl an 24 B 314

s c I Bom L R 837 (1899)

(2) Nothing in this section shall be deemed-

- (a) to preclude the Court from ordering the execution of a decree upon an application presented after the expiration of the said term of twelve years, where the judgment-debtor has, by fraud or force, prevented the execution of the decree at some time within twelve years immediately before the date of the application; or
- (b) to limit or otherwise affect the operation of article 180 of the second schedule to the Indian Limitation Act, 1877 (1)

"Where an application to execute a decree."—This was held to mean any application to execute a decree, and was not confined to the last application preceding the expiry of 12 years from either of the points of time mentioned (2). The former section referred only to decrees for the payment of money (3) or delivery of other property. A decice for the sale of mort Saged property was held not to be a decree for the payment of money, even though the judgment-delitor was personally hable for the deficiency (1). The application of the provision has apparently been extended to all decrees with the exception stated

The words' and grunted have been counted 'brand' has been held to mean 'admitted (5) as stated in O XXI r 17, and in addition there has been issue of process in execution (6). In y fresh application 'has been substituted for 'subsequent application, (7) with a view to randering it clearer that ancillary applications merely to complete arrested execution are not obnoxious to the har (8) It has been held that since the right to enforce a

⁽¹⁾ Art 183 of Act 1 \ of 1938 (2) Theshar Rai t Parbati, 15 \ 198 (1893)

Bal Chand t Raghunath Das, 4 1 155
 Pahalwan Singh t Naram, 22 1, 401
 Habit in Maharajah of Benares
 Lalji Singh 24 A 636 (1912)

⁽⁴⁾ kanl Howladar r Krishna Bundhoo Roy, 25 C 890 (1897). Ram Charan Bhagat r Sheoborat Rai, 10 1 118 (1894). Kartick Math Pandey r Juggernath Ram Marwar, 27 C 250 (1899) die ented from im Abdullah Sahib r Oosman Sahib post, ref Chandi Charan Roy v Aimbia Charan Dutt, 31 C 792 (1904), dies from Jadu Nath Frasad r Jagmohan Das, 25 1 541 (1903). Pahalwan Singh v Naran, 22 A 401 (1900), Abdulla Sahib r Doctor Oosman Sahib, 28 M 224 (1904), Vaddhinadasamy Ayyar v Soma sundram Pilla, 28 M 473 (1904)

⁽o) Dewan Ali v Soroshibala Dabee, 8 C 297 (1881)

⁽b) Milmoney Single Deo t Biscssur

Bancrjcc, 16 C 744 (1889), Chengaya t typasamı, 6 M. 172 (1882), Paraga Kuar t Bhagwan Din, 8 t 201 (1886), Ramalta t Ram Dayal, 8 t 236 (1886), Ram Newaz t Ram Charan 18 4 49 at p 51 (1885), but see Mottchand t Arshinary Ganesit, 11 B

<sup>5.24 (1837)
(7)</sup> As to this term which assumed that the previous application to execute had been made under the Code itself (Annaji Appaiji Ramji Jivaji 10 li 343 (1889), Ashoo teah Dutt i Doorga Churn Chatterjee, 6 C 504 (1880)] see Gandharap Singh v Sheo darshan bingh, 12 A. 571 (1800), Rahim Ah Khan v Phul Chaud, 18 L. 482 (1896), Viraramar a lunasami, 6 M. 339 (1883), Sream Goobo: Yusof Khan, 7 C. 556 (1881), Musharraf Begam v Ghalib Ali, 6 A. 189 (1884), Ram Sarup i Dasrath, 33 A. 517 (1911)

⁽⁸⁾ Kamsills v Ishn Singh, 32 A. 499 (1910), but this has been dissented from in Bisheshware Jasoda, 17 C W A 622 (1913)

neceived by him or taken into his disposition (1) When an application is made under this section the Court should, under O. XXI i 21, issue notice on the person named calling upon him to show cause why the decree should not be ovecuted against him as such representative. If he demes that he is so, the Court which passes a decree decides whether the person against whom execution is sought is the legal representative, though it is for the Court executing the decree to decide to what extent such person is hable (2). The decree holder should show that property of the deceased has come into the possession of his representative, and it is then on the latter to show that he has properly applied the property (3). The heirs are highlen in respect of assets even though it may be pleaded that the dehter was a benamidar (1). The right of the decree holder to have his delit paid out of the assets of the deceased in the hands of the legal representative is not affected by the provisions of sect. 104 of the Probate and Administration Act (5).

Legal representative —The last Code did not contain any definition of the term "legal representative". The framers of the former section in using this term must either have understood it in some defined sense, or have intended thereby morely to refer to such persons as, under the law applicable to the particular case, might be held to be the legal representatives of a deceased person. The first supposition was negatived by the fact that the Legislatus omitted to declare what were the characteristics of a legal representative for the purposes of this section (6). It might have been said that such a definition was unnecessary, as the term has a well known technical meaning. In their strictest and most ordinary sense the words "legal representatives" are under stood to mean executors and administrators only (7).

Though the decisions upon the construction of wills which hold it to be a flexible term and have given it another sense, such as next of kin or descendants, do not control its legal meaning in that they proceed upon this principle that if the Court finds that a testator attached to particular words a different meaning from that which is their proper legal sense, the Court is bound so to construe and give effect to the will, not in its strict legal sense, but in the way in which the testator himself used the words (8) the term is yet one which is naturally capable of a more extended sense than that in which it is ordinarily and strictly employed. Had the Legislature, therefore, intended to confine it to particular persons only, viz, executors or administrators, it would have expressly named these persons and would not have used a term which, though in its most strict sense denoting executor or administrator only, is yet capable.

Khashrobhai v Hormazsha, 11 B 727
 Sco Ram Golam Doby v Ayma Begum, 12 W R 177 (1869)

⁽²⁾ Seth Shapurji i Shankar Das Dube 17 \ 431 (1895), asto successful objector scost, see Bishen Dayal i Bank of Upper India 13 \ A 290 (1890)

⁽³⁾ Seo Rajah Roodro Naram v Aittyanund Doss 8 W R 195 (1867), Ascemoonnissa t Ameeroonnissa, 15 W R 285 (1871)

⁽⁴⁾ Doorga Soonduree : Soonja Monee, 8 W R 101 (1867)

⁽⁵⁾ Venkatarangayan Chetti v Krish

nasami Ayyangar, 22 M 194 (1898)

(6) Dinamoni Chaudhurani i Elahadut
Khan 8 C W N 843, 855 (1904) in which

the subject will be found fully discussed
(7) Ib , Price v Strange, 6 Madd 17)

⁽⁷⁾ Ib, Price v Strange, 6 Madd 1")
(8) Pagkton v Horner, 37 Ch D 703,

⁽⁸⁾ Pagkton 1 Horner, 37 Ch D 703

of a wider meaning. Where there is an executor or administrator, they alone are the legal representatives of a deceased judgment debtor (1). But the section is also commonly applied, both in the case of heirs (2) as well as in that of executors and administrators, and the term "legal representative" has been defined to ordinarily mean all these classes of persons (3).

When there is no executor or administrator, but succession by heirship as in cases governed by the Bengal School of Hindu Law, or in cases of separate and self acquired property under Mitakshara Law, the decree must be executed against the heir as the legal representative within the meaning of this section (4) The section has, however, been applied to cases where the succession is otherwise than by heirship to the last holder of an estate, as also to cases where the estate accrues to the present holder by survivorship (5) In these cases where a decree is passed against a judgment-debtor not in his or her personal capacity, but in a representative capacity, the decree may be executed ogainst the person who, though not an heir of the judgment debtor. tho last holder of the estato, is entitled thereto after his or her death whether os reversioner or surviving eo parcener (6) So masmuch os o decreo properly obtained ogainst a Hindu widow in her representative capacity is binding upon her husbond a roversioner, (7) where a suit has been instituted or defended by a Hindu widow in her representative capacity, the reversioners though they do not claim through her but as heirs of her husband, have yet been held to be her legal representatives in respect of the estate held by her as such Hindu widow (8) Again in the case of a joint Hindu formily governed by the Virtakshore,

- Dinamoni Chaudhurani r Flahadut
 Khan, S C, W N 813, S56 (1904), see sect
 Act X of 1865, Pogose v Catchick, 3 G
 Gl (1878), Sukh Nandan v Rennek 4 A
 Bolz (1882), Shaikh Moosa v Shaikh Lesa, 8
 241 (1884), Vancharam v Kalidas 19 B
 S21, 827 (1864)
- (2) Greender Chunder Chese v Mackan tosh, A C So7, 908 (1879) In Ram Kanno Dai: Lacy, 19 A 23, (1896), rents of im moveable property in the hands of the widow of a deceased were field not to be his assets And where a purely personal decree was given against a partner, execution it was held, could only go against the heuress and not against an undivided brother Veerappa Chettare v Rams Swam Arjar, 27 V 196 (1903), Gyanundra: Ram Khalo 32 A 404 (1910).
- (3) Ishan Chunder Sirkar t Bens Vadhub Sirkar, 24 C. 62, 71 (1896)
- (4) Dinamoni Chaudhurani t Elahadut Khan, 8 C W N 843, 856 (1904)
- (5) Ib For succession by Shebait, see Wohan Laline Gordhan Lalin Waharaj, P. C., 35 A 283 (1913)

- (6) Dinamoni Chaudhurani i Elahadut Khan, supra, in which case the principle of representation which exists by law in the case of decrees against Hindu widows and co parceners was extended to cases of agreement and conveyance between parties (Woodroffe J dubit)
- (7) Tribhuwan Sunder Kuar i Sri Narain Singh 20 \ 311 (1898)
- (8) Ramkshore Chuckerbutty t Kally Kanto Chuckerbutty 6 C 479 (1880), Prem Movi Choudhurani t Preo Nath Dhur 23 C 636 (1896) Tribhuwan Sunder Kuar e Sri Naram Singh 20 A 341 (1898), Musala Redds t Ramayya, 23 W 125, 133 (1899), see also Hari Saran Voitra : Bhubaneswari Debi 16 C 40 (1888) [dcereo against widow representing estate enforced against minor adopted son] but the hear of the last full owner is not in regard to a mere personal money decree against the widow her repre sentative, Rikhai Rai v Shee Pujan, 33 A 15 (1910), Kameshwar Pershad t Run Bahadur Singh, 12 C 458 (1886). Mun geshwar Kuar : Jamoona Prashad, 16 C 603

(1889)

received by him or taken into his disposition (1) When an appheation is made under this section the Court should, under O XXI 1 21, issue notice on the person named calling upon him to show cause why the decree should not be executed against him as such representative. If he demos that he is so, the Court which passes a decree deendes whether the person against whom execution is sought is the legil impresentative, though it is for the Court executing the decree to decide to what extent such person is hable (2). The decree holder should show that property of the deceased has come into the possession of his impresentative, and it is then on the latter to show that he has properly applied the property (3). The heirs are liable in respect of assets even though it may be pleaded that the dehter was a benamidar (1). The right of the decree holder to have his debt paid out of the assets of the deceased in the hands of the legal appresentative is not affected by the provisions of sect. 104 of the Probate and Administration Act (5).

Legal representative—The last Code did not contain any definition of the term "legal representative". The framers of the former section in using this term must either have understood it in some defined sense, or have intended thereby merely to refer to such persons as, under the law applicable to the particular case, might be held to be the legal representatives of a deceased person. The first supposition was negatived by the fact that the Legalsatuse omitted to declare what were the characteristics of a legal representative for the purposes of this section (6). It might have been said that such a definition was unnecessary, as the term has a well known technical meaning. In their strictest and most ordinary seuse the words "legal representatives" are under stood to mean executors and administrators only (7)

Though the decisions upon the construction of wills which held it to be a flexible term and have given it another sense such as next of kin or descendants do not control its legal meaning in that they proceed upon the principle that if the Court finds that a testator attached to particular words a different meaning from that which is their proper legal sense the Court is bound so to construe and give offect to the will not in its strict legal sense but in the way in which the testator himself used the words (8) the term is yet one which is naturally capable of a more extended sense than that in which it is ordinarily and strictly employed. Had the Legislature therefore, intended to confine it to particular persons only, viz, executors or administrators it would have expressly named these persons and would not have used a term which, though in its most strict sense donoting executor or administrator only, is yet capable

Khashrobhai v Hormazsha 11 B 727
 (1887), see Ram Colam Doby v Ayma Begum 12 W R 177 (1869)

⁽²⁾ Seth Shapurn t Shankar Das Dube 17 A. 431 (1895), asto successful objector scost see Bishen Dayal t Bank of Upper India 13 A 290 (1890)

⁽³⁾ Seo Rajah Roodro Naram v Mittyanund Doss 8 W R 195 (1867) Ascemoonnissa t Ameeroonnissa, 15 W R 285 (1871)

⁽⁴⁾ Doorga Soon lurce ν Soonja Monec 8 W R 101 (1867)

⁽⁵⁾ Venkatarangayan Chetti v Krish

nasami Ayyangar 22 M 194 (1898)

(6) Dinamoni Chaudhurani i Elahadut

Khan 8 C W N 843 855 (1994), in which

the subject will be found fully discusse I

(7) Ib, Price v Strange 6 Madd 153

(8) Laghton t Horner 37 Ch D *03

⁽⁸⁾ Eagleton : Horner, 37 Ch D '03, 711

of a wider meaning. Where there is an executor or administrator, they alone are the legal representatives of a deceased judgment debtor (1). But the section is also commonly applied, both in the eise of heirs (2) as well as in that of executors and administrators, and the term "legal representative" has been defined to ordinarily mean all these classes of persons (3).

When there is no executor or administrator, but succession by Leirship as in cases governed by the Bengal School of Hindu Law, or in cases of separate and self acquired property under Mitakshara Law, the decree must be executed against the heir as the legal representative within the meaning of this section (4) The section has however heen applied to cases where the succession is otherwise than hy heirship to the last holder of an estate, as also to cases where the estate accrues to the present holder by surviv orship (5) In these cases where a decree is passed against a judgment debtor not in his or her personal capacity, but in a representative capacity the decree may be exceuted against the person who, though not an heir of the judgment dehtor the last holder of the estate, is entitled thereto after his or her death whether as roversioner or surviving co parcener (6) So masmuch as a decree properly obtained against a Hindu widow in her representative capacity is hinding upon her husband s roversioner (7) where a suit has been instituted or defended by a Hindu widow in her representative capacity, the roversioners though thos do not claim through her hut as heirs of her husband have yet heen held to he her legal representatives in respect of the estate held by her as such Hindu widow (8) Again in the case of a joint Hindu family governed by the Vitakshara

⁽I) Dinamoni Chaudhurani : Elahadut khan 8 C W N 813 556 (1904) see sect 1°9 Act X of 1805 Pogose : Catchick 3 C 703 (1878), Sukh Anadan : Renneck 4 A 102 (1882), Shaikh Moosa v Shaikh Essa 8 Il 241 (1884) Mancharam : Kahdas 19 B 821, 827 (1804)

⁽²⁾ Greender Chunder Ghoso v Vackin tosh, 4 C 897 908 (1879) In Rau Kanno Dat t Lacy 19 \(\) 2.32 (1896) rents of immoreable property in the hands of the widow of a deceased were held not to be his assets hid where a purely personal decree was given against a partiare execution it was held could only go against the heirress and not against an undivided brother. Veerapp a Cetture t Raum Susain 1yar 27 \(\) 106 (1903) Gyanundra t Rain Vahalo 32 \(\) 404 (1910)

⁽³⁾ Islan Chunder Sirkar t Bens Madhub Sirkar, 24 C 62 71 (1896)

⁽⁴⁾ Dinamoni Chaudhurani e Elal adut Ahan S C W \ 843 856 (1964)

⁽⁵⁾ Ib. For succes on by Shebast see V han Lalji e Gordhan Lalji Vaharaj P C 35 1 253 (1513)

⁽⁶⁾ Dinamon: Chaudhuram : Elahadut Khan supra in which case the jinneil of representation which exists by law in the case of decrees against llind in whom and co parceners was exten led to cases of agreement and conveyance between part or (Woodroff

J dubit)
(*) Tribhuwan Sunder Kuar i Sri Narain

Single 20 1 311 (1898) (8) Ramk shore Chuckerbutty 1 Kally Kanto Cluckerbutts 6C 179 (1880) Prom Moys Chowdl urans : Ir o Nath Di ur 23 ((36 (1896) Tril huwan Sun I r Kuar , Sri Naram Snah 20 L 311 (1835), Musala Pedds t Raijavya 23 M. 1. 133 (1879) see also Harr Saran Montra : Bhullanceware D bs R C 40 (1558) [1 cre and almst willow representing estate enforced against r n r ad ited and but the br f the last full own rish time parl t a nere personal noney deree and not the willow her refee scriative I blant are theo Ivan 33 V Lo (1910) Kampanyar Istolad r lun Isabadur Sagh, 12 C tos (ISW). Mus geshwar huar r Jamo as Frankad, 16 C 6 3 (IS>)

though it has been held by the Madras and Allahabad and formerly by the Calcutta,(1) High Courts, that in the case of a personal decree for money obtained against the father the interest of the latter in the joint ancestral properties is not assets in the hand of the son when he dies and consequently, notwith standing his obligation tu pay his father's debt proceedings cannot be taken agrunst him under this section as the legal representative of his father the contrary view has been adopted by the Bombay High Court in that the obligation of a son to satisfy his father's dolt is within the scope of the decree against the father whether on the ground of representation of the sons by their father,(2) or on the ground that the creditor has the power to attach and sell the entire interest in the property in execution proceedings against the father, (3) and the Calcutta High Court has recently held that the hability may be determined on the execution proceedings if the legal representative has been properly brought on the record under this section (4) This question is now settled by sect 53 Where moreover the interest of the father has been attached during his lifetime (5) or a decree directing a sale of hypothecated property has been passed in the lifetime of the judgment debtor, (6) or the judgment debtor has been expressly sued as representing the undivided family (7) or the decree charges the family property , (8) in all these eases the decree, it has been held, may be executed against those who in succession, in time, take by the legal title of survivorship and not by that of heirship

The principle under consideration has been still further extended to the case of a person who without title as administrator, executor, heir reversioner or surviving co parcener is the de facto possessor of the estato of a deceared Hindu it having been held that he must be treated for some purposes as his representative and that a judgment obtained against such a representative in of a mere nullity (9) The first of these cases proceeds upon the assumption

⁽¹⁾ Seo Juga Lai Chaudhuri v Aodh Behari Prasad Singh 6 C W N 223 (1990) and cases there rehed on and Penasami Utdaliar v Seetharama Chettar 27 M 243 248 (1903), Natasayyan v Ponnusami 16 M 99 101 103 (1892) Anabudra v Dorasami 11 M 413 (1888)

⁽²⁾ Jagabhai 2 Vijbhukandas 11 B 37 (1886)

⁽³⁾ Umed Hath Sing v Ghoman Bhaije, 20 B 385 (1895) followed in Chander Pershad v Sham Koer, 33 C 676 (1906) Shyram v Sakharam 33 B 39 (1908)

⁽⁴⁾ Amar Chandra Kundu v Sebak Chand Chowdhury, 34 C 642 (1907) T B, a c, 11 C W N 593, Chander Pershad t Sham Accr, 33 C 675 (1905), but a question which raises the validity of the decree caunet, Hira Lal Sahu v Parmeshar Rai, 21 A Jof (1899)

⁽⁵⁾ I achmi Naram v Kunji Laf, 16 A 455, 156 (1894) Suraj Bunsi Kocr t Sheo Prasad

Singh 5 C 148 (1879) Kamatala v Audu kari, 5 M 232 233 (1882) see as to attach ment during lifetime of judgment debtor, Abdur Rahman z Shankar Dat Dube, 17 A

^{162 (1895)} (6) Sıvagırı Zemındar v Tıruvengada 7 N 339 (1884)

⁽⁷⁾ Muttia v Virammal 10 M. 286 288 (1886), Karpa Kambal v Subbayyan 5 M 234 (1882)

⁽⁸⁾ Muttia v Virammal supra

⁽⁹⁾ Prosanno Chunder Bhattacharjee t Krasto Chatunno Pai 4 C 342 This cast which was followed in Janaku t Dhanu Lal 14 M 454 (1891) and Chum Lal Bose t Osmoud Beeby 30 C 1044 1057 (1903) has feen described as a peculiar one, Ram Chandra Viochlerjeo v Raja Ranjit Singh 4 C W N 405, 413 (1899), Lrava * Si ira mappa, 21 B 423 (1850)

that under the law is it existed prior to 1881 the executor did not represent the deceased until he had obtained probate, and the hardship in the particular case which led the Court to take the view it did, no longer exists Madras High Court has more recently held that there is no authority for bolding that the words "legal representative" include any person who has taken possession of the property of a deceased judgment debtor, and that a stranger in possession of property who was not a party to the decree ought not to be proceeded against in execution or otherwise than by a regular suit, and that the words "legal representative" cannot be taken to include any person who does not in law represent the estate of the deceased (1) And though in the two former cases the question arose with reference to a suit brought by the creditor against the representative, and not with reference to proceedings taken in execution of a decree, the Calcutta High Court has expressed an opinion that the principle underlying the observations in these eases are equally applicable to proceedings in execution as to proceedings by regular suit (2)

From this review of the authorities it will appear that judicial decisions prior to this Code extended the sense of the term 'legal representative' beyond that of its ordinary meaning of "administrator, executor and heir" and though such extension has been attended with doubt and his in some cases been the subject of conflicting decisions, it was too late to endeavour however convenient it might have been to secure for the term that which is perhaps its strict and legitimate sense. The term was therefore not himited to administrators executors and heirs, and must have been held to include any person who in law represented the estate of a deceased judgment-debtor (3). And the term has now been so

defined in sect 2, clause (11)

A decree passed against the Valiya Rajah of a Korilagom is primu face linding on his successor and his Koulagom (4). The successor to an unsettled polition is not hable for the debts of the person whose heir he is as respects that polition. The polition recents absolutely to the Government and by the fresh grant to the successor a newly created estate for his becomes vested in him (5). In the undermentioned case an impartible Raj in the possession of the respondent was held not to be assets of the deceased nor was he the legal representative of the deceased (6) and a decree against a limited company representative of the deceased against another company (7). A decree containing an injunction can be enforced against a legal representative under this section (8)

⁽I) ChathaLelan v Govinda Karumar I''
VI, 186 (1893)

⁽²⁾ Chuni Lal Bose t Osmond Beeby 30

C. 1044 1058 1059 (1903)
(3) Dinamoni Chaudhurani v Elahadut

⁽⁴⁾ Dinamoni Chaudhurani v Elahadut Ishan, 8 C W N 843 (1904) (4) Kerala Varma t Shangaram 16 M 4-52

<sup>(1892)
(5)</sup> Arbuthnot : Oolagal pa Chetty 3 M

II C. R 303 (1870)
(6) Kali Krishna Sarkar : Raghunath Deb,

³¹ C 224 (1903), dist in Zamindar of Kartetnagar v Trustee of Lirumalai, 32 U 429 436 (1909)

⁽⁷⁾ Harish Chandra Iswary : (handpore Co, Ltd 30 C 961 (1903) \trbuthnot s Industrials Ltd. : \text{Vuthu Chettiar 31 \text{ V}}

<sup>464 (1908)
(8)</sup> Sakarlal Jaswantrat i Ba Parvatibal
6 B 283 (1901), s c, 4 Bom. L. L.

Execution has been allowed under this section against the legal representative of the legal representative (1)

There may be an estoppel Thus, though ordinarily a Court has no power to put a delitor's vendee on the record (2) where a person filed a petition in a suit, saying that all the property of the judgment debtor had passed to him and for several years opposed execution, it was held that though his name was not on the record he had yet made himself hable as a defendant (3) The legal representative hinds ill property in his possession and where an adult legal representative was in possession a salo was held good and not affected by the

non appointment of a guardian ad litem (4)

The Code of 1859 gave power to execute a decree against the estate of a deceased judgment delitor A proposal to revive this provision having been excepted to the criticisms were met by a further proposal to give a remedy against the person in possession of the estate. As already stated in the last paragraph it was formerly a question whether the term legal representative in sect 239 of the last Code included a stranger who, not being a party to the decree was in possession of the property of the deceased. It was held (5) under the Code of 1809 and this appears to be law now, that if no other legal ropresontative can be found, the decree-holder may then proceed against persons in possession of the estate belonging to the deceased. The definition in sect 2 clause (11) includes a person intermeddling with the estate

It was proposed to enact that the death of a judgment debtor before the decree had been fully executed should not be deemed to affect the validity as against such legal representative of any proceeding lawfully takon during his lifetime Where property has actually been sold by order of the Court executing the decree probably no difficulty arises. This clause was however, thought at one time to be necessary to meet the case of a Judgment debtor dying before the

salo is effected (6) It has not, however been introduced

PROCEDURE IN EXECUTION

Subject to such conditions and limitations as may be prescribed the Court may, on the application of Powers of Court to the decree holder, order execution of the decreeenforce execution

(a) by delivery of any property specifically decreed, (b) by attachment and sale or by sale without attachment of any property,

(c) by arrest and detention in prison of any person,

(d) by appointing a receiver, or (e) in such other manner as the nature of the relief granted may require

⁽¹⁾ Jafri Begamv Saira Bibi, 22 A.36 (1900)

⁽²⁾ Dhorom Dhur Sen t Agra Bank, 3 C L R 421 (1878), as to estoppel m execution see Trimbak v Hari Laxman, 34 B 575 (1910)

⁽³⁾ Lalla Poorhit Lall a Mt Sabceran, 7 W R 368 (1867)

⁽⁴⁾ Kunhammad v Kutti, 12 M 90 (1885) (5) Syud Nadir Hossein v Bissen Chand

Bassarat, 3 C L R 437 (1878) (6) See Stowell v Ajudhia Nath, 6 A 255 (1884), but see Krishnayyı t Unnissa Begam, 15 M 333 (1831)

Powers in execution.-See following section up to sect 71 and 0 XXI. with notes thereou Sects 51-54 deal with procedure in execution generally; 55-59 with arrest; 60-64 with attachment, 65-67 with sale, various rules in the Order mentioned deal with the same subjects. See notes to O. XXI, post

Enforcement of decree against legal representative.

(1) Where a decree is passed against a party as the is legal representative of a deceased person, and the decree is for the payment of money out of the property of the deceased, it may

be executed by the attachment and sale of any such property. (2) Where no such property remains in the possession of the judgment-dehtor and he fails to satisfy the Court that he has duly apphed such property of the deceased as is proved to have come into his possession, the deeree may he executed against the judgment dehtor to the extent of the property in respect of which he has failed so to satisfy the Court in the same manner as if the decree had been against him personally.

Decrees against legal representatives -This section corresponds with sect 203 of Act VIII of 1859 eave for some slight verhal alterations and the substitution of the words " remains in the possession of the judgment debtor and he" by \$ 252, Act XIV of 1882, for the words "can be found and the judgment deltor" of the Codo of 1859, and the words " in respect of which he has failed so to satisfy the Court" hy the present Code for the words "not duly applied by him" proviously appearing The Code of 1859 also had a section (211) providing tho same procedure where the decree was ordered to be executed against the legal representativo

"Where a decree is passed "-A decree passed against a person already dead, cannot however, he executed against his legal representatives (1) "Legal representative of the deceased "-This includes persons who have been legal representatives in execution proceedings, (2) and the heir of an intestate (3) A person taking possession of the estate of a deceased Hindu leaving a will may be treated as the legal representative until Probate is taken, (1)

⁽¹⁾ In matter of Gurendronath Fagore, 14 B L R, 334, note (1868)

⁽²⁾ Jafur Hossem t Hingun Jan S W R. 161 (1867)

⁽³⁾ Greender Chunder Ghose : Mackin tosh, 4 C. L. R. 210 (1878)

⁽⁴⁾ Prosunno Chunder Bhutfacharpee s Krato Chartunno, 4 C 342 (1878)

⁽⁵⁾ Chandmull t Sounders Donne 22 (253 (1844), Grey v Hazari Lal, 30 A. 150

⁽¹⁹⁰⁵⁾ (6) Sukh Nandan r Renn k, 4 1 102

^{(1552).} (7) Subbanna r Venhatakrahnan, 11 M

^{405 (1555),} habirpan e Varalira, da, 33 M. 75 (1.4/s).

Where a Hindu widow is such as such and as guardian of her son and a decree obtained against her as her husband's representative, the sale in execution of property includes the son's interest therein,(1) as also where the son was an adopted son, (2) but where the widow in the plaint was described as the widow of A deceased and the mother of D and B minors, and the decree (on a hond due hy her husband) was against her personally it was held the sale of the minor's property was invalid (3) So also where a Hindu defendant died leaving a widow and a minor son and the suit was continued against the widow not as guardian of her son, and after the widow's death, against the sister of the deceased though not appointed guardian ad litem of the minor or administrator of his estate, the minor son was not hound (4) So where a widow horrowed not as administrator and without pledging any specific pro perty of the estate, it was held to he her personal debt. (5) that is so where the debt is for reut,(6) but not where it was for necessary repairs (7) Where, however, the mother of the deceased obtained a personal decree against his widow for maintenance payable after his death, only the widow's interest in the estate of the deceased could be sold in execution (8) The test as to whether a decree against a Hindu widow binds the reversioners is whether the cause of action was one personal to her or one affecting the estate of the re versioner, (9) and the question must be decided from the decree and the execution record (10)

As to Mahomedans, a decree against one of the hens cannot hind the other heirs, (11) and a decree by consent against some of the heirs for a debt due by the deceased only binds those who are parties (12). [This is not so in the case of Hindus (13)]. A sale under a decree against a Mahomedan daughter, who though sued as representative, did not represent the whole estate, there heing a widow and another daughter, carried only the share of the judgment debtor, (14) so also a Mahomedan daughter is not bound by a decree made against the widow of her father in respect of his debts or by a subsequent sale by the widows to the judgment creditor but could only recover her share of the property on payment of her share of her father's debts, (15) Mahomedan

⁽¹⁾ Court of Wards v Ramaput Sing, 10 B L R 294 (1872), 17 W R 459, 14 M. I A 605

⁽²⁾ Norendro Nath Pahari v Bhupendra

Naram, 23 C 375 (1895)
(3) Alukmonee v Ban Madhub, 3 G L R

<sup>473 (1878)
(4)</sup> Jatha Naik v Venktapa, 5 B 14 (1880)
(5) Gadgeppa t Apaji, 3 B 237 (1879).

Ramasamı v Sollattammal, 4 M 375 (1881) (6) Kristo Gobind v Hem Chunder, 16 C 511 (1883)

⁽⁷⁾ Hurry Mohun v Gonesh Chunder, 10 C 823 (1884)

⁽⁸⁾ Baijun Doobey t Brij Bhockun, I G 133 (1875), 2 I A 275

⁽⁹⁾ Jotendro Mohun t Jogul Kishore, 7 G J57 (1881), Narana Maiya t Vasteva, 17 M

^{208 (1893),} Gadgeppa t Apap, 3 B 237

⁽¹⁸⁷⁹⁾ (10) Radha Mohun v Soshi Bhoosun, J C

L. R. 530 (1878)

⁽¹¹⁾ Sitanath t Roy Luchmiput, 11 C. L R 268 (1882)

 ⁽¹²⁾ Assamathen v Luchmeeput, 4 C 143
 (1878)
 (13) Jutadhari v Rughoobeer, 9 C 508

⁽¹⁸⁸³⁾ (14) Hendry : Mutty Lall Dhur, 2 C 395

⁽¹⁴⁾ Hendry : Mutty Lall Dhur, 2 C 395 (1878)

 <sup>(1878)
 (15)</sup> Hamir Singh v Zakia, 1 A 57 (1875)
 See also Jafri v Amir Muhammed, 7 A 822

See also Jafri v Amir Muhammed, 7 A 822 (1885), Muhammad Awais t Har Sahai, 7 A 716 (1885), Datta Mal t Hari Das, 23 A 263 (1901)

heirs who are not parties to a suit not being hound by a sale in execution but cannot recover their shares without paying their share of the delts, (1) as the purchaser does not acquire the whole estate hut acquires it subject to all legil and equitable rights of inheritance (2). Thus ma mortgage sale the heirs of the mortgager who were not parties to the suit were given an opportunity to redcem (3). The Bombay High Court, however, held that a daughter though not a party was bound by the sale (4). When, however, an heir in possession is such and a decree made against the assets of the decreased the decree binds the other heaves (5).

"Decree is for the payment of money"—A decree for accounts within a specified period which the defendant survived without proceedings being taken against him cannot, after his death, he executed against his widow and representative (6)

"Out of the property of the deceased"—The legal representative can set up an answer that the property in her possession is her own and does not belong to the deceased's estate (7). A decree obtained against the remainderman, a hother of the deceased, will not enable the creditor to touch the estate in the hands of the widow, (8) but in execution of a decree against a joint family property bought by a member of the family with joint funds may be taken in execution (9). The Court in execution proceedings will look at the substance of the transaction (10). See also seek 53

"May be executed"—The legal representative is not entitled in the execution stage to reopen the whole case and to inquire into the nature of the debt, (11) but can bring a suit (12) Sect 283 of the Indian Succession Act, where applicable, does not provent a decree holder having the whole of his decree satisfied out of the assets of the decrees do far as they go to the excusion of other creditors whose claims are admitted but who have not obtained decrees (13) Where successive applications have been made for years against a party merely as representative of a deceased defendant, execution cannot be taken out against bim personally as one of the original defendants, even if he were hable in both cancettes (14)

⁽¹⁾ Hamir Singh v Zakia, I A 57 (1875)

⁽²⁾ Sham Coomar v Juttun Bibee, 14 W R 448 (1870), see also Raj Kristo Singh t

Bungshee, 14 W R 448, note (1868)
(3) Shaik Abdulla v Haji Adbulla, 5 B 8

⁽⁴⁾ Khurshetbibiv Keso, 12 B 101 (1887), see also Nuzeerun i Ameerooddeen, 24 W

R 3 (1875)
(5) Motijan v Misrijan, 10 C L R 346
(1882), Muttyjan v Ahmed Ally, 8 C 370
(1882) [followed in Amir Dulhin v Baij
Nath, 21 C 311], Davalava i Bhimah, 29 B

<sup>338 (1895)
(6)</sup> Bidhoo Mookhee t Beejoy Keshul 12
W R. 495 (1869)

⁽⁷⁾ Ameeroonnessa v Meer Mahomed 20

W R 280 (1873) (8) Natha Hari v Jamni, 8 B H C A J

³⁷ (9) Bissessur Lall v Luchmessur, 6 I A.

⁽⁹⁾ Bissessur Lall v Luchmessur, 0 1 A

^{(10) 1}b , Shee Persaud v Saheb Lal, 20 C 453 (1892)

C 453 (1892)
(11) Sheo Sahoy v Ram Bhunjun, 23

W R 127 (1874) (12) Bustoo t Ram Purmessur, 24 W R 364 (1875)

^{(13) \}ld Komul z Reed, 17 W R 513

⁽¹⁸⁷²⁾ (14) Prem Lall v Hossemodden, 13 W R

⁽¹⁴⁾ Prem Lall v Hossemodden, 13 W 1 36 (1870)

"Any such property"-Under a decice on a bond against the widow of the deceased ohligor, I Hindu, the property of the debtor, described as the property of the widow, was sold, and it was held that the sale was good against the son and heir of the deceased, (1) so, where property is described at the tuno of the execution sale as the property of the judgment debtors, who were sund as more representatives of the deceased judgment debtor, prim i facie what is sold is the property of the deceased debtor, and even if the decree is in terms is if it were a personal decree yet it must be construed as if it was for the debt of the deceased (2) But in a case where in the judgment, though not in the decree, the widow (who was only entitled to maintenance) was described as the representative of her deceased husband, the suit being for the husbands debt, the sale of her interest did not affect the deceased e estate (3) To ascer tain what was sold under the right title and interest of the widow the Court is at liberty to look at the judgment. If the judgment bound the lever sionary heir, the purchaser took the estate absolutely (4) Under a decree ignist a widow as representative of her deceased husband, a member of a joint Mitakshara family, property of the deceased passing by survivorship to the other members, cannot be sold (5) This confines the procedure to property romaining in the possession of the legal representative leaving the creditor to follow property improperly aliened by the legal representative by a separate suit (6) The onus of proving the legal necessity of a sale by a Hindu widow is on the purchaser, and recitals in mortgages or sale deeds are not sufficient ovidence (7) A Hindu widow can with the consent of the next inversioner transfer her inherited estate inter vivos, (8) though not by bequest (9)

"If no such property remains -The decree bolder must satisfy the Court as to this before the Court will proceed under the second clause of this section (10) If the legal representative has sold such property to a third party the former is personally hable for the debt to the extent of the assets he has received (11)

"Has duly applied '-This should be proved by filing and proving an inventory (12) and unless he proves that he has duly applied his property is hable, (13) whether the debt became due before or after the death of the debtor (14) He has only to account up to the full value of the assets he received

⁽¹⁾ Ishan Chunder v Buksh Alı 1 Marsh 614 (1863), see also Jairam Bajabasheb v

Joma, 11 B 361 (1886) (2) Lalla Seeta : Ram Buksh, 24 W R

^{383 (1875)}

⁽³⁾ Ramasamı Chettı v Saluckaı, 8 M. H C 186 (1875)

⁽⁴⁾ Jugol Kishore v Jotendro Mehun 1agore, 11 I A 66 (1884)

⁽⁵⁾ Sadabart Prasad v Foolbash, 3 B L R (F B) 31 (1869)

⁽⁶⁾ Greender Chunder Ghose & Mackin tosh, 4 C L R 210 (1878)

⁽⁷⁾ Lala Birg Lal v Inda Kunwar, PC, IJ (L J 169 (1914)

⁽⁸⁾ Bajrangi Singh v Manokarnika Balsh Singb PC 35 I A 1 30 All I (1907)

⁽⁹⁾ Durga Sundan v Ramkrishna Poddar,

¹⁸ C L J 163 (1913)

⁽¹⁰⁾ Indro Narain v Kristo Chunder, 14 W R 362 (1870)

⁽¹¹⁾ Unnopoorna i Gunga Naram 2 W R 296 (1865)

⁽¹²⁾ Joogul Kishore v Kalce Churn, 25

W R 224 (1876) (13) Mooktakashee : Wooma Churn, 12

W R 233 (1869)

⁽¹⁴⁾ Ib

is legal representative, and if he has properly done so, the decree e in no longer be executed even though he may still hold property which originally helonged to the decreed palgment debtor. If the decree be against him as representative, it is a kg il and reasonable presumption, until the contrary is proved, that payments made by him were as representative alone [1].

"Such property of the deceased"—The question whether the entire set ite in a zemindary (and not merely the zemindar's life interest) was sold in execution and hought by a purchaser is a question of inved law and fact to be determined according to the circumstances of each case,(2) and the state of the law as understood at the time of the sale is to be considered in such determinent (3) Glatical lands in Birkhoom are not liable to be seized in the hands of the son in execution of a decree against the deceased fither, (4) the surplus proceeds of such tenure collected during the lifetime of the judgment-debtor are liable (5) but not those accurate after his death (6) A shikm ghatical tenure is not hable. (7) hut shatical tenures in Kharukoere ore (8)

"Proved to have come into his possession — he onus is on the detree holder to do this, (3) he has to show that some assets came to the legal representative, and the onus is then shifted to the latter to prove how much came and how it has been applied (10). The legal representative may admit receipt of assets by implication, e.g. by asking time to pay the emount of the decree (11).

"In the same manner'-1his may be by detention in the civil pail (12)

Appeal —Under sect 11 of Act XXII of 1861 on appeal lay from orders passed against a representative under sect 203 of Act VIII of 1859, corresponding with the first clause of the present section (13) See now sects 104 and 47

- (1) Ram Golam t 'lyma lk jum, 12 W R. 177 (1869)
- (2) Alaguraya Gounder t Ramanung Nacilu, 37 M. 22 (A. C) (1914), and see Veerabadra Anyar t Marudaga Nachiar, 34 V. 188 (1911), Veera Soorap pa Nayam v Lrrappa Nacilu, 29 M 484 (1906), Aralapa Naciker v Murugappa Chettiar, 36 M. 325 (1912)
- (3) Abdul Aziz Khan v Apjayasami Naicker, P C, 27 M, 131 (1.04) (4) Nilmoni Singh v Bukronath 5 C 389
- (1878-9), 9 I A 104 (1882) (5) Kustoora v Binoderam, i W R Mis 5 (1865), Raikeshwar t Bunshidhur 23 C
- 8 3 (1896) (6) Bindo Ram t Dy Collector Santhal

- Perg, 6 W R 129 (1866), s c., 7 W R 178 (1867)
- (7) Bally Doboy t Ganet Dec, 9 C 388 (1882)
- (8) Anundo Rai v Kah Prosad 10 C. 677 (1884), Kah Pershad v Anand Roy, 15 C 471 (1887 P C)
 - (9) Shurfun v Collector of Sarun, 10 W
- R 199 (1868) (10) Joogul Kishoro v Kalco Churn, 25 W
- R 224 (1876)
 (11) Ghotta Shayco v Gour Monce, 21 W
- R 117 (1873)
 (12) Mahatab Chunder t Munmohinee, 12
 W R 517 (1869)
- (13) Ameeroonnessa v Meer Mahomed, 20 W R 280 (1873)

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revenue paying estates (1) Later, however, it was held that partition of lands in a rovenuo paying estate could only be made by a Collector (2) This, however, was overruled by a Full Bench decision holding that a Civil Court could partition revenue paying estates save when the partition sought a separate allotment of rovenue (3) Under sect. 107 of the U I. Land Revenue Act, the partition cannot be made by the Collector until the decree-holder's name is recorded in the revenue papers (4) Where a person was entitled in pulsuance of an order to be put into possession of a particular village, and in execution of this order the Collector put him in possession, under this section, of a wrong village, it was held that the order of the Collector was a mere nullity, and that such person was entitled to sue for possession of the village he was rightfully entitled to (5)

ARREST AND DETENTION.

55. (1) A judgment-debtor may be arrested in execution of a decree at any hour and on any day, and Arrest and detention shall, as soon as praeticable, be brought before the Court, and his detention may be in the civil prison of the district in which the Court ordering the detention is situate, or, where such civil prison does not afford suitable accommodation. in any other place which the Local Government may appoint for the detention of persons ordered by the Courts of such district to be detained:

Provided, firstly, that, for the purpose of making an arrest under this section, no dwelling-house shall be entered after

sunset and before sunrise:

Provided, secondly, that no outer door of a dwelling-house shall be broken open unless such dwelling-house is in the occupancy of the judgment-debtor and he refuses or in any way presents access thereto, but when the officer authorized to make the arrest has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to helieve the judgmentdebtor to be found:

Provided, thirdly, that, if the room is in the actual occupancy of a woman who is not the judgment-debtor and who according to the customs of the country does not appear in public, the officer authorized to make the arrest, shall give notice to her that

⁽¹⁾ Debi Singh v Sheo Lall Singh, 16 C 203 (1889); Zarhun : Cower Sunkar, 15 C 195 (1898)

⁽²⁾ Meherban Rawoot : Beham Lal, 23 C 679 (1896)

⁽³⁾ Jogodishury v. Kailash Chundra, 24 C

^{735 (1897), 1} C W N 374 (4) Julsi Das i Sheo Narain, 28 A 375

^{(1906), 3} A L J 336 (5) Maharajah of Vijianagram t Somt-

sekara, 17 M L J 147 (1906)

she is at hiberty to withdraw, and, after allowing a reasonable time for her to withdraw and giving her reasonable facility for withdrawing, may enter the room for the purpose of making the airest.

Provided, fourthly, that, where the decree in execution of which a judgment-debtor is arrested, is a decree for the payment of money and the judgment-debtor pays the amount of the decree and the costs of the arrest to the officer arresting him, such officer shall at once release him.

(2) The Local Government may, by notification in the local official Gazette, declare that any person or elass of persons whose arrest might be attended with danger or inconvenience to the public shall not be hable to ariest in execution of a decree otherwise than in accordance with such procedure as may be preserved by the Local

Government on this behalf.

(3) Where a judgment-debtor is arrested in execution of a decree for the payment of money and brought before the Court, the Court shall inform him that he may apply to be declared an insolvent, and that he will be discharged if he has not committed any act of bad faith regarding the subject of the application and if he compiles with the provisions of the law of insolvency for the

time being in force

(4) Where a judgment-debtor expresses his intention to apply to be declared an insolvent and furnishes security, to the satisfaction of the Court, that he will within one month so apply, and that he will appear, when called upon, in any proceeding upon the application or upon the deeree in execution of which he was arrested, the Court shall release him from arrest, and, if he fails so to apply and to appear, the Court may either direct the security to be realized or commit him to the and prison in execution of the deeree.

Arrest—This section corresponds with sect 336 of Act \(\lambda\) of 1877 save that the 2nd and 3rd provisos did not then appear. These provisors as also that the 2nd and 3rd provisos did not then appear. These provisors as also the words. In the case of a surety, such security may be realized in manner provided by sect 253," were added by sect 336 of Act XIV of 1882. In such Code the words in the first sub clause, "detention" "civil prison" and "detained," were expressed by "imprisonment" "civil pair or "jail" and "imprisond". The second proviso then commenced "no outer door of a divelling house shall be broken open; but". This has now been aftered as indicated in italies by the present Code, which substitutes "broken" for "furnish "The words in italies in the 3rd and 4th proviso and in the 2nd and 4th sub clauses have been added by the present Code, the words "furnishes security to the satisfaction of the Court" being substituted for "furnish sufficient security" to the third sub clause in the Codes of 1877 and 1882 was prefaced by "The Local Government may by

notification published in the official Gazette, direct that whenever" instead of "Where," and ended with the words "places all his property in possession of a receiver appointed by the Court" instead of the words in stales—it also provided that the application to be declared an insolvent was to be "under Chapter XX". See now Provisional Insolvency Act III of 1907—The provision as to the method of realizing the security has been omitted, as it comes within the provisions of sect-115

"A judgment-debtor may be arrested"—A purdanasheen lady was not exempt from arrest (1) but see sect 56, which was introduced into the Code in 1888

"May be arrested'—The officer arresting a judgment debtor must have the warrant of triest in his possession at the time of making the appre housion, otherwise it is illegal (2). A decree against the hypothecated property and against the defendants personally, and containing no condition for execution first against the property, may be enforced against the person or the property of the judgment debtor, whichever the decree holder thinks best, (3) but a decree merely against mortgaged property and making no personal order for payment, cannot be executed against the person of the judgment debtor (4)

"On any day"—An airest may be made on Sunday under piecess of a Mofussil Court (5)

"In any other place"—A list of such places has been notafied for Burma (6) and also for Madras (7)

Sub clause (1), second provided—Under the former Lode an outer door could not be broken open. It was proposed to enact that if the judgment debtor or any person in whose dwelling house the officer authorized to make the arcest had reason to behave the judgment debtor was to be found, refused access to his house such officer might remove or open any lock or bolt and might break open any outer door. The amendments in this provise were suggested to provent vexatious forms of resistance to execution which constantly obstruct decree-holders in the execution of their decrees Afterwards, however, the amendment took its present form, the Select Committee stating that they had carefully considered the provisions as to breaking open dwelling houses, and that they had come to the conclusion that it should be limited to dwelling houses in the occupancy of the judgment debtor.

"Who is not the judgment debtor'—It was formerly held that no order was necessary to enter a zenana of a purdanasheen judgment debtor (8) but that decision was before sect 56 was included in the Code

Maharam of Burdwan v Barada Sun dan, I B L R 31 (1868)

⁽²⁾ Empress v. Amar Nath, 5 A 318 (1883)

⁽³⁾ Johanmal t Sant Lal, 9 A 484 (1587)

⁽⁴⁾ Budan v Ramchandra, 11 B 337 (1897).

^{(5) 4} M. H C lxit (1869)

⁽⁶⁾ Notification No 217, Burma Gazette, 1897, Pt I, p 256

⁽⁷⁾ Fort St George Ga ette, 1903 Pt I,

⁽⁸⁾ Kadumbinee 1 Koylashkaminee 7 C

^{19 (1881)}

Sub-clause (2) -l his sub-clause is intended to cover the class of cert up persons or classes of persons whose summars arrest might, as in the case of rulway servants, be attended with danger or inconvenience to the public

Sub clause (3) -Under the Codes of 1877 and 1883 this provision only extended to such provinces as were notified by the Local Governments. Such notifications were published as to Assam.(1) Bengal.(2) Bombas (3) Burma.(4) Central Provinces (5) Madras (6) NWP and Oudh (7) and the Punish (8) As to the Proximenal Insolvener law see now let III of 1907, which takes the place of Chapter XX of the former Code

"Apply to be declared "-Under the Codes of 1877 and 1882 this provision ran " apply under Chapter XX to be declared ' That Chapter did not apply to the towns of Calcutta, Madras, or Bombas (9) In such Presidence towns the judgment-debtor might have applied under the Act for the Relief of Insolvent Debtors 11 & 12 Viet c 21 (10)

"Expresses his intention to apply "-If he does not, and is committed to sail, he might from sail apply under Chapter XX of the previous Code that new the Provincial Insolvency Act. 1907), and may be released under its provisions (11) This section only applies to judgment debtors who are under arrest and not already committed to fail When a debtor is imprisoned he can only ho discharged under sect 58 (12) See also O XXI r 10

"Furnishes security "-The surety was under the Code of 1882 discharged on the judgment debtor filing his petition in insolvency . (13) but under the present section apparently the surety would not be discharged until the judgment debtor had "appeared" also (14) A surety is discharged by the death of the judgment debter before expiration of the time specified in the scenity bond, (15) or if the preceedings taken in execution of the decree wherein the security was furnished comes to an end or are struck off. (16) or if security is

⁽¹⁾ Assam Manual of Local Itules and

Orders, ed. 1893, p 191 (2) Bengal Local Statutory Rules and

Orders, 1903 vol. u. p 70

⁽³⁾ Bombay Last of Local Rules and Orders, ed 1896, vol. p 406

⁽⁴⁾ Lower Burms Courts Manual 1905 1 ara. 602

⁽⁵⁾ No 3751, dated 28th Sept

Judicial Commissioner & Civil Circular, 1-43 (6) Madras List of Local Rules and Orders cd. 1898, vol. L. p 195

⁽⁷⁾ N W P and Oudh Last of Local Rules and Orders, ed. 1894, p 112

⁽⁸⁾ Rules and Orders of C C of Punjab

vol. L, p 2 (2nd edition) (9) S 300A of Act XIV of 1882 (repealed by the Provincial Insolvency Act, 1907)

⁽¹⁰⁾ Ex parte Pinsent, 8 M 276 (1885)

⁽¹¹⁾ Inre William Hastic, 11 C 451 (1885)

⁽¹²⁾ In re Ouarme, 8 M 503 (1885)

⁽¹³⁾ Koylash Chandra t Christophoridi, 15 C. 171 (1887) . Ramzan : Gerard, 13 4 100 (1890). Duarkadas : Isabhai 19 B 210

^{(1891) .} Banna Walt Jamna Day 15 A 183 Imbichung (1 alu 24 M 560 (1901), Krish namar a Krishnasamy 26 M 366 (1902) Langtu : Bannath 28 A, 387 (1906), 3 A LJ 143

⁽¹⁴⁾ In Ashio Ali t Moti Lal 29 1 466 (1907) the security lurnished was not in accordance with the section

⁽¹⁵⁾ Krishnau t Ittinan, 24 M 637 (1901) ref Ashiq Ali v Moti Lal, 29 1 466 (1907) , and see Nahm Chan Ira Hazari v Mirtunjoy Barick 41 C 50 (1913) (because the event which occurred was not in contemplation of either party, and so put an end to the contract)

⁽¹⁶⁾ Lalu Sahoy : Odoya, 14 C 757 (1887)

deposited on conditions and the judgment debter dies before an order is made on his application to be declared an insolvent (1) Where the judgment-debtor has applied for declaration of insolvency, and proceedings in insolvency are pending on his application, no application for execution can be made against the judgment debter's surety (2)

"Shall release him from arrest"-A judgment debtor expressing his intention to file a petition and schedule under 11 & 12 Vict c 21 and comply ing with the conditions of this section is entitled to be discharged from custody , (3) but he will be hable, though he has taken the benefit of the insolvency sections and while yet undischarged, to arrest in execution in respect of an unscheduled debt (1) A judgment debtor who being arrested and released on furnishing security under this section, but who failed to apply to be declared an inselvent within the prescribed time, is hable to arrest, but not being arrested may apply to be declared an insolvent at a subsequent date (5)

"Security to be realized' -- A transfered deerce holder whose transfer has been recognized is entitled to execute against the surety (6) Where this surety by his bond undertook to pay the amount of the decree if the judgment dobtor did not do so within a specified time and agreed that execution might issue under the bend without suit, it was held that though the bend was some what outside the scope of this section as it was then worded summary execution could be taken out (7) But where the bend besides the usual covenants centained further stipulations as to what should happen if the judgment debtor s application in insolvency were refused it was held that the latter stipulations did not come within the purview of this section as it was then worded (8) The enforcement of the lubilities of sureties is new governed by sect 145 See notes therete (9)

Revision -An order refusing a suicty s discharge not being appealable. is open to revision under sect 115 (10)

Notwithstanding anything in this Part, the Court 56 shall not order the arrest or detention in the Prohibition of arrest or detention of women in execution of decree for civil prison of a woman in execution of a decree for the payment of money money

^{(1) 1}slnq Alı r Moti Lal, 29 A 466 (2) Langta Pande v Bannath Pande, 23

A 387 (1906)

⁽³⁾ Lx parte Pinsent, 8 M. 276 (1885) (4) Panna Iuli v Kanhaiya, 16 C 85

⁽¹⁸⁸⁸⁾ (5) Alagappa v Satathambal, 25 M. 724 (1902)

⁽⁶⁾ Chathoth : Saidindavida, 26 M 258 (1902)

⁽⁷⁾ Kamezuddi v Fauzdar 4 C L J 311 (1906), 10 C W N 830

⁽⁸⁾ Janka Das v Ram Partap 16 A 37

⁽⁹⁾ And as to waiver by sureties of right to have suit brought against them I am zuddi v Lauzdar 10 C W N 830 (1906)

⁽¹⁰⁾ Banna Mal : Jamna Das, 15 A 183

⁽¹⁸⁹³⁾

Arrest of women -This section was inserted in the last Code by sect 2. Act VI of 1888

The Local Government may fix seales, graduated [5.3] according to rank, race and nationality, of Subsistence-allowance. montbly allowances payable for the substence of judgment-debtors

Subsistence allowances -- I or notifications (1) by the Local Government of Madras see Madras List of Local Rules and Orders ed 1898, vol 1, p. 195 ce Burmah Rules Manual, ed 1897, p 115, and for N W P see North Western Provinces and Oudh List of Local Rules and Orders ed 1894 p 113 Sects 339 and 340 are now O XXI 1 39, nost

(1) Every person detained in the civil prison in execution is 34 of a decree shall be so detained .-Detention and release

(a) where the decree is for the payment of a sum of money exceeding fifty tupees for a period of six months, and,

(b) in any other case, for a period of six weeks

Provided that he shall be released from such detention before [34 the expiration of the said period of six months or six uceks, as the rase man be,-(1) on the amount mentioned in the warrant for his

detention being paid to the officer in charge of the

civil prison, or

(n) on the decree against him being otherwise fully satisfied, or (in) on the request of the person on whose application

he has been so detained, or (w) on the omission by the person, on whose application he

has been so detained, to pay subsistence allowance

Provided, also, that he shall not be released from such deention under clause (11) or clause (111), without the order of the Court

(2) A judgment debtor released from detention under this ection shall not merely by reason of his release be discharged from his debt, but he shall not be hable to be rearrested under the decree in execution of which he was detained in the civil prison

Duration of imprisonment - The first po tion of the act on down to he Proviso corresponds with sect 275 of 1ct VIII of 1500 and sect 312 of he last Code thou_h the form of the section I as been ret wheled (e de pet)

deposited on conditions and the judgment debtor dies before an order is made on his application to be declared an insolvent (1). Where the judgment debtor has applied for declaration of insolveney and proceedings in insolveney are pending on his application, no application for execution can be made against the judgment debtor's surety (2)

"Shall release him from arrest"—A jidgment debtor expressing his intention to file a petition and schedule under II & 12 Vict e 2I and complying with the conditions of this section is entitled to be discharged from custody, (3) but he will be hable though he has taken the benefit of the insolvency sections and while yet undischarged to arrest in execution in respect of an unscheduled debt (4). A judgment debtor who being arrested and released on furnishing security under this section but who failed to apply to be declared an insolvent within the prescribed time, is hable to arrest, but not being arrested may apply to be declared an insolvent at a subsequent date (5)

"Security to be realized'—A transfered decree holder whose transfer has been recognized is entitled to execute against the surety (6) Where the surety by his bond undertook to pay the amount of the decree if the judgment debtor did not do so within a specified time and agreed that execution might issue under the bond without suit it was held that though the bond was some what outside the scope of this section as it was then worded, summary execution could be taken out (7) But where the hend besides the usual covenants contained further stipulations as to what should happen if the judgment debtor a application in insolvency were refused it was held that the latter stipulations did not come within the purview of this section as it was then worded (8) The enforcement of the habilities of sureties is now governed by sect 145 See notes thereto (9)

Revision —An order refusing a surety's discharge not being appealable is open to revision under sect 115 (10)

Prohibition of arrest or detention of women in execution of decree for money

Notwithstanding anything in this Part, the Court shall not order the arrest or detention in the civil prison of a woman in execution of a decree for the payment of money

Ashiq Ah t Moti Lal 29 A 466
 Langta Pan le v Baijnath Pande 28

A 387 (1906)

⁽³⁾ Ex parte Pinsent, 8 M. 276 (1885) (4) Panna I all v Kanhaiya 16 C 85

⁽¹⁸⁸⁸⁾ (5) Alagappa v Satatbambal 25 W 724

⁽¹⁹⁰²⁾ (6) Chathoth v Sai hndavida 26 M 258

⁽⁶⁾ Chathoth v Sai hidavida 26 M 25 (1302)

⁽⁷⁾ Kamezuddi i Fauzdar 4 C J J 311

^{(1906), 10} C W N 830 (8) Janki Das v Ram Partap 16 A 37

<sup>(1893)
(9)</sup> And as to waiver by sureties of right

to have suit brought against them Kame zuddit Fauz Iar 10 C W N 830 (1906) (10) Banna Mal z Jamna Das 15 A 183

⁽¹⁰⁾ Banna Mal z Jamna Das 15 A (1893)

Arrest of women. - To a war a war of an in him it is a life would Act VI. Clinnia

 The Local G virtue on they for souls, graduated 34 io se animar for con sing et gunt. Are est alt ellega encum in gille sistence of Julian Anti-Bills 🕺

Subdistance allowances—I'm an an are negligrand walking rear of Maine of Manus Int. I Louis Ret a mail test on all 18 to 12 days labe see Burns. Biles Marrel of 1-4 p 115, and fir N W 7, see N and Wissiam Provides and Only Let all and Hair sanioning of 12 1 7 118 Sais &CO and 540 are town O XXI to the post

58. (1) Every p mon detailed in the cold prison in execution is a of a decree shall be so date, alt-Detention and release.

(a) where the decree is for the payment of a sum of money exceeding thiry rapees, for a period

of six months, and. (b) in any other case, for a period of six weeks:

Provided that he shall be released from so in detection in his as the expiration of the said period of six variations or six weeks, as the case may be,-

(i) on the amount mentioned in the warrant for his detention being paid to the officer in charge of the

cuil prison, or (u) on the decree against him being otherwise fully sain-

fied, or

(in) on the request of the person on whose application

he has been so detained, or

(w) on the omission by the person, on whose application la has been so detained, to pay subsistence allowance.

Provided, also, that he shall not be released from such detention under clause (ii) or clause (in), without the order of the Court.

(2) A judgment-debtor released from detention under this section shall not merely by reason of his release be discharged from his debt, but be shall not be hable to be re arrested under the decree in execution of which he was defound in the civil prison.

Duration of imprisonment.—The last portion of the section down to the Proviso corresponds with sect 278 of 1cl 1111 of 1879 and sect 312 of the last Code, though the form of the section has been remodelled (rate pert)

(1)

The section after the Proviso corresponds (with verbal alterations) to sect 341 of the last Code omitting clause (1) of that section, which is no longer necessary owing to the remodelled form of the former sect 342 A prisoner once dis charged for want of depos t of subsistence-money should not be retaken (1) Where a per on is imprisoned under sect 481 (now O XXXVIII r 4), post, imprisonment suffered after decree must be taken into consideration in calculating the six months (2) On the expiration of the period, the prisoner is entitled to his discharge whether the imprisonment has been continuous or only at intervals (3) The imprisonment is not a satisfaction of the decree, and the debtor can be adjudicated an insolvent for it, (4) or his personal property miv be taken in execution under the same decree.(a) This section does not empower a Judge to us a term of imprisonment at his discretion within the maximum. If hone of the conditions mentioned in the provide are fulfilled before the exput of six months, or six weeks as the case may be, the judgmentdebtor remains in Jul the full time (6) The language of clause (1) has thus been recrest to show the this provision does not confer on the Court a discretion to fix shorter periods of imprisonment than those presembed. This section does not apply the a es of imprisonment for contempt of Court (7)

59 (1) At any time after a warrant for the arrest of a Ribinoi on unused to Judgment-debtor has been usued the Court may cancel it on the ground of his serious illness

(2) Where a judgment-debtor has been arrested the Court may release hum if in its opinion, he is not in a fit state of health to be detained in the end prison.

(3) Where a judgment-debtor has been commuted to the

cutl prison he may be released therefrom-

(a) by the Local Government on the ground of the existence

of any infectious or contagious disease, or

(b) by the commutting Court, or any Court to which that Court is subordinate, on the ground of his suffering from any serious illness.

(1) A judgment-debtor released under this section may be re-arrested, but the period of his detention in the civil prison shall not in the aggregate exceed that prescribed by section 58.

(1) In to Dwark shall Mitter, bearing a help 1 pc 101, Janukien pc 12 ve hal so War nd 12 1 22 18 18 See Medical

491 (1868) (9) Khoda Tukob (Shikno Jah 5 All H Class) (1879)

(4) In the ratter of Lachubhar Lass chaulin, 61 in 11 C SoftSook (5) Janski Sogh to var Kalss Mu d 1 RLRI L > 9 (1 cost

(a) Sahwihi r Sarji, 13 M. 141 (1889)
 f IL Surjan Bibi r Sagai Vandal, 5 C. W. N. 143 (1980).

(7) Martin r. Lawrence 4 C. 600 (1979) An informal whater in Jins Iren v proceed rights not a descharge within the Leaning of the sect. In Surai Din r. Mahalin, 23 A 270 (1910). Illness of judgment-debtor — Fhis section corresponds with sect 653 of the last Code. Sect 653 was added to that Code by sect 8 of Act VI of 1888

ATTACHMENT.

60. (1) The following property is hable to attachment to and sale in execution of a decree, namely, attachment and sale in lands, houses or other huildings, goods, execution of decree.

money, banknotes, cheques, bills of exchange, hundis, promissory notes, Government securities, honds or other securities for money, debts, shares in a corporation and, sate as heremafter mentioned, all other saleable property, more able or immoveable, helonging to the judgment debtor, or over which, or the profits of which, he has a disposing power which he may exercise for his own henclit, whether the same he held in the name of the judgment-debtor or by another person in trust for him or on his helalf.

Provided that the following particulars shall not be hable

to such attachment or sale, namely -

(a) the uccessary wearing apparel, cooking tessels tells and bedding of the judgment-debtor, his wife and children, and such personal ornaments as, in accordance with religious usage, cannot be parted with by any woman.

(b) tools of artizans, and, where the judgment delitor is an agriculturist, his implements of husbandry and such cattle and seed grain as may, in the opinion of the

(h) allowances (being less than salary) of any pubho officer or of any servant of a railway company or local authority while absent from duty,

(i) the salary or allowances equal to salary of any such public officer or seriant as is referred to in clause (h), while

on duty, to the extent of—

(i) the whole of the salary, where the salary does not exceed twenty rupees monthly,

(ii) twenty rupees monthly, where the salary exceeds twenty rupees and does not exceed

forty supecs monthly, and
(111) one monety of the salary in any other case,

(1) the pay and allowances of persons to whom the Indian Articles of War apply,

(k) all compulsory deposits and other sums in or derived from any fund to which the Provident Funds Act, 1897, for the time being applies in so far as they are declared by the said Act not to be liable to attachment,

(l) the wages of labourers and domestic servants whether

payable in money or in kind,

(m) an expectancy of succession by survivorship or other mercly contingent or possible right or interest,

(n) a night to future maintenance,

(o) any allowance declared by any law passed under the Iudian Councils Acts 1861 and 1892, to be exempt from hability to attachment or sale in execution of a decree, and,

(p) where the judgment debtor is a person hable for the payment of land revenue, any moveable property which, under any law for the time being applicable to him is exempt from side for the recovery of an

arrear of such revenue

Explanation — The particulars mentioned in clauses (g), (h), (i), (j), (l) and (o) are exempt from attuchment or sale whether before or after they are actually payable

(2) Nothing in this section shall be deemed-

(a) to exempt houses and other buildings (with the materials and the sites thereof and the lands immediately appurtenant thereto and necessary for their enjoy ment) from attrehiuent or sale in execution of decrees for rent of any such house, building, site or land, or

(b) to affect the provisions of the Army Act or of any simular

law for the time being in force

on a verdict until judgment has been signed (1) Money in the hands of a garnishee which he is bound to pay is a debt, (2) so is rent that is due, (3) but claims over which no Court in British India has jurisdiction are not debts hable to be attached, but the mere circumstance that the garnishee is at the time of the application for execution beyond the limits of British India would not of itself render the debt not hable to be attached (4) A gratuity sanctioned by a Railway Company, the money being in the hands of its paymaster, is not a debt, and cannot be attached as the gift is not complete, (5) but a monthly allowance given in payment of an antecedent debt is attachable, and an attachment may be made of half the monthly allowance when 3 weeks have expired, masmuch as 3 weeks of the allowance had become an existing debt though payable on a future date (6) Money due by an agent or a vendec to his principal or vendor is a debt, and may be attached, and it is not necessary that the exact amount due should be ascertained prior to attachment, (7) but a vendor's right or interest in the balance of purchase money of immoveable property payable on execution of a conveyance is not a debt so long as the convoyance remains unsigned (8) The salary of a private person is not attachable until it becomes due and is an existing debt (9) It was questionable whether arrears of interest due on Government Promissory Notes was attachable (10) Adecree can be attached, (11) but a decree formone, though a judgment dobt is not hable to sale in execution, and sect 273 of the former Code (corre sponding with O XXI r 53 of the present Code) provide the procedure in execution (12)

"Government securities"—Money or other security deposited by the judgment debtor with a Railway Company as security for the performance of his duties is attachable subject to the lien of the Railway Company but not saleable until the deposit is at the disposal of the judgment debtor freed from such lien (13)

"All other saleable property"—As regards partnership property, it was held that it could not be attached and removed from the possession of the partners in execution of a decree against only one of the pattners, (14) nor

⁽¹⁾ Jones v Thompson, 27 L J R, N S 234 (1858)

⁽²⁾ Booth : Irail (1883), 12 Q B D 8 (3) Mitchell : Lee, L R (1867), 2 Q B

⁽⁴⁾ Ghamshamlal 2 Bhansali, 5 B 249

⁽¹⁸⁸¹⁾ (5) Janki Das t East Indian Railway.

⁽⁵⁾ Janki Das t East Indian Railway, 6 \ 634 (1884)

⁽b) Dambar Koeri t Rai Shain Kissen, 9 C W N 703 (1905)

⁽⁷⁾ Madho Das r Ramji Patak, 16 A 286

⁽⁸⁾ Ahmad ud dm v Majhs Ras, 3 1 12 (1880)

⁽⁹⁾ Ayyavavy ir t Viras imi, 21 M 393 (1857), Devi Prasad t A II Lewis, 3I A

^{309 (1909)} It has been held that the non payment of a loan does not constitute a

debt which can be attached under this section Phul Chand v Chand Mal, 30 A 252 (1908)

⁽¹⁰⁾ Boistubehurn : Battye, 1 Tay & Bell, 313 (1850)

⁽¹¹⁾ Golam Mahomed v Indro Chand, 15

W R 31 (1871) (12) Sultan Kuar v Gulzan Lal, 2 A 290

^{(1879),} Turuvengada v Vythilinga, 6 M 418 (1888)

⁽¹³⁾ Karuthan v Subramanya, 9 M 203

⁽¹⁴⁾ Karımbhaı i Conservator of Forests, 1 Bom 222 (1879)

could one partner attach the interest of another partner in the partnership business in the hands of a Receiver,(1) and debts due from one partner to another were not attachable (2) The share of a partner in the partnership in the hands of another partner might be attached, which should be done by prohibitory order, (3) and even the sale in execution of the interest of one partner, in a partnership dissolved by the death of his father and co partner, was good, (1) but where the interest attached and sold was in a subsisting partnership, the purchaser could sue for dissolution and accounts (5) The effect of these decisions have been partially codified in O XXI r 19 interest of an undivided father, a member of a Mitakshara family, can be attache I and sold This is the law in Bengal, Madras, Allahabad and Bombay. But the purchaser merely acquires the right to compel a partition as against the other co sbarers of the judgment-debtor (6) Tho interest of a son, (7) and of any other member of the joint family, is in the same position, (8) even that of a grandson in the lifetime of his father and grandfather (9) And property in the hands of a son or other descendant which is hable under Hiudu law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed shall be deemed to be the property of the deceased (10) The equity of redemption in mortgaged property can be attached and sold in execution of a decree against the mortgagor (11) but not if the person applying for attachment and sale is also the mortgagee (12) Mortgaged property may he attached but cannot be sold without a suit by the mortgagee under sect. 67 of the Transfer of Property Act (13) Property is attachable oven though it cannot be brought to sile without suit (14) A tenant's bereditary and beneficial interest in property can be attached and sold,(15) but an interest in an occupancy tenure, which is not transferable by custom or usago, is not saleable in execution, save for rent under the Bengal Tenancy Act (16) A ludgment-dehtor has a saleable interest in land upon which be was permitted to erect a mud bouso and occupy it for forty years, without any reservation by the landlord that he could be ousted, but for which be paid rent (17) Tho right to get back from the donce certain lands reserved to the judgment debtor

⁽¹⁾ Abbot v Abbott, 5 B L R 382 (1870) (2) Dwarka Mohun t Luckhimom, 14 C

^{384 (1887)} (3) Thama Sing v Kalidas, 5 B L R 386

⁽¹⁸⁷⁰⁾

⁽⁴⁾ Parvatbeesam : Bapanna, 13 M 147

⁽⁵⁾ Jagat Chunder v Iswar Chunder, 20 C. 693 (1893), see also In re Bambridge, 8 C. D 218, p 224

⁽⁶⁾ Deendyal v Jugdeep, 3 C 198 (1877 P C.), 41 A. 217

⁽⁷⁾ Jallidar t Ram Lall 4 C 723 (1878) (8) Rai Varain v Nowrut, 4 C 509 (1879) (9) Jogul Lishore v Shib Sahal, 5 A. 430

⁽¹⁸⁸³⁾ (10) Sect 53

⁽¹¹⁾ Saraswati t Nabadwip, 5 B L R. 380 (1870), Gossam Munraj t Deen Dyal, 20

W R 20 (1873) (12) Kamini t Ramlochan, 5 B L R 450 (1870), Bhuggobutty v Shamachurn, 1 C

^{337 (1876)} (13) Chundra Nath t Burroda, 22 C 813

⁽¹⁸⁹⁵⁾

⁽¹⁴⁾ Gours Sunkur v Aubhoyessury, 1 C W N, xhv (1896)

⁽¹⁵⁾ Ramessur Nath t Golamee Sahoo, 24

W R 309 (1875)

⁽¹⁶⁾ Bhiram v Gopi Kanth, 24 C. 355 (1897), 1 C W N 396, Durga Charan t. Kah Prasanna, 26 C. 727 (1899), 3 C W. N

⁽¹⁷⁾ Doorga Pershad t Brindabun, 15 W R 274 (1871), 7 B L R 159

by a deed of gift is transferable and therefore attachable, (1) so also is a life interest in trust funds in the hands of the Official Trustee, (2) but property in the hands of the Receiver of the High Court cannot be proceeded against by attachment in the Mofussil, but the High Court can order attachment and direct the Receiver to sell the interest of the judgment debter (3) Property of which the judgment debtor had been in possession for 12 years after he had filed his petition in insolvency was attachable, his title being by adverso possession (4) Property the subject of an oxisting suit is attachable, but in such a case the Court would order the sale at the fittest and most proper time (5) A decree also is attachable (6) The right to manage a rehgious trust is not attachable (7) nor the right to officiate at worship or to receive the offerings at a shrine, (8) nor can voluntary offerings which may in future be made to an idol, as being entirely uncertain (9) So also a thing utterly incapable of being estimated or valued, such as "all the claims of Ramnath against all his debtors,' cannot be attached (10) The doors and window shutters of a pucca building cannot be separately attached, as they formed part of immoveable property (11) Trees growing on the sir land of an ex proprietary tenant under sect 7 of Act XII of 1881 (N W P Rent Act) cannot be sold in execution (12) A portion of a bhag cannot be attached under a mortgage decree against that portion, the mortgage of a portion of a bhag being unlawful (13) Future rents and profits of a ghatwali tenure cannot as such be attached (14)

"Immoveable "-In Oudh no ancestral property can be seld in execution without permission of the Chief Commissioner, and no self acquired property without permission of the Commissionei (15)

"The profits of which "-Attachment of property includes attachment of the profits thereof but if after attachment the original owner be allowed to lemain in pessession of the property, the profits from the moment they found their way into the owner a packet cease to be liable for the judgment debtor (16)

"A disposing power"-A letter containing notes in the Post Office can be attached as in the disposing power of the addressee, (17) but not money

⁽¹⁾ Rudra Perkash v Krishna Mohuu, 14 C 241 (1886)

⁽²⁾ Abdul Lateel v Doutre, 12 M 250

⁽¹⁸⁸⁹⁾ (3) Hem Chunder v Prankristo, 1 C 403

⁽¹⁸⁷⁶⁾ (4) Surja Hossem v Monohur Das, 24 C

^{244 (1896)}

⁽⁵⁾ Ram Chunder t Nund Lall, 19 W R 132 (1873)

⁽⁶⁾ Golam Mahomed v Indro Chand, 15 W R 34 (1871), 7 B L R 318

^{(7)\}Ayancheri t Acholathil, 5 M 89 (1882) (8) Durga Bibi v Chanchal Ram, 4 A 81

⁽¹⁸⁸¹⁾ (9) Srl Srt Isvar t Peary Churn Dey, 6

C W N 728 (1902), 29 C 470

⁽¹⁰⁾ Fuffuzzool v Rughoonath, 14 M 1 A

^{40,} p 51 (1871), 7 B L R 186 (11) Peru Bepari v Ronou Maifarash, 11 C

^{164 (1885)}

⁽¹²⁾ Jugal v Deoki Nandan, 9 A 88

⁽¹³⁾ Narbheram : Collector of Broach, 22

B 737 (1897)

⁽¹⁴⁾ Udoy Kumanı 1 Han Ram, 28 C 483

⁽¹⁹⁰¹⁾

⁽¹⁵⁾ Act XVIII of 1876, a 20 (16) Ram Coomarv Gobind Nath, 12 W P

^{391 (1863)}

⁽¹⁷⁾ Narasımhulu t Adıapıa, 13 M 212 (18J0)

payable to an auctioneer by purchasers of goods entrusted to him for auction, except as to such amount as the judgment debtor had a disposing power exercisable for his own henefit (1) When the judgment debtor contracted to lay down a payement for B and deposited materials for the work and received an advance from B equal to the value, the materials vested in B and could not be attached (2) The corpus of trust property in the hands of a trustee cannot he attached, (3) uor an insolvent's property vested in the Official Assignce, (4) nor laud assigned to a widow hy way of maintenance with a proviso against abenation; (5) nor land assigned in her of maintenance without any mention of such proviso, as coming under clause (n) of this section; (6) hut land let under a lease prohibiting the lessee assigning the property either by sale or gift is attachable , (7) so is a donee's share in property given with a proviso that it should be held impartible (8) Joint family property is attachable in execution of a decree against the father, so as to affect the interests of his sons, unless the sons can show that their shares were not auswer able for the decree (9) In Madras, the attachment of the interest of au undivided member in a joint property in execution of a decree on a personal debt against him, constitutes a valid charge in favour of the judgment creditor and prevents the accrual to the other coparceners of the right of survivorship on the death of the judgment debter pending attachment (10) The income of property subject to a restraint upon anticipation accruing duo after the date of the judgment cannot be attached in execution of a decree against the separate property of a married woman (11)

"Necessary wearing-apparel."-This was the effect of a Bombay High Court decision in 1872 (12) A mangalsutra or necklace worn he a married woman during the lifetime of her husband and never removed is exempt (13) (and see now amendment), so are the clothes, equipment and arms of a person subject to the Indian Marine Act, (14) so is the stridhan property of a Hudu wife when execution is sought of a deeree against her husband (15) Projects in tenants is not exempt from attachment (16)

"May, in the opinion of the Court, be necessary - Beasts used in agriculture are not privileged until the Court has declared them to be so (17)

- (1) Smith t Mahabad Bank, 23 1 13, (1901).
- (2) S C C Reference, 2 N W P H C R 337 (1870)
- (3) Moheeput : 1 thars Chowdhry, 19 W 18 226 (1873), Bishen Chand : Nadir Hossem, 15 C. 323 (1897 P C), 151 1 1
- (4) Denobundhoo e Shushi Mohun 12 (
- L R 60 (1882)
- (5) Devaler Man 10 B 342 (1886). (6) Gulab : Ban idhar, 15 A 371 (18 3) me also Ban sihar e Gulab, 16 1. 443 (15 4)
- (7) Gelak Nath r Mathura, 20 C 3
- (') Narayanan e Kamian, 7 M. 31. (1551).
 - (9) Ja abhair bhukandas, 11 R 37(12-6).

- (10) Badur Krishnu e Lakshmana 1 M
- 202 (1551) (11) Gudem e Venkateaa Mooded) 17 ULJ 363 (1907) lat postat when a
- Play of Insuran a is attachate see Shankar e Umahar 15 lein L. P. 329 3.
- (12) Cangaran + Larliu + Ri H + 2 2
- (15"2). (13) Appeter lates a sill of electrical states
- (III) Set VIV. 1155 A M (is) Takarara (is a lift (i)
- 122 (1571)
- He Da salmara t Hate h and 1" it R v6 (15"2".
 - (1") Inhara Dares tam
- (180) DC L 1 1

not a pension and is attachable, (1) similarly the grant of an annual sum made by Government as compensation for loss sustained by the grantee on account of improper resumption by Government of rent free lands (2). In England, superannuation allowance already accrued due to a retired police constable is attachable, (3) and pensions solely in respect of past services are hable to sequestration, though half pay, being to some extent for future services, is not (4). A zemindari granted (not revenue free) by Government as a reward for services rendered is not a pension (5). Pensions were exempted by Act XXIII of 1871. In clause (9) the words "military or civil" have been omitted as being of no value. The word "pensioners" of itself covers every class of pensioner

"Salary of any public officer"-Under sect 236 of Act VIII of 1859, salaries of Railway servants had to be actually due before they could be attached, (6) similarly the salary of a Telegraph Officer, (7) but now the unprivileged portion can be attached in advance (8) The Calcutta High Court has held that while the pay of an Indian Staff Corps officer, as being of a public officer, comes within the meaning of this section, that of an officer of the Regular Forces, not being of a public officer, does not, (9) and the Allahabad High Court has also held that an officer of the Regular forces is not a public officer and that his pay cannot be attached, (10) but in Madras it has been held that he is a public officer and his pay is attachable (11) Half the pay of persons subject to military law other than soldiers of the regular forces is liable to attach ment (12) An attachment upon the salary of a Railway servant ceases to be operative after he has filed his petition in Insolvency, and should be withdrawn on notice heing received of the making of the vesting order (13) For definition of "public officer ' see sect 2 (17) Under the Code of 1859, the whole of the salary of a peon in the service of a Mamlatdar under Government could be attached, if it had become due (14) The remuneration of a Watandar cannot be attached while in the hands of the Collector or other disbursing officer, but otherwise if in the hands of the watandar himself (15) A lhot is not a public officer and the percentage on collections received by him is not salary and is attachable (16) The salary of a private person cannot be attached until it becomes due and a debt

⁽I) Lachmi Narain v Makund Singh, 26

A 617 (1904)
(2) Jiban Krishna v Sripati Charan, 8 C

W N 665 (1904)

⁽³⁾ Booth v Trail, 12 Q B D 8 (1883)

⁽⁴⁾ Dent v Dent, L R 1 P & D 366 (1867), Willcock v Terrell, L R 3 Ex D 323 (1878)

⁽⁵⁾ Lachmi Narani v Makund Singh, 26 A 617 (1904), Amua Bibi v Najnum Nissa 31 A 382 (1909)

⁽⁶⁾ In matter of Hollick, 10 W R 447 (1868) 2 B L R 108

⁽⁷⁾ Hussen Bhamjee v Hicks, 18 W R 124 (1872)

⁽⁹⁾ Bhoyrub Chunder : Madhub Chunder,

⁶ C L R 19 (1880)

 ⁽⁹⁾ Calcutta Trades Association v Ryland
 24 C 102 (1896), Velchand v Bourchier, 37
 B 26 (1912), 14 Bom 777

⁽¹⁰⁾ Lecky v Bank of Upper Burms, 33 A 529 (1911)

⁽¹¹⁾ Watson v Lloyd 25 M 402 (1901)

¹¹⁾ Watson v Lloyd 25 M 402 (1901)

^{(12) 44 &}amp; 45 Vict c 58, s 151

⁽¹³⁾ In matter of Donoghue, 19 B 232 (1894)

⁽¹⁴⁾ Tejram v Kusalji, 7 B H C, A J

<sup>110 (1870)
(15)</sup> Canpatlal v Sampatram, 10 B H C

^{400 (1873)}

⁽¹⁶⁾ Ravji t Sayajirao, 13 W R 673

^{, (1889)}

custs (1) Tonnerly it was held that money given by Government to its servants, not only for past services but also us a retainer for future services, cannot be attached, and that the pay of a Government official was not attached (2)

"One molety of the salary,"—That under the Code of 1883 was half the salary or leave allowance actually payable (3) but under the present Code it refers only to salary or allowance equal to salary while on duty. In a recent case it has been held that a salary is "property" of an insolvent within the incuming of the Provincial Insolvency Act (seet 16, sub-sect 2, clause a), by which provision, read with this section, the amount of the appropriation of the income of a public officer for the benefit of his creditors has been fixed (4)

"Pay and allowances"—Nor is the pay or allowance of a person subject to the Indian Marine Act, below the position of a gazetted officer, hable to attachment (5)

"Wages of labourers and domestic servants."—Labourers are persons who carn their daily bread by personal, manual labour or in occupations which require little or no art, shill, or previous education. Their wages may depend on the amount they do (6) For what is included in domestic servant, see cases noted (7) In England the attachment by any Court of Record or inforior Court of the wages of any servant, labourer, or workman was abolished in 1870 (8)

"An expectancy of succession"—This includes the right of a roversioner to succeed on the death of a Hindu widow if he happen to survive her (9). Also the hie interest in the residue of the property of a testator ascertainable after full administration, (10) or a son's interest in his father's estate which was bequeathed to his mother for life, (11) or the life interest which a judgment debtor would be entitled to in an estate after the payment of certain charges, cannot be sold in execution (12). Where however a Mahomedan by deed granted property to his wife on condition that if she hid a child by him, the grant should be a perpetual molurium and if no child then a life molumium with remainder to the settlos it we sons the interest of one of such sons was attachable, (13) so is the interest of a person v he makes a gift of land to a Hindu widow for her maintenance such interest being a vested interest in the land (14)

⁽I) Ayyavayyar : Virasami, 21 W 393 (1897), Devi Prasad v Lewis 31 A 304 (1990)

⁽²⁾ Rajbulluh Scal : Mackenzie, Fulton 82 (1859)

⁽³⁾ Beard t Egerton, 6 B 179 (1883)

⁽⁴⁾ Ram Chandra Neogi v Syama Churan, 19 C L J 83 (1913)

⁽⁵⁾ Act XIV of 1887 s 81

⁽⁶⁾ Jechand : Aba 5 B 132 (1880)

⁽⁷⁾ Dh. nno Scrang : Upen Iro Mohun, 8 B L R 244 (18"2) See also Bhim Das :

Upendro Mohun, 9 B L. R 1p 4 [1872]
(8) The Wages Attachment Abolition Act,
33 & 34 Vict. c. 20

⁽⁹⁾ Koraj koonwar i Komol Koonwar, 6 W R 34 (1866) Ram Chunder i Dhurmo, 15 W R, F B 17 (1871), 7 B L R 341, see also Gour Surun i Ram Surun, 8 W R

<sup>2.3 (1867)
(10)</sup> Beebee Tokas t Davod Mullick, 4

W R 87 (1865)
(11) Inandibat t Rajaram 22 B 551

⁽¹⁸⁹⁷⁾ (12) Beebee Tokarı Beglar 6 Moo I 1

⁵lu (1856), 7 B. L. R. 244 (13) Umes Chunder t. Zahur Fatima, 17 I. 3. 201 (1889)

⁽¹⁴⁾ Kachwain : Sarup Chand, 10 A 4:2 (1885)

"Other merely contingent or possible right or interest"-As for instance, a vendor's light in the balance of purchase money payable on the execution of a conveyance, so long as the conveyance is not executed, (1) or a claim under a future award of arhitration, (2) the interest in pre empted property of a successful pre emptor who has not yet paid the pre emptive piece fixed hy his decree, (3) hut property the subject of an existing suit is attachable, though the Court would order its sale at the fittest and most proper time (4) A vested remainder in a house is attachable (5) A mere right to receive profits which are not yet due is not attachable (6)

"Right to future maintenance"-The mere right to future maintenance cannot he attached (7) This includes land assigned to a widow in heu of maintenance (8) but without any right of alienation (9) The right of a Hiudu widow to reside in her husband a family house is a purely personal right and eannot he attached under this section (10) Formerly, the Court might order the party chargeable with the payment of an instalment of maintenance about to become due not to pay and the judgment dehtor not to receive so that it be paid either to such person as the Court should direct or that an arrangement under sect 268 (O XXI r 16) for its collection or administration he made (11) This however has not been the practice since (12) An annuity given by will, not by any right of maintenanco but out of the testator's bounty, is attach ablo. (13) so are arrears of maintenance already accrued due (14) The incomo of a fund in hands of trustees payable half yearly to the judgment dehtor cannot be attached after the last payment has been made and before the next is payable there being no debt "owing or accruing" (15) but under the Code of 1859, an annuity charged on an estate could be attached at the instance of the percon by whom it was then payable he having inherited the estate from the grantor of the annuity, (16) so can maintenance charged by deed on the grantor's property and recoverable by suit on non payment, (17) also in execution of a mortgago decree, the right to receive an allowance assigned to the judgment dehter's deceased wife in heu of her sharo of landed property and inherited by him from

(1908)

⁽¹⁾ Ahmad ud dun v Majlis Par 3 A 12

⁽²⁾ Tuffuzzool 1 Rughoonath 14 Moo

I A 10 (1871), 7 B L R 186

⁽³⁾ Gorakh Singh v Sidh Gopal 3 A I J 183 (1906), 28 A 383

⁽⁴⁾ Ram Chun ler : Nun 1 Tall 19 W R 132 (1873)

⁽r) Annuji t Chan lrabat 17 B 503

⁽⁶⁾ Sher Singh v Sri Ram, 30 A 240

⁽⁷⁾ Duloon : Sungun 7 W R 311 (1867), Ixisl en 2.3 W Moness ir 1

⁽⁸⁾ Gulab Kuar t Bansulhar 15 1 371 (1893)

^() Manis imi + Arimani 1º M L. I 7

⁽¹⁰⁾ Salakshi z Lakshmaya, 31 M 500

⁽¹¹⁾ Monessur v Beer Protap 15 W R 189 (1871) B L R 646 Chukowno v Numoo dah 24 W R 5 (18"5)

⁽¹²⁾ Hardas v Baro la Kishore 27 C 3S

^{(1899) 4} C W N 8-

⁽¹³⁾ Gopal I al Seal v Marsden 10 C W >

^{1102 (1906)} (14) Lasheeshuree v Greesh Chunder, 6

W R 61 (1866), Hoymobutty v Koroona, 8 W R 41 (1867) (15) Webb v Stenton 11 Q B D 518

⁽¹⁸⁸³⁾

⁽¹⁶⁾ Dheraj Walitub v Dhun Coomarce, 17 W R 251 (1871)

⁽¹⁷⁾ Enact How n : \njecboonessa, 11

W R 138 (1869)

her in I mort, she I by him (I). So where a person ells property in consideration of a payment down and an amounts, the amounts as attachable even where the purchaser is the Court of Wards (2) But the encoure of morests belowing to a married woman, subject to a jestraint on anticipation account due after the date of a decree against such married woman's separate property under sect 8 of the Married Woman's Property Act, 15 not bable to attachment in execution of such decree (3) An hereditary grant of an allowance of paddy out of the nelverous of certain land is not a right to future maintenance (1) It has been recently held that this exemption of a right to future maintenance does not affect 1 roperty or an interest in property which was granted for maintenance, and that thus the crop standing on land allotted to a widow for main tenance can be attached (5). A distinction has been recognized between a right to receive money for purpo es of muntenance properly so called and a right or interest in a toperty which forms a fund or estate out of which an annuity is baid to the range -the former is a personal right and malienable, the latter can be thenated. Where an appellant conveyed his estate to his son, but retuned a right to receive from him a certain sum annually it was held that this was not a right to future in untenance, but a valuable interest in the property (6)

61. The Local Government, with the previous sanction of Partial exemption of the Governor General in Courseil, may, by agricultural produce general or special order published in the lecal official Gazette, declare that such portion of agricultural produce, or of any class of agricultural produce, as may appear to the Local Government to be necessary for the purpose of providing until the next harvest for the due cultivation of the land and for the support of the judgment-debtor and his family shall, in the case of all agriculturists or of any class of agriculturists, be exempted from liability to attachment or sale in execution of a decree

Attachment of agricultural produce "-Sec O XXI rr 11 and 45 These provisions, which in the original Bill affected "growing crops" only, have been extended to all "agricultural produce ' While it has been considered that the Court should attach such produce, which will now in all cases bo treated as moveable property by taking it into its possession and custody at the same time the procedure relating to the "actual seizure of moveables cannot be applied, in its entirety to a growing crop, and having regard to the special provisions contained in O XXI r 74 with respect to the sale of cultural produce considerable objection has been deemed to exist against allowing such produce to be ordinarily removed on attachment. In these

⁽¹⁾ Salamat Hossein v Luckhi Ram 10 C 521 (1884)

⁽²⁾ Har Shankar : Baijnath Das, 23 A 164 (1901)

⁽³⁾ Goudom: Venkatess 30 VI 378 (1907)

⁽⁴⁾ Vardyanatha : Lggia, 30 V 279(1907), s c, 17 M L J 373

⁽⁵⁾ Gobinda v Mcenatchi 22 M L J 204 (1911)

⁽⁶⁾ Padmanund : Rama Proshad, 16 C I J 351 (1912), 17 C W N 662, Asad v Haidar, 38 C 13 (1910), 12 C L. J 130 , Tara Sundari t Saroda, 12 C L J 146 (1910)

erreumstances, in order to give proper effect to O XXI r 74, it has been enacted by O XXI r 44, post, that attachment should be effected by affixing a notice in situ on the field or threshing-floor and also, by way of greater caution, on the judgment debtor's ordinary place of residence. To meet special cases of persona, not residing in the actual neighbourhood, under the special orders of the Court, affixtuo on the louise in which the judgment debtor carries on business, or personally works for gain, or in which he is known to have last resided or personally worked for gain, is allowed

"Agricultural produce."-The original proposal was to authorize the Court only to declare a fixed proportion of any growing crop to be exempted, hut it was universally considered impracticable. It has been considered to be clear that the amount to be exempted, not merely of growing crops but of all "agricultural product,' must depend upon the circumstances of each particular case As a matter of working practice, the original proposal to treat a proportion of growing crops as free from hability to attachment and sale could not be convemently carried into effect. It was therefore proposed that the growing crop, as such, should be attached, but that the proportion to be exempted should, when ascertained, he "released from attachment," and should be face from hability to sale Subsequently, however, the words "he exempted from hability to attachment or sale in execution of a decree" wore substituted for the words "bo released from attachment and shall be free from liability to sale in execution of a decree," in order, it was said, to make it clear that the exemption extends to produce which has been hypothe-The provisions of O XXI r. 44 authorizing the judgment debtor to attend to his crop while under attachment, were thought sufficient to provent any hardship arising from this procedure. The proviso, originally appended to the draft of this section by way of greater caution, saving any first charge which by any law is vested in the Government for the recovery of revenue, or in a landholder for the recovery of rent, has been omitted, because it was considered that the special and local enactments, by which the first charges in favour of ient of revenue are cleated are sufficiently safeguarded by sect 3, ante

62. (1) No person executing any process under this serure of property in Code directing or authorizing seizure of moveable property shall enter any dwelling-house after sunset and before sunnse.

(2) No outer door of a dwelling house shall be broken open unless such duelling-house is in the occupancy of the judgment-debtor and he refuses or in any way prevents access thereto, but when the person executing any such process has duly gained access to any dwelling-house, he may break open the door of any room in which he has reason to believe any such property to be.

(3) Where a noon in a duelling-house is in the actual occupancy of a woman who, according to the customs of the country, does not appear in public, the person executing the

process shall give notice to such uoman that she is at liberty to withdraw; and, after allowing reasonable time for her to withdraw and giving her reasonable facility for withdrawing, he may enter such room for the purpose of seizing the property, using at the same time every precaution, consistent with these provisions, to prevent its clandestine removal.

Seizure of property—This section, save for the first sentence, come sponds with sect 271 of Act X of 1877, with the exception that in that Act the words "house or other building" were used instead of "duelling house" the first sentence was added by Act XIV of 1882 According to that Act, sub clause (2) commenced with the words "or shall break open any outer door of a duelling house" instead of the words in itabes while sub clause (3) commenced "Procuded that if the room be" instead of "Where a room in a duelling-house," while the word "break" in sub clause (2) has been substituted for "unfacen and". The second sub clause has been amended to bring it into how with sect 55, ande

"Any outer door "—It was formerly held that he might break open the door of a shop, (1) or remove locks on the door of a goldh and put on other locks for safe ustedy (2) Under the earher Codes, which prohibited the breaking open of any outer door of a dwelling house it was held the privilege extended to anout house or other office annexed to the dwelling house but not to a building such as a storehouse or barn standing at a distance and not forming parcel of it (3) By the amendment introduced by the present Code the judgment debtors refusal to grant access to his dwelling house justifies the person executing to break open any outer door, that is, any outer door of the dwelling house of the defendant but not of the house of a stranger

"Break open"—A person executing a process for attachment of move ables having gained access to the house was held to have a right to remove the lock from the door of a room in which he had reasonable ground for supposing moveable property was lodged (4). A bainfi who breaks the doors of a third person in execution of a decree against the judgment debtor is a trespasser if it turns out that the person or goods of the debtor are not in the house [5].

"Actual occupancy of a woman —This provision does not apply to the arrest of a purdanasheen woman (6)

As to arrest see sects 55 and 132

63. (1) Where property not in the custody of any Count is

recently attached in several Courts than one, the Court which shall receive or realize such property, and shall

⁽I) Damodar Parsotam v Ishvar Jetha 3 Bom. 89 (1878)

⁽³⁾ Sowdamineo v Juggessur Soor 13 W R 339 (1870), 5 B 1 R App 27

⁽³⁾ Bankuvart Venudas, SB H C 1 J 1.7(1871)

⁽⁴⁾ Kondasawmy : An hnasawmy, 5 M H C 189 (1870)

⁽⁵⁾ Reg t Gazi 7 B II C (r (a 83 (1870)

⁽⁶⁾ Kadumbineo e koylashkaminee, 7 C

^{13 (1651)}

under the decree gets a good title against all persons whom the suit binds (1). The quantity and nature of right and interest existing in the debtor at the time of attachment and advertisement for sale, alone pass by the sale (2). But in inortgage suits the right, title, and interest, both of mortgage and the mortgage, is passed: the right of the mortgagor as it stood when he made the mortgage, and not merely as it stood at the time of the Court sale (3). An auction-purchaser is bound to satisfy himself of the value, quantity, and title of the thing sold, just as much as if he were purchasing the same under private contract (4). Where the sale is not vitated by fraud, the only extent to which the purchaser can claim ichef is that indicated by sect 315 (now r. 93, post) (5). In the case of Registrar's sales in the High Court, compensation is also allowable for circus and misstatements as to particulars of description of the property (6).

Ordinarily the purchaser buys merely the right, title, and interest of the judgment debtor with all its defects (7) This was expressly stated in the certificate under the Code of 1859 and is, in fact, ordinarily the case now, though what could have been and what was sold is a mixed question of law and fact to be determined on the whole of the proceedings and the facts of the particular case (8) As stated ordinarily, the personal right, title, and interest of the debter passes. In certain cases the estate passes as in the case of a Hindu widow where the proceeding, though nominally against the heiress, is really against lier as representing the estate, (9) or in those cases under the rent law where a sale passes not morely the right, title, and interest of the tenant but the tenure itself (10) Leaving out of consideration this latter ease, which is subject to certain statutory rules, the purchaser simply gets what the debtor, whether

13, 15 (1869), Sundara Gopalan v Venkata Varda Ayyangar, 17 M 228 (1893), Hura Lal: Karun un massa, 2 A 780, 783 (1880), Ram Naran Singh v Mahtab Bibi, 2 A 828, 829 (1880), Krahnapa v Panchapa, 6 B H C R 258 (1899), Dhondu v Ramij, 4 B H C R, A C J 114 (1867) [as to fraud, how over, see at p 116], as to express warranty, see Mahomed Phalat Navroji Balahhai, 10 B 211 (1885), as to decree holder knowing of charge selling without mention of it, see Douglas t Collector of Benares, 5 M. I A 271 (1857)

- Umes Chunder Sircar v Zahur I atima,
 C 164, 178 (1890)
- (2) Ram Onoogroho Singh t Mt Montorun, 6 W R 223 (1866), Sundara Gopalan t Venkata Varada, 17 M. 228, 230 (1893), Soojant Ali Khan t Khoosal Chand, 5 S D, N W 501 (1861)
- (3) Shuk Abdulla : Hap Abdulla, 5 B 8 (1880)
 - (1) Jummal Mr : Jerbhee Lall Dass, 12

- W R 41 (1869), Sheikh Mahomed Basirulla v Sheikh Midulla 4 B L R App 35 (1870) (5) Sundara Gopalan v Venkuta Varada
- Ayyangar, 17 W 228 (1893)

 (6) Ram Naran t Dwarka Nath Khettry,
 4 C W N 13 (1899), Kishori Mohan Rai t
 kali Charan Ghosh, 1 C W N 106
 (1896)
- (7) Dorab Ally t Abdul Azoz 5 I A
 125, s c, 3 C 80b (1878), Decadyal t
 Jugdeep Naram, 3 C 198, 1 I A 247
 (1877), Ram Fubul Singh v Bissesswar
 Lall Sahoo, 2 I A 131 (1875), Ali Saheb
 v Kaji Ahmed, 16 B 107 (1811), Sundara
 Goyalan t Venkata Varada Ayyangar, 17
 M, 228 (1893)
- (8) Barhamdoo : Ram Naram 19 C L J 182 (1913)
- (9) Sco Vayne s Hindu Law, 7th ed., s. 642 (10) Doolar Chand: Lalla Chabeel, 6 I. A 17 (1878), Niladri 2 Bichitranand, 37 C 823 (1910)

personally or representatively, had, (1) subject to the same bars, such as limita tion,(2) and to all equities,(3) hens, mortgages and leases, (4) pain rent, (5) revenue and cesses (6) His hability may be affected by estoppel. So if a person sells property covered by a mortgage, but, suppressing that fact, obtains the value of the property unencumbered, be may be estopped from saying that the purchaser took it subject to the hen (7)

Though the possession of an auction purchaser differs in some points (8) from that of a purchaser at a private sale, yet a purchaser at an ordinary execution sale is in privity with, and the representative in interest of, the judgment debtor so as to be affected by the latter's admissions affecting the property taken and estoppels binding ou him (9) An auction purchaser's conduct in buying is only some evidence of an admission of title in the judgment-debtor, which he can explain or rebut He is not estopped from setting up a title independent of that based on his purchase (10)

The purchaser takes the property subject to that which affects what he has purchased, viz, the property Mere personal obligations not affecting the land do not piss So it has been held that without notice he is not bound

(1) Nic as to crops Matoola Sirdar i Dwarka Nath Mottry 4 C 814 (1879), Land Mortgago Bank i Vishnu Govind Patanlar, 2 B 070 (1878), Ramalinga v Sarmappa 13 V. 15 (1880), unsovered trees Faqueer Sonar i khuderun 2 A H C R 251 (1870), buildings Abu Husan i Ramzan Ali, 4 i 381 (1822), Mookta Sundurce i Muthoora Nath, 22 W R 209 (1874), Right to easements Hurce Madhub i Hem Chunder, 22 W R 522 (1874)

(2) Shridhur Vinayak i Balaji 6 B H C R 220 (1803) Rajah Enayet Hosseni i Gurdharo Lall, 12 M I N 366 11 W R P C 29 (1809), per contra the purchaser can add his possession to that of the debtor for the jurpose of pleading limitation Abalich i Kaji Minad I 6 B 197 (1804)

(3) Ram Lochun t Ram Naram, 1 C L R 236 (1877), Yeshwant Babsrav t Govind Shankar, 10 B 453 455 (1886)

(4) Oojagur Roye - Ram Khelawan 10 W R. 351 (1800), Mathura Dase Nahar 7 B H C. R. 21, at p. 20 (1870), Balai Bapon i Satiya Chamabhar, 6 B 1.03 (1802), Sobbag Chand e Bhai Chand, 6 B 103 (1852), Sobbag Chand e Bhai Chand, 6 B 103 (1852), Naban Lait Ganga Rame, 13 V. 25 (1850), Land Mortgage Bank e Ram Ruttun Neego. 21 W R. 270 (1874), Shyama Churn Lobut tasharjee e baanda Chandra Das. 3 C W N. 3.3 (1800), the rights of a judgment creditor to be enfurthle must be reserved to three must be notice. Dockee Chand e

Oomda Begum 21 W L 263 (187), Aursing Naram t Raghoobur, 10 C 609, 011

(1884) (5) Obhoy Chuuder: Milambur Monkerjee 1864, W. R. 72, Sheikh Khoda Bukh t

Digumbureo Dassee, W. R. 1804 207 (6) Chatraput Singh : Grindra Chunder Roy, 6 C. 389 (1880)

(7) Douglas t Collector of Iknars, 5 M, 1 A, 271 (1857), Dullab Surkar r krushua Bakshi, 3 B L. R. 407 (1850). McLonnell r, Mayer, 2 A H C R 31 (1872), Balloo Singla t Asshan Lall 3 A 113 (1857). Buowars Das t Wuhamnal Washiat 1 A 4,00 (1887) and as to decree 1 Hern t decision, his own charges see not 1 203 walf, and as to Pstoppel gen rails Vidit to 1 ki donce bet arrib to taken to the arribe to the decree with the state of the s

(s) See e.g. Unknown Dales e. bair Madhub Chuckerlutt, i.e., "(15"), where the doctrim that a just) study [1] perty of which h. in it the owner is bound to make good the sade out of a subsequent interest, was held to a just possible acquired interest, was held to a just possible to an autton sale. In law to how atomatically held to have been added to the same held to be a fine to held to be a fine held to

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(R) Parist Harrist Patie 3 262 dans 7 CH (R. 182 (1977) by an agreement to mortgage made by the judgment debtor (I) And similarly where A, as surety of B for a loan, sued C an auction purchaser of the lights and interests of B in a bond pledged for the debt, on the ground that he had purchased the hond with all its liabilities, and amongst them was the amount due to A hy B it was held that C, not being a party to the loan transaction, was not hable (2) He is not affected by a custom hinding purchasers by private sale only, (3) nor by a notice of fereclosure issued, after his purchase, on his predecessor (4)

If hetween the time of attachment and time of sale the interest of the judgment dehtor is accelerated or enlarged the increment passes (5) Under the last Code it was held that the purchaser's title to mesne profit or possession did not accrue till confirmation (6) The title now accrues under this section at the date of sale. Where there has been attachment of decree after sale, hut hefore confirmation the attaching creditor has a right to have the sale confirmed (7)

As to whether a purchaser is a party or representative within the meaning of sect 244 (now 47) (8) see latter section and notes thereto

Suit against pur chaser not maintainable on ground of purchase being on behalf of plaintiff

(1) No suit shall be maintained against any person claiming title under a purchase certified by the Court in such manner as may be prescribed on the ground that the purchase was made on behalf of the plaintiff or on behalf of some

one through whom the plaintiff claims

(2) Nothing in this section shall bar a suit to obtain a declanation that the name of any purchaser certified as aforesaid was inserted in the certificate fraudulently or without the consent of the real purchaser, or interfere with the right of a third person to proceed against that property, though ostensibly sold to the certified purchaser, on the ground that it is liable to satisfy a claim of such third person against the real owner

Suit against certified purchaser -It has been said that the object of the section was to prevent judgment debtors from purchasing their own pro perty at auction in the name of another (9) The first sub clause of this section

⁽¹⁾ Bhuggobutty Dassee t Shama Churn Bose, 1 C 337 (1876)

⁽²⁾ Shibjoy Thakur v Popose S D 22

lug 1860, p 144

⁽³⁾ Kalian Das & Bhagerathi & A 47 (1883)

⁽⁴⁾ Mohun Lali Sookool : Goluck Chunder Dutt, 10 M. I. A 1 (1803), Rameshwar : Juggut Mewar 11 C 341 (1885) /ahoor

⁽⁵⁾ Umes Chunder Sirear : latima, 18 C 161, 17 L 1 _01 (1889)

⁽⁶⁾ Amer Kazum v Darbari Mai 24 A

^{475 (1902)} (7) Boharia Rudravi Kour v Ram Pertap

Mull, 11 G W N 158 (1906) (8) Yishvanath Charlu Naik & Subraya

Shivana Shetti, 15 B 290 (1890)

⁽⁹⁾ Aishan Lal v Garuruddhwaja Prasad Singh, 21 A., at p 213 (1899) See Achhaibar Dube : Taj asl Dube 23 A 507, 559 (1907), Lhuda Baksh v Aziz Alam, 27 1 194 (1904) . Harl Singh v Shor Singh, 31 A 282 (1909)

corresponds with a portion of sect 260 of Act VIII of 1850. The wording there was "the purchase was made on behalf of another person, not the certified purchaser, though by agreement the name of the certified purchaser was used." This was altered to "the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims." By sect 317 of Act X of 1877, and the same Act added the second sub clause except the portions in it thes. The present Code in the first sub-clause has substituted "any person claiming title under a purchase certified by the Court." (which will include both the purchaser and his successor in title) for "the certified purchaser," and added the words in italies in the second sub-clause. It had been previously held that the expression "certified purchaser," included the person standing in the shoes of the Court purchaser.

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⁽¹⁾ Hari Govind t Ramchandra 31 B 61 (1900), Manji v Hoorbai 35 B 342 347 (1911) (the mortgagee of the certified pur chaser)

⁽²⁾ kazal Rahaman t Imam Ah II C 583 (1887), Brijo Beharec t Shah Wajed, 11 W R 3"2 (1870)

W R 3"2 (1870)
(3) Ambica v Gopal Buksh, 1 C L J 550
(1901)

⁽⁴⁾ Sheetanath v Madhub Narain, I W B 329 (1864)

⁽b) Bykunt Chunder v Khema Moyco Debia 9 W R 360 (1868)

⁽⁶⁾ Ramakrishnappa v Adinarayana, 8 M 511 (188.)

⁽⁷⁾ Hazı İrjun v Larutulla, 9 C I R ... 15

⁽⁶⁾ Kanizak i Montlur Dis 12 C _001 (1885) Subhat Hira Lai 21 C 610 (1891) and Sohun I alli Laia Gyi O N W P II C R 295 (1871) holling the sut w uld he, and Rama Kurup = Sirdevi, 10 M _00 (1894), and Kiban I al t Carurudilwaji, _1 Y _08 (1894), kolding the opposity yiew

⁽⁹⁾ Mr. Joshi v Muhamma I Ibrahm, 10 B H C A J J11 (1873), Kumara t Srini vasa, 11 M 213 (1887)

⁽¹⁰⁾ Achaibar Dubo : Taj ant Duke, - J A 557 (1307)

by an agreement to mortgage made by the judgment debtor (1) And similarly where A, as surety of B for a loan, sued C, an auction purchaser of the rights and interests of B in a bond pledged for the debt, on the ground that he had purchased the bond with all its liabilities, and amongst them was the amount due to A by B it was held that C, not being a party to the loan transaction, was not liable (2) He is not affected by a custom binding purchasers by private sale only, (3) nor by a notice of foreclosure issued, after his purchase, on his predecessor (4)

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⁽⁵⁾ Umes Chunder Sircar : /ahe Latima, 18 C 101, 17 L L 201 (1889)

⁽⁶⁾ Amir Kazim v Darbari Mal, 24 A

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⁽⁸⁾ Vishvanath Charlu Naik v Subraya Shivapa Shetti, 15 B 290 (1890)

⁽⁹⁾ Kishan Lol i Garuruddiwaja Prasad Singh, 21 A., at p. 243 (1899). See Achhaibar Dubo: Tapasi Dubo, 23 A. 557, 559 (1907). Ahuda Baksh v. Aziz Alam, 27 \ 104 (1904). Harl Sin, h. v. Sher Singh, 31 \ 1. 282 (1909).

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PART II.

SLC. 66

"No suit"-That is a suit between a benamcedar and the beneficial owner, (4) even where the heneficial owner has had previous possession (5) But where the ecrtified purchaser does not defend the suit against the heneficial owner, the corresponding section in the earlier Code did not har the suit and the defence could not he taken hy a defendant who was not the certified purchaser, (6) so where the purchaser admitted the plaintiff s claim and stated he had made over the ecrtificate to him (7) Prior to the amendments made hy the present Code there was a diversity of opinion as to whether this section included a suit hy a judgment ereditor against the certified purchaser who purchased benames for the judgment-debtor, the Calcutta High Court holding that such a suit was not harred by this section as it stood prior to this Code, and the Madras High Court and the Allahabad High Court holding otherwise, (8) and the additions now made to the second sub clause affirm the latter decisions The section does not preclude a suit by A, whose property was sold against the certified purchaser, who after the sale agreed to sell the property to A (9) Nor does it preclude a suit by one toint holder of a decree on a mortgage for

⁽¹⁾ Hari Govind v Ramchandra 31 B 61 (1906), Manji v Hoorbai, 35 B 342, 347 (1911) (the mortgageo of the certified pur

⁽²⁾ Fazal Rahaman : Imam Ali, 14 C 583 (1887), Brijo Beharce : Shah Wajed, 14 W R 372 (1870)

⁽³⁾ Ambica v Gopal Buksh, 1 C L J 550 (1901)

⁽⁴⁾ Sheetanath v Madhub Naram, I W R 329 (1864)

⁽⁵⁾ Bykunt Chunder v Khema Moyee Debia, 9 W R 360 (1868)

⁽⁶⁾ Ramakrishnappa t Adinarayana, S M. 511 (1880)

⁽⁷⁾ Hazı Arjun v Farutulla, 9 C L R 295 .

⁽⁸⁾ Kamzak : Vonohur Das 12 C 204 (1885) Subha v Hara Lal, 21 C 519 (1894), and Sohun Lall : Lala Gya, 6 N W P H. C R 265 (1874) holding the suit would be, and Rama Kurup v Sridevi, 16 M 290 (1892), and Kishan Lal : Garuruddhwaja, 21 4 238 (1899), holding the opposite view

⁽⁹⁾ Wor Joshi t Muhammad Ibrahim, 10 B H C A J 344 (1873), Lumara v Srint tasa, 11 M. 213 (1887)

⁽¹⁰⁾ Achaibar Dube v Tapasi Dube, 29 A 557 (1907)

"Against"-Where A in execution sold the share of B, the judgmentdehtor, in a house, and it was purchased by C, the son of B, and subsequently A attached and sold the same share in execution, D being the purchaser, a suit for possession by D against C was dismissed as heing within this section (1) This section is not intended to interfere with benamee transactions generally, and a suit by a certified purchaser who purchased benamee, for the property purchased against the real purchaser who was honestly in possession failed, (2) and in such a suit the real owner might sat up a defence that the certified purchaser was the apparent owner only and a mero trustee (3) So where the assignee of the certified purchaser sued for possession against a third party, the latter could show that the sale was benamee and in fraud of creditors, (4) and a person in possession of the purchased property, when sued for rents and profits by the certified purchaser, may set up a defence that the certified purchaser was only a benameedar on his behalf, (5) even a decree holder may sue the certified purchases for the properties purchased by him benamee for the judgment debtor and of which the judgment debtor was in possession (6) When the certified purchaser purchased benamee for A and then conveyed the property to B for A's henefit the property could, it was held, be taken in execution by the creditors of A, but it was doubted whether they could have done so if it had not been conveyed to B, (7) but that doubt

purchaser The section does not preclude a person purchasing benames from setting up his title against a person who is not the certified purchaser and does not claim through him (3)

"Purchase certified"—the section does not bar a suit where the cottfied purchaser does not defend the suit against the beneficial owner, and tho defence cannot be taken by a defendant who is not the certified purchaser, (9) likowise where this certified purchaser admits the plaintiffs claim and states he has made over the certificate to him, (10) nor under the wording of the previous Codes did it preclude a suit against a person who derived his title from the certified purchaser (11) such as his mortgagee or his heir (12) The Bombay High Court dissented from this, holding that "certified purchaser"

⁽¹⁾ Khuda Bakhsh t Aziz Alam, 27 A 194 (1904)

⁽²⁾ Bahuns Koonwur t Lalla Buhorec, 18 W R 157 (1872 P C), 14 Moo L A 496

¹⁰ B L R 159
(3) Lokhee Naram t Kallypuddo 23 W R
358 (P C 1875), L R 2 1 L 151, Uut

^{358 (}P C 1875), L R 21 1.151, Mut hoora τ Raickomul, 21 W R 278 (1875), Jan Muhammad ν Hahi Baksh 1 1 230 (1876)

⁽⁴⁾ Mirza Khyrat : Mirza Syfoollah, 8 W R. 130 (1867) (5) Ghazi ud din t Bishan Dial, 27 A 143

^{(1.05), 2} L L J 111 (6) Sohun Lall : Lala Gya Lerehad, 0

N W P H C R 265 (1871)

⁽⁷⁾ Satapa v Karbasapa 7 B H (A J 21 (18:0)

⁽⁸⁾ Shorosutty Dasseo : Gopecsoondery, 1 Marsh, 423 (1863)

⁽⁹⁾ Ramakrishnappa v Admariyana, 5 V 511 (1885)

⁽¹⁰⁾ Hazı Arjun a karutulla 9 C L R 235

⁽¹¹⁾ Pheyyavelan : Kochin 21 M. 7

 ^{(1897),} Sibta Kunwar ι Bhagoli, 21 Λ 196
 (1899)
 (12) Dukhada ι Sremonto 2ο C 950 (1899)

⁽¹²⁾ Dukhadat Sremonto 26 C 950 (1839) 3 C W N 657, Nokori i Sarup Chun ler, 5 C W N 311 (1900)

in Teather proceedings on the some of the teat place aser, (1) and the annular city on he duties belong the first book on by the procest Cole aforms on last

Where the preparty was becalf if a manufactuate sum by a pleader of a party in the name of his mainter, a section not to epicaler and his modurer was manufactable (a). It is accordant to the discount for the participation is made by a number of a partition has a fact of the latest to the latest apartition by a Herbard and our latest and the latest control of the plantific father with fact of the act of 1 to a number of the latest control of the latest contro

"On the ground"- I become the a part thegal, but if the lecoure he ute of the just an a the che ground, the suit is not raintainable, but otherwise of the plate a reach mendion that he purchase is become and gives by to we are at wanter ha he'd at referre the projects to the real owner, (6) or ulive be use the er of the real owner, a namor, and never worth 1) at git to the trajects 1 and seed (1) or m' ere be not chased while ther aid arest of, and with recreased the real ource, who was ille nonlinequary multipage in cone, in of the conserve and acreed to execute a conveyance and gave the real owner the cale certificate and delivery order (a) himilarly witte the thantiff, having been in ten exact for cleven years sued on a title so paired by long to season against the assignce of the certified purchaser.(9) or as anot the certified that later, on the amount of an existing possession which had continued eight years from the time of the sale, the smi was maintamable, (10) but the suit must not be lased on the ground of the nurchase being behance, but on some other unlerendent ground. So a suit by the alleged real owner who was in procession against the certified purchaser for a declaration of title is not maintainable (11) nor where the certified purchaser acknowlisted that he had tought a portion of the property on behalf of the plaintiff & predecessor in title unless that acknowledgment were accompanied by some act which would operate as a valid transfer of the property. So where the certified purch ser by a consent decree admitted that his mother was entitled to a share of his father's estate and then purchased in execution of a decree.

- (I) Harl v Hamchandra, 21 B 61, 8 Bem. L. R. 873 (1966)
- (2) Aghore Nath v. Ram Churn, 22 C 805 (18 6)
- (3) Bodh Sing e Guneschunder, 19 W. R. 350 (1573), 12 B. L. H. P. C. 317. The Jrinciple of this case, which related to a joint Mindu family, was lield applicable to partnership. Adhlathar Dibbe c Fapase Dibbe, 29 A 577, 501 (1907).
- (4) Natesa Ayyar + Venkatramayyan, 6 M 135 (1882) - Minakabi + Kahanarama, 20 M 149 (1897)
- (5) Bunda Ali : Bibeo Ameerun, 25 W. H. 493 (1896) ; Minell : Hahi Bakheli, 5 A.

478 (1543)

- (6) Momappa + Surappa 11 M 211, 1ara Soondarce + Oojul Monce 11 W. R. 111
- (1870)
 (7) Sankumu (Narayanan, 17 M 282
- 1893) (8) Kumlalinga + Ampatra, 18 M 436
- (1895) (9) Karamuddiu - Niaiuut, 10 C 199 (1891)
- (10) Sasti Chura : Annopuma, 23 C (40) (1696)
- (11) Beshan Deal : Chaze ud den, 23 \ 175 (1901)

property mortgaged to his father, the representatives of the mother were debarred under this section from recovering a portion of the property (1)

"Purchase was made on behalf of the plaintiff"-The former worde were "on behalf of any other person" This does not include an agreement by the purchaser to sell after his purchase, (2) but it does include a case where the defendant as the alleged agent of the decreeholders, who had been refused permission to purchase, purchased the property, and the decree holders, hearing of the purchase, supplied the purchase money, ratified the purchase, and agreed to take a conveyance after confirmation of the sale (3) It does not apply to a case of a purchase made by a member of a joint Hindu family with joint funds , (4) nor in a suit for partition by a Hindu son, to a purchase by an outsider benamce for his, the plaintiff's, father with family funds (5) Nor does it apply to a case where the person setting up the benamee character of the purchaser does not claim under the certified purchaser or the alleged real purchaser. So the purchaser in execution of a mortgage decree may prove that the certified nurchaser of the interest of one of the mort gagors in a salo in execution made subject to the mortgage was benamee for the mortgagor, (6) and a decree holder may sue the certified purchaser for sale of the properties purchased by him benamce for the judgment debtor and of which the judgment debter is in possession (7) But the Allahahad High Court held otherwise, holding that the question of who the plaintiff might be was not material, and that all suits against the certified purchaser were within the section (8) The eccond sub clause now provides an exception to this decision It certainly cover suits by the beneficial owner or the successors in title of the beneficial owner (9) This section contemplates a suit by a person claiming to be the beneficial owner against the certified purchaser and not a suit where a third party asserts the certified purebaser is not the beneficial owner, in a suit by the certified purchaser, (10) nor a suit by a creditor of the real owner (11)

"Fraudulently or without the consent," etc -Of course where a case comes under the second paragraph the claim cannot be barred by the first (12) The earlier portion of the second sub clause of this section embodies

⁽¹⁾ Durga t Bhagwan Das, 23 A 34

⁽²⁾ Kumara v Srimvasa 11 M. 213 (1887) , Mor Joshi v Muhammad Ibrahim, 10 B H C, A J 344 (1873)

⁽³⁾ Ganga Baksh : Rudar Singh, 22 A

^{434 (1900)} (1) Bodh Sing : Guneschunder, 19 W R

^{356 (1873), 12} B L R P C 317 (5) Natesa Ayyar t Venkatramayyan, 6

M 135 (1882) , Minakshi i Kahanarama, 20 M 319 (1897) (6) Kollantavida i Tiruvalil, 20 M 302

⁽¹⁸⁹⁷⁾

⁽⁷⁾ Sohun Lall t Lala Gya Pershad, 6

N W P H C R 205 (1874)

⁽⁸⁾ Kishan Lal v Caruruddhwaia, 21 A 238 (1899)

⁽⁹⁾ Ram Narain v Mohaman, 26 A. 82 (1903), Sarju v Bindeshri 33 1 382 (1911),

Naram Dey v Durga Dei, 35 A 138, 142 (1913)

⁽¹⁰⁾ Uncovenanted Service Bank : Abdul Bars, 18 A 461 (1896), Delhi and London Bank : Chaudhr: Partab 21 1 49 (1898)

⁽¹¹⁾ Kanizak : Monohur Das 12 C 20

⁽¹²⁾ Ambika Prosad : Gopal Baksh, I

C. L J 550 (1901)

PART II. SEC 68

the decision in the cases noted (1) Unless fraud or absence of consent is shown, the suit is not maintainable against the certified purchaser (2)

67. The Local Government, with the previous sanction ! of the Governor General in Council, may, by Local Power for Government to notification in the local official Gazette, make make rules as to sales of land rnles for any local area imposing conditions in execution of decrees in respect of the sale of any class of interests for payment of money. in land in execution of decrees for the payment of money, where such interests are so uncertain or undetermined as, in the opinion of the Local Government, to make it impossible to fix then value.

Sales of land -This section was introduced into the Code by sect 327 of Act X of 1877 The present section only re-enacts the first clause of that section, omitting the words "from time to time" after "may" and adding the words in italics The remainder of the section formerly ran, "and if, when this Code comes into operation in any local

execution of decrees are in force therein,

in force, or may, from time to time, with the sanction of the doct Council, modify the same All rules so made or continued, and all such modifica-

tions of the same, shall be published in the local official Gazette, and shall thereupon have the force of law " Rules have been published as regards Bengal, (3) Punjub, (1) and

Coorg (5)

DELEGATION TO COLLECTOR OF POWER TO EXECUTE DECRLIS AGAINST IMMOVEABLE PROPERTY.

The Local Government may, with the previous 68. sanction of the Governor General in Council, declare, by notification in the local official prescribe Gazette, that in any local area the execution rules for transferring to Collector execution of decrees in eases in which a Court has certain decrees. ordered any immoveable property to be sold, or the execution of any particular kind of such decrees, or the execution of decrees ordering the sale of any particular kind of, or interest in, immoveable property, shall be transferred to the Collector

⁽¹⁾ Sheetanath : Madhub Varam, I W II 329 (1864) . Koosumba t Iufuzzul, IJW II 85 (1870), Shama Keshee t Raj Klaser 11 W R 179 (1870) . Gosmish . Influered t B L. R. App. 32 (1570) (2) Ganga Paksh r Bular birgh . 1 4

⁽f) C. Latta territe, July 10th 1878, 11 1. 1 735 and latt 7th 1880 11 1 p. 1 (1) I will half ton No an h dated ti t h l 157?

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^{434 (1900)}

- 69. The provisions set forth in the Third Schedule shall Provisions of Third apply to all cases in which the execution of a schedule to apply decree has been transferred under the last preceding section.
 - 70 (1) The Local Government may make rules consistent Rules of procedure with the aforesaid provisions—
 - (a) for the transmission of the decree from the Court to the Collector, and for regulating the procedure of the Collector and his subordinates in executing the same, and for retransmitting the decree from the Collector to the Court,
 - (b) conferring upon the Collector or any gazetted subordinate of the Collector all or any of the powers which the Court might exercise in the execution of the decree if the execution thereof had not been transferred to
 - the Collector,

 (c) providing for orders made by the Collector or any gazetted subordinate of the Collector, or orders made on appeal with respect to such orders, being subject to appeal to, and revision by, superior revenue authorities as nearly as may be as the orders made by the Court, or orders made on appeal with respect to such orders, would be subject to appeal to, and revision by, appellate or revisional Courts under this Code or other law for the time being in force if the decree bad not been transferred to the Collector
- (2) A power conferred by rules made under sub section (1)

 Jurisdation of cval upon the Collector or any gazetted subordicularity and the collector or upon any appellate or revisional authority, shall not be exercisable by the Court of by any Court in exercise of any appellate or revisional jurisdation which it has with respect to decrees or orders of the Court
- 71 In executing a decree transferred to the Collector under collector deemed to be section 68 the Collector and his subordinates shall be deemed to be acting judicially

Transfer to Collector—This subject is dealt with in these sections in the next section, and in the third schedule to which the other sections of the list Code have been transferred. The provisions except in one particular are with some verbal alterations the same as those of the last Code. The exception referred to is the necessity for the record of reasons for in adjournment under cluss. It of the chedule. The words "and resend or clust.

any such declarate n which appeared in section 320 of the last Code, have been omitted. The last three paragraphs of sect 320 of the last Code were added to that Code by sect 30 of Act VII of 1888 (I). The section provides that the Local Government may frame rules for regulating the procedure of the Collector and his subordinates in excention of decrees transferred to him (2). The general provisions of the Code do not apply to proceedings held by the Collector for the execution of such decrees (3). When a manfaction has been made, the Cruf Court's cease to have jurisdiction to execute the decree (4). It has been held that a Judge can recall a case sent to the Collector (5). But this has also apparently been held to be not so, (6) or at least doubtful (7).

The Collector may cancel his own order of postponement of the sale (8) is to power to set aside sale (3) application for payment by instalments under Dekhan Agnediturist. Rehef Act in case of decree previously transferred to Collector, (10) disabilities of proprietor of property taken under management by the Collector (11) see cases sated. The power of the local Government to make rules providing for claims not passed into decrees, (12) reference to the District Court (13). In Allababad it is held that where the Chall Court is satisfied that the land which is ordered to be sold or any portion of it is ancestral, it should transfer the decree for execution to the Collector so far as regards ancestral land only (11).

Preclusion of Civil Court's powers—It was proposed to insert the lollowing clause which, however, has not been done—"The Court shall be precluded from exercising any jurisdiction with respect to any matter relating to the exercise by the Collector or any granted subordinate of it c Collector of all or any of

- (1) In Ganpat Ram Voti Ram v Isaac Adamji 15 B 322 (1890) the rules were held not to be retrospective and see Kalian Moti Bestibles, 17 B 282 (1893)
- Pathubbar 17 B 289 (1892)
 (2) The following notifications prescribing rules are cited in O Kinealy Bombay, Bomlay fact of Local Rules and Orders, ed. 1896, vol 1, pp 398-300, Barmal Burmah Rules Manual, ed. 1897, pp 110-111, Vi V P A Oudh, N W P and Oudh List of Local Rules and Orders ed. 1898, pp 111-112, Central Provinces, Central Provinces, Central Provinces, Central Provinces, Central Provinces, Central Provinces of Special (3) Sheo Prasad: Vinhammal Moham Khan 25 A 167 (1992) [in which s 310a of the last Code was held to have no applies iton], Madha Prasad: Hansa Kuar, 5 A 114 (1883) [s 241] Keshab Deo t Radhe Prawad 11 A. 94 (1885) [s 311] Nathu Wal I Jachim Naran 9 A 47 (1886) Ragho

- · Hanmati, 15 Bom. L R 389 (1913) , 37
- B 488
 (4) Sukhdeo Rai i Sheo Gulam, 4 A 382
 (1882) and as to ancestral property there
 dealt with see Ram Prasad i Radha Prasad,
 7 A 402 (1885)
 - (5) Mahadan Karandikar t Hari Chikne,
 - 7 B 332 (1883)
 (6) See Wadho Prasad : Hansa Kuar. 5 A.
- 143 (1883)
 (7) Hargovan Parbhudas v Hıra Hanbhai,
- 8 B 301 (1884) (8) Wazir Ali t Janki Prasad 28 A 671
- (1906) (9) Peta : Chumlal 31 B 207, 216 (1906)
- (10) Mancherp : Thakordas 31 R 120 (1906) (11) Ganga Prasad : Ganga Balsh 29 A.
- 415 (1907)
 (12) Regulation Collector : Ramasami
- (12) Regulation Collector : Ramasanii Chetti, 28 M 489 (1905)
 - (13) Ibid
- (14) Ahmad Ghaus Khan : Lalta Prasad, -8 A 631 (1906)

the powers vested in him in regard to any decree transferred under this section, but it shall not be precluded from exercising, in any other matter, all or any of the powers vested in it, notwithstanding that the decree has been so transferred; and a cuil suit shall be with respect to any act done or order made by the Collector or by any gazetted subordinate of the Collector with respect to which, if it had been done or made by the Court acting within its jurisdiction, a civil suit would have been main tainable. The proper principle has been enacted to be that the Civil Court should be precluded from interfering in any matter declared to be within the Collector's jurisdiction,(1) but that it is not divested of its ordinary jurisdiction in regard to any other matters merely because the decree has been transferred to the Collector, and that a Civil suit will he (2) with respect to every order of the Collector upon which, if it had been made by the Court acting within its nursdiction an action could have been maintained

Where court may authorize collector to starsfaction of the land or share, the Court may authorize sale of land and the Collector represents to the Court that the public sale of the land or share is objectionable and that satisfaction of the decree may be made within a reasonable period by a temporary altenation of the land or share, the Court may authorize the Collector to provide for such satisfaction in the manner recommended by him instead of proceeding to a sale of the land or share.

(2) In every such case the provisions of sections 69 to 71 and of any rules made in pursuance thereof shall apply so far as they are applicable

Stay of Sale —This section corresponds with sect 244 of Act VIII of 1859. The section then commenced "When in any district where land, paying receive to Government is ordinarily sold by the Collector as provided in sect 248, the property attached consists" etc., and proceeded to provide that "the Court may authorize the Collector, on security for the amount of the decree or for the value of such land or share being given to make provision for such satisfaction" etc. The present wording of first sub clause was adopted by sect 326 of Act X of 1871, which also eliminated the proviso as to security. The second sub clause was added by sect 326 of Act XIV of 1882. The present Code has omitted the

437 (1

20 A 379 (1898)

⁽¹⁾ As to the Collector s duties and powers in execution, see Lallu Trikan v Bhayla Methia, 11 B 478 (1887), Ganpatram Motiram t Isaac Adami, 15 B 322 (1890), Sunder Das v Mansa Ram, 7 \ 407 (1884), Tapesri Lal v Dovikssendan Rai, 16 A, 1 (1893), Onkan Singh t Mohan Kuar, 20 A 428 (1898), Mathura Das t Panha Lal, 19 B 216 (1891), Muhammad Said Khan v Panjag Sahu 16 \ 1. 228 (1891), Nathu Mal

t Lachmi Narain 9 A 43 (1886), Ragho t Hanmiti 37 B 488 (1913) 15 Bom L R 38J (2)

dan P. ..., of last Code was considere I] Sunder Dast Mansa Ram, supra Mathura Dast Panha Lal supra, Bando Bibi t halka, 9 \ 602 (1887), Sham Behari Lal t Rup hishore,

words "or management" after the words "temporary alienation" and substituted "69 to 71 and of any rules made in pursuance thereof" for "320, paragraph 2, to 395 (both inclusive) "

The section does not apply to a decree which directs the sale of land or of a share of land in nursuance of a contract specifically affecting the same (1)

"The Court "-That is, the Court executing the decree That Court should deal with it itself and not in deference to the opinion of a superior Judge who forwards the recommendation of the Collector (2)

"May authorize "-It is discretionary with the Court to authorize or not as it thinks fit. It is bound to hear any objections made by the decree holder and any evidence adduced by him (3). The only indulgence the Court may sanction is to allow the judgment debtor a reasonable period for satisfying the decree by the temporary alienation of his property. A Court executing a decree cannot vary its terms by authorizing payment by instalments,(4) while the property remains in the possession of the judgment debter (5)

For form of authorization see the First Schedule, App E . Form No 25

"Collector to provide "-- Execution cannot be taken out against property under the management of the Collector As against such property, the time it is under such management shall be excluded in reckoning limitation (6) Posses sion cannot be given to an alience of the judgment debtor of property under such management but damages can be awarded (7)

DISTRIBUTION OF ASSETS.

Proceeds of executionsale to be rateably dis tributed among decree-

holders

(1) Where assets are held by a Court and more [s persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of

money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realization, shall he rateably distributed among all such persons

Provided as follows ---

(a) where any property is sold subject to a mortgage or charge, the mortgagee or meumbraneer shall not he entitled to share in any surplus arising from such sale (b) where any property hable to be sold in execution of a

decree is subject to a mortgage or charge, the Court

(5) Kashoo Lall t Ameer Jan 2 N W P

H. C. R. 347 (18"0). Muttra Pershad v

⁽¹⁾ Uhagwand Prasad r Shee Sahas, 2 1. 876 (1550)

⁽²⁾ Muttra Pershad : Ram Pershad, 6 \ W P H C. R 33 (1873)

⁽³⁾ Huro Provad r hali Provad 9 C. 2 N

⁽⁴⁾ Nico Pershad : Niva Ram, 2 N W

Ram Pershad 6 \ W P H C. R. 39 (15"3). (e) Gurdhar Das r Har Shankar, 20 1 (") "th Jaidayal r Pam Sabar, 17 C 432

P H C R. 53 (1670).

^{3~3 (1~3&}gt;). (155/)

may, with the consent of the mortgagee or incumbrancer, order that the property be sold free from the mortgage or charge, giving to the mortgagee or incumbrancer the same interest in the proceeds of the sale as he had in the property sold;

(c) where any immoveable property is sold in execution of a decree ordering its sale for the discharge of an incumbrance thereon, the proceeds of sale shall be applied—

first, in defraying the expenses of the sale; secondly, in discharging the amount due under the decree,

thridly, in discharging the amount due unaer the decree, thridly, in discharging the interest and principal momes due on subsequent incumbrances (if any), and,

fourthly, rateably among the holders of decrees for the payment of money against the judgment-debtor, who have, prior to the sale of the property, applied to the Court which passed the decree ordering such sale for execution of such decrees, and have not obtained satisfaction thereof

(2) Where all or any of the assets hable to be rateably distributed under this section are paid to a person not entitled to receive the sainc, any person so entitled may sue such person to

compel him to refund the assets

(3) Nothing in this section affects any right of the Government.

Object and scope of section —Under the Code of 1859 the attach ing creditor was entitled to be first paid out of the proceeds of the property attached and sold, the surplus only being hable to distribution rateably among subsequent attaching creditors—whereas under the Code of 1877 and subsequent and present Code it is immaterial at whose instance an attachment is placed—Every creditor who has applied is entitled to a rateable distribution (1). The present provisions prevent multiplicity of procedure and that scramble by several judgment debtors which used to take place under the Code of 1859 (2). The section draws a sharp distinction between attachment and realization (3) and an attaching creditor is entitled to no priority over other creditors until a sale at his instance has actually taken place.

The object of the section is two fold I ristly to prevent unnecessary multiplicity of execution proceedings, to obviate in a case where there are many decree holders, such competent to execute his decree by attachment and sale of a particular property the necessity of each and every one separately attaching and separately selling that property. The other object is to secure

⁽¹⁾ Vishvanath Maheshwar v Virchand Panachvan 6 B 16 (1881), Peaced i Ma Ian Gopal v C W N 577, 580 (1902) The principle was all hel to case not falling within the C de in Sewdut Roy t Sree Cant Mat 3 37 C v 33 (1904) Butloo

Khan t Comani Singh, 13 C W N 1177

⁽²⁾ Bithal Das : Yand Lishore, 23 A 101, 113 (1900)

⁽³⁾ Soobul Chunder Law t Russick Lal Witter 15 C 202 _09 (1888)

an equitable administration of the property hyplacing all the decree bolders upon the same footing, and making the property rateably divisible among them, instead of allowing one to exclude all the others merely because he happened to be the first who had attached and sold the property (1)

Where it was contended on behalf of the defendants that, having regard to the terms of the action an attachment made by the plaintiffs enured for the benefit of all persons holding decrees for money against the same judgmentdehtor, and who complied with the conditions specified in the section, that is to say that, provided the defendants have, prior to the realization, applied to the Court holding the assets for execution of decrees for money against the same judgment-debtor and have not obtained satisfaction thereof, they are, without any attachment of their own, entitled to share rateably with the plain tills in the proceeds of the sale, although in the absence of the plaintiff's attachment they could not themselves, after the judgment-debtor's death, have enforced execution against this property, it was held that argument was to some extent favoured by the language of the section, but that it was clear that this section cannot he read absolutely literally. If it were to ha read literally, without any regard to its real object and policy, the result would be an abourdity, because the only condition expressly required is the existence of an application for execution made by the persons specified prior to the realization area spective altogether of the result of such applications or any objections to them however well founded. But it has been held, and it could not otherwise have been held, that an application for execution which was hurred by limitation (2) or an application which had for any reason been rejected, would not entitle the applicant to share rateably under this section, and therefore it is clear that one must give the section a common sensa construction, and see what sort of casa it really provides for The object of the section being as above stated, it was not desired to enlarge in any way the rights of decree holders or place at their disposal the proceeds of property which they could not have themselves attached It entitled to share in the proceeds only those decree holders who could have themselves attached and sold the property. It was not meant to enable a decree holder to indirectly get the benefits of an execution which he could not humself have enforced directly Where the decree holders are persons who could have themselves attached and sold the property then hut only then an attach ment and sale hy one is correctly described as enuring for the benefit of all (3)

The provisions of this section show that when property is sold in execution of a decree it is sold not only for the realization of the money due under that particular decree, but of all other decrees the holders of which have applied for execution. When property is sold in execution of a decree it cannot be sold again at the instance of another decree holder, who may have attached it hefore the attachment effected by the decree holder, under whose decree it is actually sold and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground (4).

Bithal Das t Nand Kishore 23 A. 106
 (1900) Fink v Maharaj Bahadur Singh,
 C W N 27, 30 (1899)

⁽²⁾ See Radha Gobind : Shaikh Oozeer 13 W R 219 (1871)

⁽³⁾ Bithal Das v Nand Lishore 23 A. 106 109-111 (1900)

Kartic Nath Roy t Surbanand Shaha
 C 317 (1885)

Where in execution of two decrees certain properties were sold the proceeds of which were sufficient to pay the decree holders, it was held that on the interposition of a creditor who had not attached, the Court was right in selling a third property, as such creditor would be entitled to share, with the result that it could not be said that by the amount realized from the first sale the decrees under execution were satisfied (1)

The section relates to procedure only, and was intended to afford an additional facility to decree holders. It does not interfere with substantive rights or the maintenance of a suit, notwith etanding that a party may not have availed himself of its facilities (2) On the other band, failure to participate does not prevent a creditor executing his decree in any other manner (3)

Permission granted to a judgment creditor to set off the amount of the purchase money payable for the property sold against the debt due to him under his decree must be taken to be granted subject to the provisions of this section (4)

The formor section was bold not to apply to a deposit made by a judgment-

debtor under sect 310A (now O XXI r 89) of the former Code (5)

An order under this section affects only interests existing at the time
The insolvency of the debtor introduces a new state of things from the date
of the insolvency, but as regards sums accrued due prior to the date of the
insolvency, the order under this section creates righte which are not affected
by the insolvency (6)

It has been held that sect 490 (now O XXXVIII 1 12) did not empower a decree holder to share in the distribution of property he has attached, and that though there was no necessity to re attach, an application for execution was importative (7)

Under the last Code it was in some cases held that when a person desired to share in the assets realized by a salo in execution he must apply to the Court in which those assets were for the execution of his decree and if it were found that property attached by an inferior Court was already or thereafter hecamo subject to an attachment issued from a superior Court the decree holder must have applied to transfer his application to the higher Court if he desired to secure the application of the attached property and its proceeds to the satisfaction of his decree (8) A contrary view was adopted in the Calcutta High Court, where it was held that the section did not require the transfer of the decree to the Court where the process of realization took place as a condition

⁽¹⁾ Mohunt Megh Lall & Shih Pershad, 7

C 34 (1881)
(2) Janoky Bullubh Sen v Johnraddin

Mahomed, 10 C 567, 576 (1881)
(3) Syad Nadir Hossem v Thovildarinee,

⁽³⁾ Syad Nadir Hossein v Thoyildarines 19 W R 255 (1873)

⁽⁴⁾ Madden t Chappani, 11 M. 356 (1887), and cases there cited, dist in Sree Krishna Chandook Chand, 32 M. 334 (1998)

⁽⁵⁾ Roshun Lall t Ram Lall Mullick, 30 C _62 (1903), s c, 7 C W N 341, Biharr Lall Paul v Gopal Lall Scal, 1 C W N 695 (15,7)

⁽⁶⁾ Howatson : Durrant 27 C 351 (1900) ,

s c, 4 C W N 610 Insolvency after attachment has no effect see Viraraghava t Parasumara, 15 M, 372 (1891)

⁽⁷⁾ Pattanji Shapurji t Jordan 12 B 100 (1833), but seo Bhu_owan Chunder Kurtiratna v Chandra Mala Gupta 23 C 773, 777 (1992)

⁽⁸⁾ Muttalagırı Nayak ı Muttayyar, 6 M 357 (1863) . Raghubar Dyal v Banko Lal, 22 A 182, 185 (1900) [Decree of Rosenuc Court] Numbaji Tubiram v Vadia Venkati, 16 B 683, 680 (1802) Andanaya ı Binmrao

precedent to an application under sect 285 (now 63) of the former Code (1) And

amount

to an attachment, (3) but if a debt was attached no equitable assignment of it was valid against another creditor who subsequently obtained an order under this section (1). An application does not therefore operate as a substantive attachment, and will lapse, as formerly was the case, when the original attachment terminates.

It is not loss provided either that an application for distribution cannot

decree-bolder, or that notice of such an application having been made must of uccessity be given to the other decree holders (5). After an order for distribution has been made, and before the funds have been actually distributed, it is open to one of the decree holders to maintain a suit for a declaration that the decree of a next decree-holder is collimate, and that he is not entitled to share in the sale proceeds (6)

Assets held—That is available for distribution in execution of a decree. The words of the last Code were assets "realized by sale or otheruse in execution of a decree". Assets meant the proceeds of the sale of the property sold in execution (7). Moneys paid into Court by sale or otherwise were assets from the moment of their payment into Court (8). "Realized" meant that property had been converted into or obtained in cash, or some other form available for immediate distribution. There is nothing in the word itself which required that the process should take place as the result of any ulternor proceeding in the course of execution (9). Assets were realized when the whole of the proceeds were paid into Court (10). But the word "realized was however followed by words which showed that the realization must have

Annajı, 19 B 539, 543 (1894) İn Jaynarayan Meghraj v İsmail Karamslı, 20 B 377 (1895), it was held there was a transfer, acc Krishna Shankar v Chandra Shankar, 5 B 198 (1889), Dattatraya v Rahmulla, 15 B 450 (1893), Himalaya Bank v Huert, 3 A 710 (1891) [as to this case and S C C, see Bhagvan v Balu, 8 B 230 (1883), Malhar v Nars, 0, B 174 (1884), Krishna v Mansaram, 18 B 40 (1893), Kelu t Vikrishna, 15 M. 315 (1891)]

- (1) Har Bhagat Das v Anandaram Marwarı, 2 C W N 126 (1897), Clark v Alexander, 21 C 200 (1893)
- (2) Arimuthu v Vyapuripandaram, 35 M.
 588 (1911)
- (3) Ganga Dass v Kuthali, 7 A 702 (1885), Durga Charau Rai Chowdry v Monmohina Dasi, 15 C. 771 (1888)
- (4) Sorabji Edulji i Govind Ramji, 16 B 91 (1891), but of Jetha Bhima i Lady

- Janbar, 37 B 138 (1912)
- (6) Chunni Lal v Jugal Kishore, 27 A 132
- (6) Trailakya Nath Adhya v Pulin Behari Basal, 3 C. L. J. 385 (1904)
- (7) Ramanathan Chettiar v Subramania Sastrial, 26 M. 179, 181 (1902)
- (8) Valvanath Vlaheshvar v Virchand Panachand, 9B 16 (1881), Srinusas Ayyan gar v Scotharamayyar, 19 M. 72, 74 (1895), that is when the Property became available for distribution Sew Bar Bogla v Shib Chunder Sen, 13 C 223 (1889), Verrayya v Annamala Chetty, 31 M. 502 (1008)
- (9) Manilal Umedram v Nanabhai Manik Ial 28 B 264, 274 (1903)
- (10) Ramanathan Chettiar v Subramania Sastral, 26 M. 179 (1902), in which it was as a built that the words did not apply to the 25 per cent deposit Ref to Hafez Maho med v Damodar Pramanick, 18 C 212 at 211

taken place in a particular way, viz in execution (1) from the property of the judgment debtor, (2) the proceeds being "assets" even before the sale becomes absolute (3) Where therefore assets were realized but not in process of execution the section did not apply, as where moneys were paid by a judgment-debtor under arrest (4) or paid into Court (5) voluntarily, though no doubt under pressure of the decrees, or were realized by private sale of properties attached, the assets being realized under the section, not by the attachment but by the sale (6)

Although this section is wider than sect 295 of the last Code, yet the effect of sects 275 and 310x of the last Code (now represented by O XXI r 55 and O XXI r 89) remains unaltered, and therefore sums paid into Court for a particular purpose under O XXI r 55 are not assets under this section, (7) neither are sums paid into Court under O XXI r 89 (8)

The object of the provision should be to expedite and cheapen the execution of decrees against the same person by adjusting the claims of rival decrebolders without the necessity for separate proceedings. If, however, the property is not sufficient to satisfy all the claimants, the wording of the last Code as judicially interpreted, held out an inducement to the attaching creditors to settle out of Court with the judgment debtor at the expense of the other decree holders (9). The language of the section has been altered and widened by referring to assets held available for distribution rather than to assets "realized in execution." It is necessary of course that assets in order to be "held" must be realized. It is not however necessary now that the realization must have been in execution as that phrase was interpreted under the former. Code. It is sufficient that having here realized (and probably that will he held to be when the entire amount due from a purchaser bas been paid into Court) they are available for distribution in execution. The creditors

(1891), Armuthu v Vyapuripandaram, 25 M. 588 (1911), Maharaja of Burdwan v Apurba, 15 C W N 872 (1911), 14 C L J 50

- (1) Manulal Umedram v Nanahha Manuk ali, 28 B 264 274 (1903), Sew Ban Bogla v Shili Chunder Sen, 13 C 225 (1886) Bashen Chunder v Uonmohinee 8 W R 501 (1867) Fin realization was held to be by execution in Fink v Maharaj Baladur Singh, 4C W N 27, 26C 272 (equitable execution by appointment of receiver], Sorahu Edalu t Govind Ramij, 16 B 91 (1891) [delat tatached and paid into hands of Sheriil]
- (2) Purshotam Das v Mahanant Suraj bharthi, 6 B 538 (1882), Gopaldai v Chunni Lal, 8 A 67 (1885) (3) Vishi anath Maheshwar v Virchand
- Pana Chand, 6 B 16 (1881) (4) Purshotam Das t Mahanant Suraj
- hharthi, 6 B 588 (1882)
 (5) Gopaldarv Chunm Lall, 8 A 67 (1885),
 w Bux Bogla t Shib Chunder Sen, 13 C.

Sreenath Roy, 21 C 809 (1894), Vibredha priya Tirthasami i Yusuf Sahib, 28 M 380 (1905) (6) Vibredhapriya v Yusuf Sahib, supro-

22. (1886), Prosonnomovec Dasses t

- (6) Thredhaprija v Yusuf Salnb, svpre, and the section does not apply where the judgment debtor has paid money out of Court to one of the decree holders who had taken steps to execute the decree and who then intimated to the Court that his claim had been satisfied Govri Dutt : Amarchand C L. J. 49 (1911)
- (7) Sorahi Coovari & Kala Raghunath, 36 B 156 (1911)
- (8) Harai Saha v Faizlur Rahman, 40 C 619 (1913)
- (9) See Purshotam Das v Mahanant Suraj bharthu, 0 B 588, at p 500 (1882) ['The arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper with the dohter behind the back, and independently of other creditors who may have applied for execution"]

must apply before (I) the assets have become so available to the Court holding

"Court"—Section 285 (now 63) of the last Code contained the words
"which shall receive or realize such property" (3) A transferee may apply for
execution to the Court which passed the decree (even though the latter may
have been transferred for execution (4)), and the Court executing the decree
was held to have no jurisdiction upon the application of the transferee who
had not so applied (5) A decree was passed by the Subordinate Judge, and in
execution of that decree a sale of certain property was held and conducted by
the Nazir of the District Judge, held that in reference to that sale the District
Judge had no jurisdiction to pass any order under the provisions of this section (6)

Decree for money — Every decree (7) other than a decree for the enforcement of a mortgage (8) is, to the extent to which money is payable thereunder, a decree for the payment of money, notwithstanding that the amount of money so payable has not yet heen ascertained, (9) or that relief of another kind his bration of a money claim.

a deeree for the payment

of money, and a decree directing the payment of mones by any person dose not ecase to be a decree for the payment of mones in so fir as that person is concerned, merely because it directs as against another person the realization of a money claim from mortgage property (12). The Madras High Court has more recently held that a decree directing the sale of mortgaged properties in default of payment of money is a decree for money whether there is a threetion to pay personally or not, and whether the temedy against the property is it husted or not (13). The section refers to bond file decree holders and the Court

- (1) See Tiruchettambala Chetter Schan yangar, 4 M 383 (1881)
- (2) See Krishnashankar i Chan Ira Shan kar, 5 B 198 (1880)
 - (3) See Bhugwan Chunder Kustratus e Chundra Mala (cupta 216 777 (1982), s.e., 1 (a la J 97
 - (4) Ban Nath Gornka : H Breat 1 (* L. J 317 (1.05)
 - (5) Jameshwar Prasad r Thakur Prasad 25 L 447 (1'8)3)
 - (ii) Nobo Kish we Dasa : Protap Chunder Bautree, 1 C. L. R. 534 (1878)
 - (7) See Hart e Tara Press in: Muklerger, 11 U. 718 (1885). A maraghara by sargar a 11 U. 718 (1885). A maraghara by sargar a 12 U. 718 (1885). A judg ment under a 80 of the liss livert Act as an not decree Tare Blay, and as Hergisan & B. 511 (1884). As to the light reportant attitued decoardiguigate middle programs of the decree, see Union I kan Daar Vallas 13 B. 171 (1888), data in Lalliants (Manager, Court of Ward, 14 C. L. 9 L. 9 of 44 (1911).
- (6) Jagat Narain Ral r Dhundhey Rai 5 \$ 566 (1802), but a mortgage may wave his lien and proceed unlive that action Fulker Buksh : Chuttertharee Chowley, 14 W R 299 (1870), as also where the obtains a decrewithout declaratin of tien. Radhakart Riy v Wurra's Ulafat 24 W R is 30 (1873)
- (9) Viraranhava Ayyannar r Virada Ayyannar 5 M 123 (1882) [dictre for meane pronts] 1 ut see Mt 1 inda Bibs. v Jal'a Gojeenath 21 W R 65 (1873).
- (10) Hart e Tara Presento Mukher,ce, espes loll kommach Kathere Pakter 2031 107-110 (150), dot in Lakharie Mana-ce, Court of Wards 14 C. L. J. (20, 611 (1911).
- (II) Fard Howleder's Arabov Landbor Roy, 25 C 500 (1937), cast Hart's Tara Process Malberge, II C 718 (1935), a c, 2 C W N 118.
- (12) It has and hands hack of Lauren satural versue hand, 13 t. 25 (1997).
- 113) Varia shoung e Samushiran, 20 V 473 (1 04.

taken place in a particular way, viz in execution (1) from the property of the judgment dehtor, (2) the proceeds being "assets" even before the sale hecomes absolute (3) Where therefore assets were realized but not in process of execution the section did not apply, as where moneys were paid hy a judgment-dehtor under airest (4) or paid into Court (5) voluntarily, though no doubt under pressure of the decices, or were realized by private sale of properties attached, the assets heing realized under the section, not by the attachment but by the sale (6)

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The object of the provision should be to expedite and cheapen the execution of decrees against the same person by adjusting the claims of rival decree-holders without the necessity for soparate proceedings. If, however, the property is not sufficient to satisfy all the claimants, the wording of the last Code as judicially interpreted, held out an inducement to the attaching cieditors to settle out of Court with the judgment deliter at the expense of the other decree holders (9). The language of the section has been altered and widened by referring to assets held available for distribution rather than to assets "realized in execution". It is necessary of course that assets in order to be "held" must be realized. It is not however necessary now that the realization must have been in execution as that phrase was interpreted under the former Code. It is sufficient that having heen realized (and prohably that will he held to he when the entire amount due from a purchaser has been paid into Court) they are available for distribution in execution. The creditors

(1891), Arimuthu v Vyapuripandaram, 35 M. 588 (1911), Maharaja of Burdwan a Apurba, 15 C W N 872 (1911), 14 C L J 50

(1) Manulal Unceram v Nanabhai Manulal, 28 B 264, 274 (1903), Sew Bux Bogla v Shab Chunder Sen, 13 C 225 (1886) Bishen Chunder v Monmohinee 8 W R 561 (1867) The realization was held to be by execution in Fink v Maharaj Bahadur Singh, 4 C W N 27, 26 C 272 [equitable execution by appointmont of receiver; Sorabji Edalji a Covind Ramji, 16 B 91 (1891) [debt attached and paid into hands of Shoriff] (2) Purshotam Das v Mahanant Suraj

bharthi, 6 B 588 (1882), Gopaldai v Chunni Lal, 8 A. 67 (1885) (3) Vishvanath Maheshwar v Virchand

Pana Chand, 6 B 16 (1881)
(4) Purshotam Das t Mahanant Suraj

hharthi, 6 B 588 (1852)
(5) Gopaldarv Chunni Lall, 8 A 67 (1885),
ow Bux Begla t Shih Chunder Sen, 13 C

225 (1886), Prosonnomoyee Dassoo v Sreonath Roy 21 C 809 (1894), Vibredha priya Tirthasami v Yusuf Sahib, 28 M 380

(6) Vibredhaj nya v Yusuf Sahib, si pra, and the section does not apply where the judgment dehor has pail money out of Court to one of the decree holders who had taken ateps to execute the decree and who then intimated to the Court that his claim had been satisfied, Gover Dutt v Amarchand C L J 39 (1911)

(7) Sorahi Coovari v Kala Raghunath, 36 B 156 (1911)

(8) Harai Saha v kaidur Rahman, 10 C

619 (1913)
(9) See Purshotam Das v Mahanant Sura)

bhartin, 6 B 588, at p 5.0 (1882) ["The arresting creditor may avail himself of the arrest to enter into any arrangement he thinks proper with the delitor behind the back, and independently of other creditors who may have applied for execution'] must apply before (1) the assets have become so available to the Court holding the assets (2)

"Court"—Section 285 (now 63) of the last Code contained the words "which shall receive or realize such property" (3) A transferee may apply for execution to the Court which passed the deeree (even though the latter may have been transferred for execution (1)), and the Court executing the decree was held to have no jurisdiction upon the application of the transferee who had not so applied (5) A decree was passed by the Subordinate Judge, and in execution of that decree a sale of certain property was held and conducted by the Nazir of the District Judge, held that in reference to that sale the District Judge had no jurisdiction to pass any order under the provisions of this section (6) As to transfer for execution, vide ante

Decree for money — Every decree (7) other than a decree for the enforce ment of a mortgage (8) is to the extent to which money is payable thereunder a decree for the payment of money, notwithstanding that the amount of money so payable has not yet been ascertained, (9) or that rehef of another kind has also been granted, (10) hut a decteo directing the realization of a money claim from mortgaged property and declaring the judgment debtor to he personally liable for any deficiency in a mortgage decree (11) is not a decree for the payment of money, and a decree directing the payment of money by any person does not easily the payment of money in so far as that person is concerned, merely hicause it directs as against another person the realization of a money claim from mortgage property (12). The Madras High Court has more recently held that a decree directing the sale of mortgaged properties in default of payment of money is a decree for money whether there is a direction to pay personally or not, and whether the remedy against the property is exhausted or not (13). The section refers to bona fide decree holders and the Court

See Tiruchettambala Chetti: Seshay yangar, 4 M 383 (1881)

⁽²⁾ See Krishnashankar : Chandra Shan kar, 5 B 198 (1880)

⁽³⁾ See Bhugwan Chunder Kutuatna v Chundra Mala Gupta, 29 C 773 (1902), s c, 1 C L J 97

⁽⁴⁾ Bail Nath Goenka : Holloway 1 C L J 317 (1905)

⁽⁵⁾ Jameshwar Prasad t Thakur Prasad,

²⁰ A. 443 (1903) (6) Nobo Kishore Dass & Protap Chunder

Banerjee, 1 C L R 534 (1878)
(7) See Hart v Tara Prosonno Mukherjee,
11 C 718 (1885). Virarayhaya Ayyangar v

¹¹ C 718 (1885), Viraraghava Ayyangar t Varada Ayyangar, 5 M 123 (1882) A judg ment under s 80 of the Incolvent Act is a money decree In re Bhugwandas Hurjian 8 B 11 (1884) As to the legal represen tative of deceased judgment debtor purchaser of the decree, see Munmohan Dast Vizbai, 18 B 171 (1888), dats in Laldhrit Manager, Court of Wards, 14 C L J 639,644 (1911)

⁽⁸⁾ Jagat Narain Rat v Dhundhoy Rat 5 A 566 (1883), but a mortgagee may waive his lien and proceed under this section. Fulker: Bulsh v Chutterdharee Chowdry, 14 W R 299 (1870), as also where he obtains a decree without declaration of hen. Radhakant Roy v Murza Sudafat 21 W R 86 (1873)

⁽⁹⁾ Viraraghava Ayyangar v Virada Ayyangar, 5 M 123 (1882) [decree for meane profits] but aeo Mt Einda Bibec v Lalla Gopeenath 21 W R 66 (1873)

⁽¹⁰⁾ Hart v Tara Prosonno Mukherjco, supra, foll Kommachi Kather: Pakker, 20 M. 107, 110 (1896), dist. in Laldhari: Manager, Court of Wards 14 C L J 639, 644 (1911)

⁽¹¹⁾ Fazil Howladar v Krishno Bundhoo Roy, 25 C 580 (1897), dist Hart v Tara Prosonno Mukherjee, 11 C 718 (1885), s c., 2 C W N 118

⁽¹²⁾ Delhi and London Bank v Uncovenanted Service Bank, 10 A. 35 (1887)

⁽¹³⁾ Vardhmadasamy : Somasundram, 28 Vi 473 (1904)

- The provisions as to the execution and letum of comcommissions issued by missions for the examination of witnesses shall apply to commissions issued by—
 - (a) Courts situate beyond the limits of Bitish India and established or continued by the authority of His Majesty or of the Governor General in Council, or
 - (b) Courts situate in any part of the British Empire other than British India, or
 - (c) Courts of any foreign country for the time being in alliance with His Majesty

Commissions —This subject is further dealt with in O XXVI and the notes thereto, to which refer —As to forms of letter of request, see First Schedule, Appendix H No 8, and as to the same O XXVI r 5, post

PART IV

SUITS IN PARTICULAR CASES.

SUITS BY OR AGAINST THE GOVERNMENT OR PUBLIC OFFICERS

- 79 (1) Suits by or against the Government shall be insti-[s Suits by or against tuted by or against the Secretary of State for India in Council
- (2) Nothing in this section shall be deemed to limit or otherwave affect any information exhibited by the Advocate General in exercise of the power declared by section 111 of the East India Company Act, 1813.

Suits—This is sect 416 of the last Code Sects 417-421 are now in 2-6 of O XXVII, the first rule of that Order, dealing with pleadings, being new Sect 422 is now r 27 of O V Sect 423 is r 7 of O XXVII Sects 424 and 425 are now sects 60, 81 Sects 426 and 427 are r 8 of O XXVII Sects 428 and 429 are now sects 51 and 52

The inhility of the Secretary of State for India in Council to be sued depends on the statute 21 & 22 Vict o 106, for the better government of India, and turns principally upon the construction of sect 65 of that Statute (1) Whether a suit will be at the instance of Government is a matter of substantive law As regards the Court in which such a suit assuming it to be should be brought, reference should be made in the case of the High Courts to their Letters Patent, in other cases to the various Indian Civil Courts Acts, and to sects 16-20 of this Code (2) Whether and when a suit will be against a public officer is a question

Subbaraja : Government, 1 M 296 (1863) or may not be gad to carry on business [Rundle : Secretary of State, 1 Hyde, 37 (1862-63), Doya varan; Secretary of State, 1 C 296 (1887)] Several suits have been deputed an which the cause of action did not accrue within the local limits, and in which therefore those Courts could have had juris diction only if the Government could be held

⁽¹⁾ See for a recent decision in which the earlier cases are cited Jehangir t Secretary of State 27 B 189 (1902) and others cited in O Lincaly 8 C P C, notes to s 416

⁽²⁾ I idear te notes to those sections and in particular as regards suits against Govern ment, see those in which the question has arisen whether the Government may [Buprodas Dey c Secretary of State, 14 C. 262 m (1884).

of substantive law Judicial officers are protected by Act XVIII of 1850, but no such general protection is granted to executive officers (1) None of these matters are relevant to these provisions, which deal with the subject of procedure in a case properly instituted. The statute first eited provides that the Secretary of State for India in Council may be sued as a body corporate, and this section provides that suits shall be so entitled (2) Where, however, a suit was wrongly brought against a Magistrate, the High Court, on appeal, allowed the name of the Magistrate to be struck out, and that of the Secretary of State for India in Council to be inserted (3)

Informations —The power of the Advocate General to exhibit informations in the nature of actions at law or Bills in Equity was expressly declared by sect 111 of the East India Company Act, 1813 (53 Geo 3, c 15b), and kept alive by sect 2 of the Government of India Act, 1833 (3 & 4 Will 4, c 85), and again by sect 1 of the Government of India Act, 1853 (16 & 17 Vict c 95), now merged in the statute of 1858 already mentioned (21 & 22 Vict c 106) The Governor General in Council spreeluded by sect 22 of the Indian Councils Act 1861 (24 & 25 Vict c 67), from legislative interference with the provisions of any of the enactments above quoted —The question was considered whether sect 416 of the last Code appeared to exclude informations exhibited by the Advocate General, and whether it was therefore desirable to add a proviso saving such information —And this has been done

80 No suit shall be instituted against the Secretary of State for India in Council, or against a public officer in respect of any act purporting to be done by such public officer in lise official capacity, until the expiration of two months next after notice in writing has been, in the case of the Secretary of State in Council, delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district, and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the rehef which he claims, and the plaint shall contain a statement that such notice has been so delivered or left

"No surt"—The words "no surt" under the last Code were held to mean what they say, that is no surt of any land, and the section was not confined to a particular class of surt, such as surts founded on tort and claiming damages

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te carry on business in those limits—See Hukin Chand, C. P. C. 321, Ross Johnson i Serictary of Sixte, 2 Hyde, 153 (1864), P. A. O. S. N. Co. i Secretary of State, 5 B. R. C. R. App. (1861), Brito e Secretary of State, 6 B. 201 (1881), Hari Bhanji i Secretary of State 4 M. 344 (1879), see also as to jurisdue tin, Hearasy i. Secretary of State, 6 A. H.

C R 17 (1873)

⁽¹⁾ Some cases will be found a listed in

O kinealy a C. P. C., notes to s t

(2) Volum Chunder a Scena ste, 1

⁽²⁾ Volin Chunder i Scent (11, 1 C 11 14 (157) Magus 670

⁽¹⁵⁵_) a₅741 (155_)

And it has been held under the present Code that this section applies to suits of every kind (1) The object of notice is to give the defendant breathing time, so as to enable him to determine whether reparation ought to be made . and the principle is applicable to any class of suit (2) The substitution of the words "any act" for "an act" points in the same direction Notice has, in consequence, been deemed necessary even when the remedy sought was an injunction, and though delay involved in the giving of notice might involve the commission of the wrong complained of before the suit was filed (3) But the objection for want of notice can only he taken by the Scoretary of State, and where no rehef is claimed against him it has been held that no notice is necessary (4)

"Shall be instituted."-That is, commenced The section says that uo suit shall be instituted, not that it shall not be proceeded with or main tained The lauguage of the section is imperative and absolutely dehars a Court from entertaining a suit instituted without compliance with the provisions of the section A Court cannot under such circumstances stay proceedings end allow time to the plaintiff to serve the requisite notice, but its only course is to reject the plaint (5) It has, however, heen held that there is nothing in the law to show that in case of any emendment of the plaint, necessitated by the alleged discovery of feets previously unknown to the plaintiff, the Secretary of State should have a further notice of two months, when the relief asked for is not altered by such emendment, and it only embodies certain further material in support of the plaintiff's contention (6) And where in an action already instituted against the Secretary of State, a public servant was also efterwards joined as defendent, who, however, was not sued for eny act done hy him independently of Government, and no separate rehef was asked for against him no notice was held to be required in his case (7) Further there is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of it at the trial (8). Though the Secretary of State is not a necessary party to a suit to set aside a revenue sale, yet the Government has such an

⁽¹⁾ Secretary of State : Gajanan 3. Il 362 (1911), Sakharam Bagwan r Secretary of State, 14 B L. R 3.3 (1912), Secretary ol State t Itale Linan 37 M 113 (1314)

⁽²⁾ Secretary of State : Raylucks Dels ... C .31 243 244 (1837) ref to Vanithra Chan ira Nan hie Seen tars of State 50 L.J. 115, 167 (f.07) c stra Shakel zadec Shahurahah Bejum e bergusen 7 C 413 (1551) where it appears to have been conathem that in three was required that bend in in respect of torti us or quasi tertious acts. It may, however, be a question whether the was an act done in off all capacity in the s medicard. See Vardather ... it Gamputar ... is 14 Rose, 402 (180) Indee he and a Harr ant, 30 R. o 7 (15 c), where it was bout

that the seels to led to t apply where the suit was is excontracts that we thinganist · Gillector | Kaira 35 B 12 (1510).

⁽³⁾ Harris Northary of State, 27 B 424 (1 at3) a. c. 5 lt la la 131, no Secretary of State e Rajlucks with at juilled (1937). (I) I sabulana Sahar I had human, 33 CHACLED a C. ICL. J. 512 Nagiolal r The Official Assessment I house In It. 1115 (1312) . 37 R 213

⁽⁵⁾ hach habe abr ber etary diblate, #4 L 15" (1.2 2).

¹⁰⁾ Ezza i Seritari Phate, The d N 24(1:2), Le DIC 34

⁽⁷⁾ Ib.

¹⁹⁾ Vamelta Charica Nation to September

of Marc, St. L. J. 163, 163 (t.s.i).

interest in the suit as would justify the Court in adding the Secretary of State as a party,(1) and this section, it has been held, does not prevent that being done (2)

Public officer -Sec as to the definition of this term, sect 2, ante Official Trustee , (3) Official Assignee , (4) Administrator General , (5) a Collector acting as agent of the Court of Wards, and as such illegally seizing property. (6) and a Talukdarı Settlement Officer, when acting as manager under Act XXI of 1881,(7) or under sect 79A of Bomhay Land Revenue Code (Bom Act V of 1879),(8) have been held to be public officers

"In respect of any act "-The words "in respect of an act purporting to be done by him in his official capacity" were introduced by Act XII of 1879 into sect 424 of the last Code under which it was held that the qualifications "in respect of an act, etc.," do not relate to the Secretary of State They did not apply to the case of the Secretary of State 10 Council (9) This is now made clear by the introduction of the words "by such public officer" The defendant must not only be a public officer, but the act must bedone in his official capacity (10) If not,(11) then the section does not apply There must, however, be a distinct act by the public officer which is complained of to entitle him to notice, and so it has been held unnecessary where a Collector was made a party not in respect of any alleged illegal act by him, but on the application of the minor's personal guardians in order to protect the minor's title, (12) and where a Collector was merely guardian ad hiem. In such a case the suit is not against him at all, and he defends on behalf of the minor only (13) To take a case out of this

⁽¹⁾ Bal Mokoond : Jirjudhun Roy, 9 C 271, 276, 277 (1882), Balkishen Das v Simpson, 2 C W N 513 (1898), s c, 25 C 833. foll in Bhola Nath v Secretary of State for India, 17 C W N 61 (1912) , 40 O 503 (A. C.) (1912)

⁽²⁾ Bal Mokoond v Jirjudhun Roy, 9 C

^{271,} supra (3) Shahebzadee Shahunshah Begum v

Pergusson, 7 C 490 (1881) (4) Joosub Haji v Kemp, 20 B 809 (1902).

⁸ c. 4 B L. R. 929 (5) Bholaram Chowdhurye Administrator

General, 8 C. W N 913 (1904), Antone v Administrator General, 28 B 529, 532 (1904) (0) Collector of Bunor v Munuvar, 3 A

^{20 (1880)} (7) Sardarsingii t Ganpatsingii, 14 B

^{395, 402 (1889)}

⁽S) Talukdarı Settlement Officer v Bhar 11bha1, 14 Born. L. R 577 (1912), Chhaganlal t 1he Collector of Kaira, 35 B 42 (1910). Secretary of State & Gajanan, 35 B 362 (1911), 13 Bom. L R 273, Cecil Gray v Cantonment Committee of Poons, 31 B 583

⁽¹⁹¹⁰⁾ (9) Secretary of State v Rajlucki Debi, 25

C 239, 242 (1897) (10) See Jegendra Nath v Price, 24 C 581

^{(1894) [}dist in Nulisannad Baddig v Pantia Lall, 26 A 220 222 (1903)], Secretary of State v Rajlucki Debi 25 G 239 (1897). Antone v Administrator General 28 B 529 (1904), and of Swamurayacharya v Collector

of Dharwar, 15 B 441 (1890), Bakhtwar Mal v Abdul Lahf, 29 A. 567 (1907), in which the acts were held to have been done in official capacity, Chhaganlal : The Collector of Kairs, Supra

⁽¹¹⁾ Muhammad Saddiq v Panna Lali 26A 220 (1903), and two following notes A public officer sued in respect of an act done in bad faith is not entitled to notice Peary :

Weston, 18 C W N 115 214 (1913) (12) Bhau Balapa v Nana 13 B 343, 347

⁽¹⁸⁸⁸⁾ (13) Anantharaman t Ramasami, 11 M.

^{317 (1888) [}explaining Narsingrav t I uxu manrav, 1 B 318 (1876)], of Jadou Muljer Chhagan Raichand, 5 B 300 (1891)

section it must be proved that there was something in the conduct of the Secretary of State which provented the plaintiff from complying with its provisions (1)

Notice — The three requisites to be stated are (a) cause of action, (b) name and residence, (c) rehef sought

The object of the section heins merely to inform the difendant substantially of the ground of complaint, the words "stating the cruse of action" should not be construed too strictly or narrowly (2) In considering the sufficiency of a notice on this point, it should not be read with the strictness with which a plaint should he read (3) A notice is sufficient if it substantially fulfils its object in informing the parties concerned generally of the nature of the suit intended to be filed (1)

The name of the intending plaintiff must be stated. A notice given by a party who dies before suit does not enjure, it has been held, for the benefit of his representative, and enable the latter to maintain the suit without giving a fresh notice, as the notice in such place does not give the name of the actual plaintiff (5). Further, the abode of the intending plaintiff must be stated (6) the amended section adds description of plaintiff. And this applies to all plaintiffs it there are more than one

Lastly, the relact claimed should he stated Generally, and as regards all these matters, it may be said (to adopt the language of Pollock, C B).(7) it is, on the question of sufficiency, necessary "to impart a little common sense into notices of this kind," and to ascertain whether the object of the Legislature has been substantially and effectively carried out. If no notice has heen given, or it is held to be insufficient, the proper course, it has been beld, is not to dismiss the suit, but to roject the plaint, and give an opportunity to serve a fresh notice (8)

"Plaint shall contain a statement"—The portion of this section relating to the plaint, containing a statement that such notice has been left or delivered in the manner presented by it, is separate from the earlier portion, which deals with the delivery of the notice two months before suit It is only when notice is not given that the suit is hable to be dismissed (or the plaint rejected). The suit, however may be proceeded with, if notice has been given in the manner prescribed, and subsequently the plaint is amended in order to state that fact (9)

- (1) Sakharam v Sceretary of State, 14 Bom L. R. 353 (1911), Secretary of State v Gajanan, 35 B 362 (1911), 13 Bom L R
- (2) Bholaram Chowdhury v Administrator General, 8 C W N 913 (1904), Secretary of State v Perumal Pillas, 24 M, 279, 282 (1900), Bachchu Singh v Secretary of State, 25 4, 187, 191 (1902)
- (3) Parbutti Churn v Nobin Chunder, 13 C L. B 195 (1883)
- (4) Jehanger Cursetjit Secretary of State, 27 B 189, s c, 5 Bom. L R 30, McInerney t Secretary of State for India, 38 C 797 (1911), plaint cannot be amended as to nature of suit after the notice.
- (5) Bachchu Singh : Secretary of State, 25 A 187, Bhola \ath : Secretary of State for India in Council, 17 C W N 64 (1912), 40 C 503, notice must give names etc., of all plaintiffs
- (6) Ih, at p 191, Bholaram Chowdhury & Administrator General, 8 C W N 913, 916 (1994)
- (1904)
 (7) Jones v Aicholls, 13 M. & W 363, exted in Eales v Municipal Commissioners of
- Madras, 14 M. 386, 390 (1890)
 (8) Bachchu Singh v Scoretary of State,
 - supra, at pp 190, 193
 (9) Bholaram Chowdhury v Administrator
 - (9) Bholaram Chowdhury v Administrator General, 8 C W N 913 (1904)

by a Foreign State against private individuals, as distinguished from rights which one State in its political capacity, may have as against another State in its political capacity (1) The second proviso takes the place of clause (b) of sect 131 of the last Code It was thought that the language of that clause required restriction masmuch as it appeared to confer on the head of a Foreign State a general power to litigate in respect of the private lights of its subjects It was considered, however, that the object of such higation must be the enforce ment of a privato right vested in tho head of the State or in an officer of the State as such, and the language has been modified accordingly. A Foreign State can only obtain rehef subject to the rules and pursuant to the practice of the Court in which it sucs, and one of the conditions is that, like an individual, it will give discovory (2)

specially appointed by order of the 85 (1) Persons Government at the request of any Sovereign Persons specially ap-pointed by Government Prince or Ruling Chief, whether in subordito prosecute or defend nate alhance with the British Government or

for Princes or Chiefs

otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief

(2) An appointment under this section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief

(3) A person appointed under this section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto

Persons appointed to prosecute or defend -- As regards the meaning of the words "Sovereign Prince' or Ruling Chief" see notes to next section

This section was not intended to himit the scope of O III r 2 correspond ing with sect 37 of the last Code and does not prevent the institution of a suit by an independent Prince in his own name and through a recognized agent other than one appointed under this section (3) The section applies to suits filed in a Court of Revenue under the provisions of Act XII of 1881

⁽¹⁾ Hajon Manick t Bur Sing 11 C 17 (1854), foll Gurdyal Singh v Raja of Taralkot 22 C at p 229 (1895) at p 228, it was doubted whether the suit fell within the nortona off to occoa-

Ch App 590, Republic of Peru v Weguchn, L R 20 Eq 140 (3) Maharaja of Bhartpore : Nacheru, 19

^{1 510 (1897),} following Beer Chun ler t Ishan Chunder, 10 C 136 (1683)

⁽²⁾ United States of America : Wagner, 2

tion of the suit should be obtained from the Advocate General, or the Collector or other efficer appointed by the Local Government (such as in Allahabad the Le al Remembrancer), (1) as the case may be An Assistant Collector discharging the duties of the Collector during his illness cannot grant sanction under this section (2) The object of such sanction is to guard charitable trusts from abuse, and for that purpose to prevent such proceedings from being instituted for no other reason than because it is known that the costs will be payable out of the charity funds (3) Where, however, a person has capacity to sue, the metrics that retuated him do not affect his capacity and will not by themselves defeat a suit for which sanction has been obtained (1) The Advocate General, Collector, or other officer is required to exercise his judgment before giving consent (5) Where the language of permission indicated that as regards the interest of the plaintiffs the Collector did not exercise his sudgment, it was beld to be n mere irregularity within sect 578 (now 99), post (6) But it has also been held, that the consent in writing must be a specific permission given to two or more persons by maine, and that a permission given to one applicant by name "and another" is not a sufficient compliance with the terms of the section (7) The suit brought under this section must correspond with the sanction as no reliefs can be awarded which are not contained in the section (8) It has been held by the Allahabad High Court that the obtaining of sanction is a pre requisite for the institution of the sut, and that the section cannot be read as meaning merely that the Courts cannot proceed with the suit already instituted until that consent bas been obtained, and that therefore if no valid consent is given before the institution of the suit, the mustake cannot be subsequently rectified unless by means of withdrawal, with permission to institute a fresh suit (9) Tho Advocate General may give consent to the institution of a suit, but not for the amendment of a defective suit (10) And the Court's action after the institu tion of the suit in unking a defendant a plaintiff has been held not subject to the consent of the idvocato General (11) Nor is consent necessary for the amendment of the plaint by mentioning particulars of the breach of trust (12)

⁽¹⁾ NWP Coudh Rules 1893 p 114 (2) Somehand t Chhagradal 35 B 243

⁽¹⁹¹¹⁾

⁽³⁾ Sajedur Raja & Gour Mohun 21 C 418, 421, 425 (1897)

⁽⁴⁾ Vanohar v Lakhmuram 12 B 247 259 (1887)

⁽⁵⁾ Sajedur Raja t Gour Mohun 24 C 418 428 (1897) It has been held that under the former Code a person having a special right (such as one next critified to be trustee) was entitled to file a suit under s 539 without sanction Cummah Chetty v Ramanuja Chariar, 24 M L J 48 (1912) (6) Ib

⁽⁷⁾ Gopal Der : Kanno Der 20 1 162 (1303)

⁽⁸⁾ Sajad Hussem Collector of Kaira 21 B 257 (1895) Srinivasa v Venkata, 11 M 148 (1877)

⁽⁹⁾ Gopal Dei v hanno Dei, 26 1 162 (1993) the Madras High Court, however in Ramajangar t Krishnayyangar 10 M 180 (1837) appear to have held the other way

See Iyer's Hindu Endowments cerc (10) Darves Sidik t Jainudin 30 B 603

⁽¹⁹⁰⁶⁾ (11) Ram Churn Tewary: Protap Chandra

Dutt 2 G L J 448 (1886)
(12) Dhanjibhoy Raghoov Meherally Moral

⁹ Bom L R 901 (1906) But see 4blml Rehman t Cassum I brahim, 36 R 168 luwhere sanction a condision procession of amendment

4. The trust must be a public one.—The section presupposes the existence of a public trust and a suit for the administration, either partially of completely, of that trust (1) It enables the persons mentioned therein to sue trustees to enforce the better administration of the trust (2) Where, however, it is said that the section presupposes a trust, this does not mean that the defendant must admit the trust before the section can apply, but that the suit must proceed upon the allegation of the existence of a trust which may or may not be admitted by the defendant (3)

Private trusts concern only individuals or families for private convenience or support. By public trusts may be understood such as are constituted for the benefit either of the public at large, or of some considerable portion of it answering a particular description In private trusts the beneficial interest is vested absolutely in one or more individuals, who are, or within a certain time may be, definitely ascertained, and to whom therefore collectively, unless under somo legal disability, it is, or within the allowed time will be, competent to control, modify, or determine the trust A public or charitable trust, on the other hand, has for its objects the members of an uncertain and fluetuating body, and the trust itself is of a permanont character (4) A trust is none tho less a trust for a public purpose if its main object is the support of fakirs of a particular sect (5) The trust may be charitable, such as for the relief of the poor, or the advancement of learning, religion, or objects of general public utility, or religious, though all religious uses are charitable uses Though, therefore, the section, as originally enacted in the Code of 1877, did not contain the words "or roligious," there is little doubt but that the Legislature intended the section to embrace both charitable and religious purposes (6) It was however, held that the corresponding section in the Code of 1877 did not apply to religious endowments,(7) and therefore in the Code of 1882 the section was altered to

⁽¹⁾ Jamal ud din v Mujtaba Husam, 25 A 631 (1903)

⁽²⁾ Srimiyasa Ayyangar t Srimiyasa Swamu, 16 M. 31, 32 (1892)

⁽³⁾ Budh Singh v Niradbaran Roy, 2 C L J. 431 (1905), Shadajananda Dut t Umeshananda Dut, 2 C L J. 460 (1905)

⁽⁴⁾ Lewin on Trusts, 18, and see generally is to this section P R Ganapathi Lyerk Laws relating to Hindu and Vahommedan Religious Endowments See the following cases as to whether trusts are public Jugal Kishore v Lakshmandas, 23 B 559 (1899), Manohar t Lakshmandas, 23 B 559 (1899), Manohar t Hakimiram, 12 B 217 (1887) [Trust for Hindu idol and temple], Dakhm Din t Rahimunnissa, 16 A 412 (1891), Girijanund t Sailajanund, 23 C 615 (1896), Blugobutty Prosonno t Gooroo Prosonno, 25 C. 112 (1897), Jagadin Ira Nath t Himanta Kumani, 23 C 615 (12) (1995). As to

English Equity governing the relief in respect of Hinducharitable trusts, see Sayad Hussein minn v Collector of Karra, 21 B at p 52 (1895), Bikani Min v Shuk Lal, 20 C 116, F B (1892), Mahomed Masanulla v Annar Chand, 17 C 498 (1899), Mahomed Israil v Sasti Churn, 19 C 412 (1892) See as to decession of idol Radiabani Chimmani, 31 B 27 (1878), and Sarasi an Shri Ganesh i Kesharav, 16 B 625, 635 (1890) Chintamou t Dhondo, 15 B 612 (1889) and private trust Satinappayar v Perivanni, 14 M 1, 7

<sup>(1500)
(5)</sup> Mahant Puran Atal : Darshan Das,
31 A 48 (1912)

³⁴ A 48 (1912) (6) Seo Thanga Karappa & Arumaga, 5 M. 383, 384 (1882)

⁽⁷⁾ Ib., Girjaita i Kandasanii, 10 M 375 506 (1856), Fhackersey i Hurbhum 8 B 132, 150, 451 (1883)

expressly include religious trusts, in consequence of these rubugs and doubts which had been entertained. The contention that, while there exists the special enactment, XX of 1863, for the proper appropriation of endowments of lands relating to temples, the words "religious purposes" should be considered as referring only to cases where the endowments do not relate to temples, has been overruled (1)

The public trust may also be either express or constructive. The first are those which are raised and created by act of the parties, and are declared by them either in word or writing A constructive trust (to which this section also, though not the English Statute, applies) (2) is one arising, not by the act of the party, but hy operation of law, where a trustee gains some personal advantage by availing himself, and through the medium of his situation as trustee (3) It is imposed on such a person to prevent him from holding for his own benefit an advantage gained by reason of the fiduciary relation sub sisting between him and others, and for whose henefit only it is his duty to act (4) So, if a lease were the subject-matter of a public trust, a constructive trust would arise if a trustco renewed the lease in his own name. He would, in such case, be deemed to be a trustee for those interested in the original term And this would be equally so if the trustee was trustee of right or trustee de son tort And were there a breach of such constructive trust, hy making away with the renewed lease or net applying its benefits to the purposes of the trust there would be such a breach of trust as is referred to in this section (5) It has been recently held that where it is proved that certain property has been held for many generations for such purposes as the support of fakirs, and there is no evidence that the property was ever held for any other purpose, the Court ought to presume the existence of a charitable or religious trust within the maaming of these sections (6)

Where it was objected that the section was limited in its action to suits relating to property, and that its operation could not be extended to spiritual offices, it was held to be applicable where it is sought to remove the trusted from a religious office if, as the holder of such office, he is called upon to exercise husiness functions either as trustee or as manager of temple funds and properties, and thus necessarily possesses civil rights and consequent

liabilities (7)

5 There must he a breach of trust or necessity for directions —
Nextly, assuming that there is a trust and trustee it must be ascertained whether

Narasunba v Ajjan 12 VL 157, 158, 159 (1888)

⁽²⁾ See Subbayya v Krahna, 14 VI 186, 202, 216 (1890), Jugal Kashore t Laksh mandas 23 B 659 (1899) s c I Bom. L. R 118, Manohar Gancsh t Lakhmuram Govand ram, 12 B 247, 265 (1897), afid. 24 B 50

⁽³⁾ Lewin on Tru ts, 196 11th ed. , Budree

Das Mukum t Choom Lal Johurry 33 C 789 at p 506 (1996)

⁽⁴⁾ Id., Godefros Prusts 2nd ed. 133 (5) As to such, tide post Budree Das

Wakim t Chooni Lal Johurry, supra

(6) Mahant Puran Mal t Darshan Dar.

³⁴ A. 468 (1912)

⁽⁷⁾ Shadajananda r Umeshananda, 2 G L J 400 (1905)

there is a breach of trust. If not, then the direction of the Court must be required for the administration of the trust. A breach of trust is not necessary. It is sufficient if there be a public trust, and the direction of the Court is considered necessary for its administration (1) If there be neither a breach of trust (2) nor necessity for such directions, (3) then the section does not apply As to evidence of breach of trust and the grounds which will justify removal for breach of trust, see cases below (4)

6 The suit must be for relief of the kind mentioned—Lastly though some or even alf of the other elements stated in the section are found to exist, a suit will not be within it unless the ielef sought therein is that which is expressly or impliedly mentioned in the section (5). No difficulty arises as regards the relief expressly mentioned in clauses (a) to (g). Contention has ever taken place as to what may be held to be included in the words "such further or other relief as the nature of the case may require".

The general clause ought to be read with the five preceding specified clauses, and the nature of the rehef which may be properly granted under it is of the same character as the rehefs which may be granted under the proceeding clauses. The five specified clauses are not merely illustrative, but furnish in indication of the nature of the rehef which may be granted in a suit under this section (6). This clause must be read with what has preceded as referring to further rehef to which the party may be entitled, which insess out of the casteuce of the trust in respect of which the suit has been brought (7). On this ground it has been held that a suit which has been instituted simply and solely for the purpose of having a declaration that certain proporty is trust-proporty, and which was in no way a suit for the administration of the trust, or the removal of the trustees, or for any of the purposes referred to was not within the section (8). It may, however, be that in a suit for such purposes a declaration may be meddenation may be meddenated and ancellary thereto (9). Within the words

acetion.

⁽¹⁾ Raghubar Dal v Kasho Ramanu, IT IS, 22 (1888), som Nett Ramt v Venkata churula, 46 M. 450 (1902), though there was no breach of trust the case was held to be one where the direction of the Court was required.

⁽²⁾ See e.g., Girjans Sambandha t Kanda sunt Lumbran, 16 M 375, 566 (1886), Mrya Sali : Sayal Bana, 22 B 496, 199 (1886), Naoroji Manekji t Dastur Kharsedji, 28 B -0, 74 (1993), where the cause of action was held not to be an alliged breach of trust

⁽³⁾ See e.g., Miya Vali e Sayad Bava, supra On the other hand, in Neti Rama v Venkatacharulu, supra, the case was held to be within these words

Shailajananda t Umeshananda, 2 C L.
 tiet (1906) Chintaman e Dhondo, 15 B
 (1888) Damo lar e Bhat Bhogo Lal, 22

B 493(1896), Annan Raghunathe Nuayan 21 B 556 (1894) Anantanarayana a Kutta lam, 22 U. 181 (1899), Girdharlale Naraulal 14 Bom L R 1135 (1912)

⁽⁵⁾ See Jun Mr v. Ram Nath, S C 32, 34, 35 (1881), Budree Das Mukim v. Choom I al Johurry, 33 C 785 (1996)

⁽⁶⁾ Budh Singh i Aradbaran koj 2 C. L. J. 431, 438 (1905), Budreo Die Mukim i Choom I al. Johnry, supra Sir. Dinshi Manchi Petit i Sir Jametsi 13 B 50 (1908)

⁽⁷⁾ Jamal u libn v Mujtab v Husam, 25 A 631 (1903)

^{(8) 1}h

⁽⁶⁾ See Kazi Hassan v Sagun Balkrishna, 24 B 176, 181, 247 Ranade, J., who said only that a suit by a beneficiary for a declaration against strangers was not borred by this

"further or other rehel" is, it has been held, a decree for an account (1) This is now expressly mentioned in clause (d) Before a scheme can be settled for the management of a temple and its funds, an account of the trust property must be taken. Until the trust funds are ascertained it is impossible to settle a scheme (2) The Calentia High Court has in one case held that a sun for the removal of a tustee, and for the recovery of taust property from the lands of a third party to whom it has been impropelly alterated by the trustice, falls within the section (3) But this decision has been dissented from in the same Court, (4) in which it was held that persons claiming a title purely adverse to a trust are not proper parties to a suit for the execution of the trust. The Allahabad High Court has also held that the aliences are not proper parties, that a prayer for recovery of possession is not entertainable under this section, and that a suit for such purpose could be instituted only by the trustee (5)

The High Courts at Caloutta, (6) Bombay, (7) and Allahabad (8) have held that in a suit under this section the Court may remove a trustee hestilely for breach of trust, and that the section applies both to contentious and non contentious cases. Such relief was held to be involved in clause (b) of the former section, or to be included in "further or other relief." The Madras High Court, however held though at one time there was a difference of opinion on the point, that a suit to remove a trustee did not be under this section (9). A prayer for removal might however be inserted where the right of suit existed independently of, and the suit was not brought under this section (10). The unemded section

- (1) Tricumdass Mulji v Khemji Vullabi ilas, 16 B 620, 629 (1892), Chotalal Lalh miram v Manoliar Ganesh, 24 B 50 (1899), s c., in High Court, 12 B 247, 267 (1887) See also Sayad Hussenman t Collector of Kaira. 21 B 48, 51 (1895)
- (2) Chotalal Lakhmuram : Manohar Ganesh, 4 C W N 23 (1899)
- (3) Sajedur Raja i Gour Mohun, 24 € 418, 423 (1897) foll. by Stanley, CJ, in Ghazaffar Husain i Yawar Husain 28 \ 112 (1905)
- (4) Budh Singh v Niradbaran Roy, 2 C L. J 431 (1905), Budree Das Mukim t Choont Lal Johurry, 33 C 789 (1906), per Burkitt, J, in Ghazaffar Husain t Yawar Husain, 28 A. 112 (1905)
- (5) Huseni Begam t Collector of Morada bul, 20 1, 46, 49, 50 (1897)
- (6) Sajedur Raja r Gour Mohun, 24 (418 (1971), Mohuddin r Sayaluddin 20 (810 (1893), and see Bishen Chan I r Su I Sadir, 15 1 % 1, 10 (1887)
- (7) Frieumdass Mulji t. Khemji Vullal li-

- das, 16 B 626, 629 (1892), Chntaman Bajan v Dhondo Ganchi, 15 B 612, 617 (1888), Advocate General v Moulvi Abdul, 18 B 401 (1894), Annaji Ragbunath v Arayaa Sitaram, 21 B 550 (1896), Damo dar Bhatji v Bhat Bhoglal 22 B 493 (1896), Damodarbhat v Bhoglal 24 B 45 (1899), Sayad Hussenmian v Collector of Kaira 21 B 48 (1895) [a suit to remove trustees must therefore be brought in the District and not Subordinato Judgos Court] Girdharlal v Naranlal, 14 Bom L. R. 1135 (1912)
- (8) Husen: Begam v Collector of Morada bad, 20 A. 46 (1897) Girdhari Lal r Rain Lal, 21 A. 200 (1899)
- (9) Rangasami Naickan t Varadappa Naickan, 17 M. 462 (1891), Subbayya v Krishna 14 M. 186 (1890), per Muttusami Ayyar, J. Narasimha t Ayvan Chetti, 12 M. 157 (1983), contra, per Best and Vierr, 1J.
- in Subbayya t. Krishna, supra (10) Tiruvengadah r. Srinivasa, 22 M. 361
- (1833)

makes it now clear that it applies both to non contentious and contentious suits, and clause (a) expressly mentions the removal of a trustee

As clauses (b) and (c) allow of the appointment of new trustees and the vesting of the property in new trustees, it follows that the Court can take possession from the old trustee who has been removed and give it to the new trustee. Whether the Court can grant rehef by taking possession of trust-property from the hands of a third party, to whom it has been improperly ahenated, (1) has already been discussed. If there is a trustee and the suit is merely to recover property from strangers and not for the execution of the trust, it does not come within the section If, again, there is a trustee, but the suit be for his removal. then, till he is removed, the trust estate is vested in him, and he alone can sue strangers for possession. When the new trusteo is appointed he can sue (2) It has also been held that where there is a trustee, worshippers can not sue strangers for possession,(3) though they are entitled, irrespective of this section or O I r 8 to maintain an action against any person improperly interfering with their rights to worship (4) If, however, a suit merely for possession as against strangers is not within the scope of the soction, this question does not properly arise under it It amounts simply to this, who has title under the ordinary law to sue for possession, and need not he further discussed Within the terms "further relief" are the appoint ment of a receiver, (5) and the grant of an injunction, both forms of rehef being of a merely ancillary character, and a decree for the cancellation of unauthorized leases (6) The Court, in sanctioning a scheme, may provide for the appointment of additional or new trustees, though such appointment may not he in conformity with the original constitution of the trust, or with the rules in force in respect to it, and a scheme framed is liable to variation for good cause shown (7) Where a suit is maintainable under this section and the plaint seeks rollef specified in that section sect 42 of the Specific Relief Act does not apply (8)

"A suit"-The procedure under Romilly's Act (52 Geo III c 101) was by petition and summary order, whereas a regular suit is prescribed by this section (9) There is, however, no ground for suggesting that a suit under

(4) Sullar (vadu e Asanali 23 M 100 n

⁽¹⁾ See Sajedur Raja : Gour Wohun, 24 C (1897), at p 123, and cases in note (2) p 373.

⁽²⁾ Budh Singh v Maradburan Roy, 2C L.

^{1 431, 436, 438 (1905)} (3) Lamaraju t Asanali, 23 M. 99 (1899) . Subbarayadu : Asanali, 23 M 100 n (1819) . Husem Begins : Collector of Moradabad, 20 1 16 50 (1897), Raghubar Dial : Kesho Pamanuj 11 1 18 (1888) See, however, leazi Hassan e Sagun Balkrishna 24 B 170 175 176, 181 (1874)

⁽⁵⁾ Gyanananda Asram t Aristo Chandra,

⁸ C W N 101, 107 (1901) (b) Rum Churn lewary : Protan Chandra Dutt, 2 C L J 118 (1886)

⁽⁷⁾ Prayag Doss : Tirumala, 28 M 119 (1905) A scheme was framed by the P C in Prayaga v brumala, 9 llom L R 588 (1907), # c, J1 J A 78

⁽⁸⁾ Netal Rama , Vankatacharula, 28 M 1ru (1902)

⁽⁹⁾ See Subbayya | Krishna, 14 M 186. 184 (45 10)

this section has the character of a summary proceeding. It possesses all the characteristics of a suit under sect 9 of the Code (1). Where a suit which is not within the section is instituted in a District Court, it has been held that the Court should not dismiss the suit, but should deal with it under sect 57, clause (a) (now O VII r 10), and r turn the plaint to be presented to the proper Court (2). So, also, where a Subordinate Judge held that this section was a bar to the suit, no consent having been obtained, it was held that he should not have proceeded to dispose of the case, but should have returned the plaint to be presented to the Court having jurisdiction to try the suit (3).

"Any other Court"—With reference to the words "any other Court empowered on that behalf," it has been held that the notification empowering the Court should not be directed to a particular judge and should not purport to deal with a particular hitgation which on the date of the notification was pending before another Court (1)

Execution —So far as a decree under this section orders particular acts to be performed by the defendants in the management of the trust, it may be enforced by their imprisonment or by the attachment of their property, or both (5). And in order to obtain the removal of trustees who have infringed the scheme, the latter may be amended so as to include a provision for removal, and it is not necessary to file a separate suit (6). In the undermentioned case (7) application was refused as the requirements of sects 235 (j) and 260 of the former Code bad becu ignored. Where an order was held act to invest a suit with a representative character, a person not on the record and not a member of the community of the plaintiffs hut claiming certain rights under the decree, was held to have no right to apply to compel the observance of the scheme directed by the decree (8). The directions in a scheme framed may be enforced in execution on application by persons interested (9).

Settling a scheme—Settling a scheme under this section is largely a matter of discretion, and the scheme will not be interfered with in appeal unless the discretion has been improperly exercised or the Court has failed to give due consideration to matters which it was bound to consider [10]

Costs -The costs of the Advocate General as hetween attorney and

Shailajananda: Umeshananda, 2 C L.
 J. 460, 469 (1905), Rangasami v Varadappa,

J. 460, 469 (1905), Rangasami v Varadappa,
 M at p 468 (1893)
 Muhammad Abdullah v Lallu, 21 1

^{187 (1899)}

⁽³⁾ Jamal ud din v Mujtaba, 25 A. 631, 633 (1903)

⁽⁴⁾ Abdul Karım ı Abdus Sobhan 39 C 146 (1911), 16 C W N 44

⁽⁵⁾ Damodarbhat v Bhogdal 24 B 45 -24 M L J 199 (1912) (1899), followed Prayag Doss t Tirumala, 28

M 319 (1905)

⁽⁶⁾ Ib

⁽⁷⁾ Sha Karamchand ν Ghelabhar, 19 B 34 (1693)

⁽⁸⁾ Ragava ν Rajaratnam, 14 M. 57 (1890)

⁽⁹⁾ Prayag Doss t Tirumala, 28 M 319

⁽¹⁹⁰⁵⁾

⁽¹⁰⁾ Kurpa Shankar a Manohar Tamicekor, 24 M. L. J. 199 (1912)

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⁽¹⁾ See Sujedur Raja : Gour Mohun, 24 C

^{(1897),} at p 423 and cases in note (2) p 373
(2) Budh Singh v Niradbaran Roy, 2 C L.

^{1 431, 430, 438 (1905)}

⁽³⁾ Kamaraju i Asanali, 23 M. 99 (1899), Subbarayadin i Asanali, 23 M. 100 n (1804), Huseni Begami i Collector of Moradabid, 20 A ii 70 (1897), Brajhuhar Dial i Kesho I aranaj ili A 18 (1888). See, however, bare Hassin i Sajun Bilkirshim, 21 B 17 1 f 150 181 (1831).

⁽⁴⁾ Sell arova la c Asanale 21 M 100 m (45)

⁽⁵⁾ Gyananan la Asram e Kristo Chandra,

⁸ C W N 104, 107 (1901) (6) Ram Churn Lewary : Protap Chandra

⁽⁷⁾ Prayag Doss : Tirumala, 28 M 119 (1995) A scheme was framed by the P C in Prayaga : Tirumala, 9 Bom L R 588

^{(1907),} a c, 34 I \ ~8 (8) \ctar Rama t \rinkatacharul | 26 M 150 (1902)

⁽¹⁾ Seo Subhayya / Krishna 14 M 18th

^{183 (15.0)}

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⁽I) Shailajananda t Umeshananda, 2 C.L. J. 460, 460 (1905) , Rangasamı : \aradappa,

¹⁷ M. at p 468 (1893) (2) Muhammad Abdullah : halle, 21 1

^{187 (1899)} (3) Jamal ud din : Mujtaba, 2. A. 631.

^{633 (1903)} (4) Abdul Karım : Abdus Sobhan, 33

C.146 (13th, 16C W Y 44

⁽⁵⁾ Damodarbhat e Bhogilal 24 B 45 -24 M L J 199 (1912) (1533), followed Prayag Doss r Titumals, 28

M 319 (1905)

⁽⁶⁾ Ib (7) Sha Karamchand : Ghelabhai 13

B 34 (1893)

⁽b) Ragava v Rajaratnam 14 M 57

⁽⁹⁾ Prayag Doss : Tirumals, 23 M 31J (1.305)

⁽¹⁰⁾ hura Shankar r Manchar Tamlecker,

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⁽¹⁾ See Saje lur Raja r Cour Mohun, 24 C (1857), at j 423 and cases in note (2) p 373

⁽²⁾ Buth Singh: Niradi sran Roy, 2 C L

 ^{1 (}a), 13 (100)
 (a) Kamvaju (Azall, 23 M 99 (1859),
 8) barayad (Azall, 23 M 100) (1859),
 8) barayad (Azall, 23 M 100) (1859),
 11 (a) 11 (a) (a) (b) (a) (b) (b) (b)
 12 (a) (b) (b) (b) (b) (b)
 13 (b) (b) (b) (b) (c) (c) (b)
 14 (b) (c) (b) (c) (c) (c) (c)
 15 (c) (c) (c) (c) (c)
 16 (c) (d) (d) (d) (d)

^{17) 177 17 181 (187)} (1) 5 17 rival 1 | Dinah 21 M 100 st (15)

^() Gyananan la Asram t Aristo Chan Ira.

SC W \ 101, 107 (1901)
(b) Ram Chara Tewary : Protan Chandra

Dutt, 2 C L. J. 148 (1886)

(7) Prayag Doss v. Tirumala, 28 M. 119

⁽¹⁰⁰⁾ Ascheme was Irained by the P.C. in Pravaga v. Thumala, 9 Hom. L. R. 588 (1397), a.c. J.H.A.78

⁽⁵⁾ Netal Rama i Venkatacharula 26 M 450 (1902)

⁽¹⁾ See Sul Layra (Art line 14 M 18 h.

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⁽⁴⁾ Abdul harımı : Abdus Sobhan, 39 C. 146 (1911), 16 C. W N 44

⁽⁵⁾ Damodarbhat v Bhogdal, 24 B 45 -24 M L J 199 (1912) (1599), followed Prayag Doss t Tirumala, 28

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⁽⁶⁾ Ib

⁽⁷⁾ Sha haramchand : Ghelabha: 13 B 34 (1893)

⁽⁸⁾ Ragava v Rajaratnam, 14 M 57

 $^{\{1899\}}$ (9) Prayag Doss t Tirumala, 28 \1 319

⁽¹⁰⁾ hirpa Shankar r Manohar Tamleckor,

to take advantage of the remedy given by this section (1). The provisions of this section show that where a clum is dismissed an injunction cannot subsist pending an appeal, or until the period for lodging an appeal has elapsed, for if such were the case the Court would not have had authority given it to grant compensation (2)

⁽¹⁾ Wilson v Kanhya Sahoo, 11 W R 113 (1869), as to the remedy by sunt, see Ioy Kalee Dassee v Chand Malla, 9 W R 131, 137 (1869), Nanda Kurnar Shaha v Gour Sunkar, 5 B L R 1pp 4, 6 (1870)

⁽²⁾ Shukh Moheeooddeen v Shakh Ahmed Hossein, 14 W R 334 (1870) Sco Ram Chand : Pitam Mal, 10 A 506, 572 (1888), Yamin ud doulah : Ahmed Vii Khan, 21 C 561, 563 (1894)

PART VII

APPEALS.

APPEALS IRON ORIGINAL DECREES

96 (1) Save where otherwise expressly provided in the 15.54 body of this Code or by any other law for the Appeals from original decrees. time being in force, an appeal shall he from etery decree passed by any Court exercising original jurisdiction to the Court authorized to hear appeals from the decisions of

such Comt

(2) An appeal may be from an original decree passed exvarte.

(3) No appeal shall be from a decree passed by the Court with the consent of parties.

Appeal.-An appeal is a stage in and part of the proceedings in a suit (1) There must be a suit, for if there is none there can be no decree, and therefore no appeal (2) It is the removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of the former Court,(3) and the lodging of an appeal is thus equivalent to an allegation that the decree is wrong and that the reasons which led to it are as stated in the judgment insufficient (4) It is a hearing before another tribunal, being in this distinguished from a review which is the reconsideration of the same subject by the same Judge (5) The function of an Appellate Court is to determine what decree the Court below ought to have made. It may affirm, reverse, or vary the decree under appeal (6) The rule upon which the Privy

⁽¹⁾ Ac Duh Chand 9 B L. R 190 196 (1872)

⁽²⁾ Peary e Baroda 19 C. 485 (1832) [a proceeding under sect \$4 of the Bengal Lenancy Act, and see also as to applications under sect 93, Hussain : Mutooldhar: 14 C 312 (1887), and proceedings under sect 91 of the same let, Dya Gazı r Ram Lal 2 (W Y 351, 352 (1897)1

⁽³⁾ Chappan e Voidin Kutti, -2 M 68, 80

⁽¹⁵⁹⁵⁾

⁽⁴⁾ Mt Pan Korr e Bhu, wunt Korr, 6

³ W P H. C R 19, 21 (1873) (5) Moheswar Sing r Bengal Government, 7 Moo L A 283, 305 (1853), though ex necessi tate there may be cases in which a review

might take | lace in fore another and different Judge (b) Aristo Linkur c Baroda Caunt, 11 M

L L 465, 433 (1872)

PART VII SEC 96

may either embody the result of its decision upon every question in the decice in the form of a declaration or otherwise, or it may not do so Cases of this last mentioned description, again, sub-divide into two classes, in one of which the decree is supported by the decision upon each of the questions determined, and in the other it is in spite of the decision upon some of those questions, as, for instance, where a suit fails upon the question of limitation, but the question of title is found for the plaintiff (1) The mere fact that a Court bas gone on to determine a question which it could not determine so as to bind the parties does not give a right of appeal against a decision on such a question (2)

The former section allowed an appeal from any part of the decree which may also be of a provisional or preliminary character, such as a decree in a partnership or partition suit (3) Though an appeal was allowed against a portion of a decision, jet there should, it was held, be a decision relating to the disposal of the entire suit (1) The words "or from any part" have been now omutted

"Courts authorized to hear appeals "-See the various Civil Courts Acts, and in Act XII of 1887, sects 20, 21, sect 55, Indian Divorce Act (IV of 1869) (5) As to idmiralty juri-diction, see note (6)

The subject matter of an appeal should be valued (7) for the purpose of turisdiction, according to the law in force at the date of the appeal and not of the suit which led to it (8) Where a plaintiff definitely fixes a certain sum as the amount of his claim, this must be considered as the vilue of the original suit and the appeal will be accordingly, but where he fixes a certain sum as the amount of his claim only approximately or tentatively, and prays that the mount of his claim may be recertained in the course of the suit, then the amount found by the Court to be due to him must be regarded as the value of the original suit for the purpose of determining the forum of appeal (9)

Ex-parte decree (clause 2) - The clause allowing appeals from ex parte decrees was added by lect 45, Act VII of 1888, previous to which let it was doubted whether an appeal was given in such ca es (10)

In Jonardan v Ramdhone,(11) the Calcutta High Court said that "when a decree is passed ex parte against a defendant, a remedy by appeal is now always open to hun by sect 510 of the Code as muended by Act VII of

200 (1552)

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⁽¹⁾ Peary Mohun : Ambica Churn, 21 C. J00, 901, 905 (1597)

⁽²⁾ Dva Gazar Ram Lal, 2 C W N 351,

⁽³⁾ Krahussami lyyarasırır Raja Gopula 13 3 ar. ar, 15 ML "3, 57 (1593)

⁽i) Raja of Ventatauri i Mahomed Rahemutulls, 3 M 13, 14 (1551)

⁽⁵⁾ And Percy r Percy, 18 L 3 5 3 7, 379 (1500), overruling Workan r M kin 4 1

⁽r) Inthomat crufthochil

^{17 (10, 51, 52, 53 (1587).} (7) her is test such heab-

ary Jurisdiction. (5) Muttammal (Chumana, 1 VL ...V

⁽⁹⁾ Gulab Khan : Abdul Wahab, 31 C 300, 363, s. c., 5 C 11 \ _33 (1+14), f 11 Installs Bharyan : Chan bra Moha : Ba. r.t.

HC W N 1133 (1 07), & c, o (LJ 25) Paraja M r : Laua' , 17 (W \ 116 119 7

^{(10) &}gt; + 1 Aun 44, 1 L 357 Rahama 1, > L 3.1 (1532),

¹³⁴¹ al, 3 14 110 (155.), 1 (155.)

^{(11) -3}

1888 But such a remedy can be efficacious only in those cases, and their number must be small, in which the cz parte decree is either wrong in law on the face of the proceeding or is based upon evidence so weak that even though unrelutted it is insufficient to sustain the decree. In the great majority of cases in which a defendant having a good defence has had an ex parte decree passed against him, the disadvantage ho labours under is that ho has not been able to substantiate his defence by evidence before the Court Upon the record, as it stands, the ex parte decree may he unassailable, but if the defendant has an opportunity (which he was prevented from having owing to some sufficient cruse) of placing on the record evidence which he could have adduced to substantiate his defence, no such decree should have been passed. The remedy in such a case cannot be by way of appeal, which must ordinarily proceed upon the record as it stands The proper remedy must be the one provided by seet 108 of the Code" In Sadhu Krishna Ayyar a Kuppan (1) however, Sir Arnold White, C J, said that these observations were merely obiter, and he added "they seem to me to involve the reading into the Code of a great deal which the Legislature might have said but did not say. I think it must be taken that the Legislature by accident or design has given a right of appeal apart from the merits, against an order on the ground that the defendant was not in default in failing to appear and against an ex parte decree, also apart from the ments upon the same grounds. There is a power to remand a case when the Appellate Court reverses an order refusing to set iside an ex parte decree, and it seems to me anomalous to hold that there is no such power when the Appellate Court allows an appeal against a decree upon the ground that there ought not to have been an ex parte decree against the defendant" (2) In this case it was held by the bull Bench that when a suit is decided ex parte an Appellate Court, to which the appeal from the decree 19 preferred under sect 510 of the former Code, had jurisdiction to reverse the decree of the lower Court on the ground that such Court was wrong in proceeding to decide the suit ex pane and remand the suit for re-hearing (3)

Appeal as to costs - See notes to sect 35, which deals with the general power to award costs

Consent decree (clause 3)—No appeal hes from such a decree A consent decree cannot be set aside by appeal or by motion (4). It or setting aside such a decree there are two available modes of procedure (a) by a sunt (b) by an application for a review of the judgment sought to be set aside. But the note proper mode is by an application for review (5)

Who may appeal -In the first place, whatever may be a party s rights

PART VII

5EL 96

^{(1) 30} M 54, 59, F B (1906)

^{(2) 30} ML 54, 59

⁽³⁾ Foll. Perumbara Nayar t Subrahmani an Pattar, 23 M. 445, and Habb Baksh t Baldeo Prasad 23 A 167, 168 (1901), and dissenting from Jonardan Dobey r Ramd hone Singh 23 C 738 (1899), Parvatshanlar t Bai Naval, 17 B 733 (1892), Caussanel t Soures, 23 M. 250 (1899), Sadha Kirshna r

huppar Ayyangar, 30 M. 54

⁽⁴⁾ Fatmabai t Sonbai, 36 B 77 (1911)

⁽⁵⁾ Aushootosh v Tara Prasanna, 10 C 612 615 (1384) See also Nistarini v Nando Lal 26 C 891, 907, s c, 3 C W N 670 (1889), Bray Mohmi t Chintamoni, 5 C W N 877, 878 (1901), Bhutnath v Ram Lal, 6 C W N 82, 85

under the general law, he may forego them and debar himself, or he estopped from asserting them If, therefore, an appellant agrees not to appeal, he cannot do so (1) A party, it has been held, may also otherwise be barred from appealing Thus, where a decree was obtained against A and others, and A not appealing, the decree was set aside and the case remanded on the appeal of the co defendants but re assumed by the first Court at was held that A could not appeal from the last decree (2) In the under mentioned case (3) however, a suit having been decided by the first Court after an intervener had been made party, it was remainded for trial on the appeal of the intervenor whose name was ordered to be expanged from the record The suit was decided again in f nour of the plaintiff, but the decision was reversed on appeal. It was held that the fact of the defendant having in the first instance allowed the intervenor ilone to appeal, did not dehar him, after the case was reepened by remand, from appealing in his own person

Chapter XLI of the last Code treated of appeals from original decrees, and Chapter XLII in the same Code of appeals from appellate decrees provided that an appeal shall be from such decrees gene, ally It is not expressly said by whom an appeal may be preferred, but it may reasonably be assumed that any party to the suit in which a decree is presed may, if dis-itisfied with it appeal from it O XLI r 33 refers to the judgment in appeal from original decrees, and enacts that it may be for confirming, varying or investing the decree against which the appeal is made, and applies under sect 108 to judgments in appeal from appellate decrees Hence, also, it is inferrible that the parties who are allowed to appeal are those who desire that a decree should be varied or reversed (4)

But a pro forma defendant tourist whom no judgment has been given has no right to appeal, even if another party has been found to be the owner of the land, masmuch as such finding carries with it no legal consequence as against him (5) So in the under mentioned case (6) it was held that the tenant had no reason to object to a decree, which was altogether in his favour, and it was not competent to him to present in appeal from the finding on an issue. Lien in the case of findings inserted in the decree it ell it is not necessary to appeal

⁽¹⁾ Moodshio Ameer Mr a Maharanee In kerpt hoer, 14 M. L. \ 203 (1571), \ \ \text{mant} Das t Ashburn r, 1 4, 207 (15"6), Pretab Chunder Dass : trathoon St 400 (1882), s. c. 10 C. L. It. 113 , Bahir Das Chakeararte t Nobin Chun kr 1 al, .. J C 300 (1.01) . * 1 6 C. W Y L.I. Litam Chandra Kurthy i Mictra Nath Chattopadhya ad Corr (1 01) in Rajmohan C saan r Gourmohun Gossain No. 1 1 H (1501) a decree of an Uncllate tourt obtain a after congressive was h 11 to be fraudulent and was set Ass le If a person carry s on an appeal contrary to I a agreement a sutfr la sus will le Jailtanie Das Ran 30 I. H. "I(IS)

See also Ragobir Dial : Last India Com pans, Fulton, 116 (1813)

^{(-) \}and hishori Singh r Balmokund, I Shome 12 (157")

⁽³⁾ Buck t Sugh t Mirza Machook Mi

He 15 W L JT. (15 1)

⁽⁴⁾ Jumma Single & Kamer un misse J \ 102 100 107 (1570)

^() Rum Di + Lu | kar | Hunglar M o Linx . . . 3 11 11 50 (15"1)

⁽b) Mutta Kariaraj pa i Arum as 7 M 21. 113 (1573), as to obj ett n to im la , m Might tour er bajar hij in Boan? J 1988 p. . D. cited in 1 Hi Ladle laguage B to Rap to num 13 B to ... (1588)

if the findings be on issues which are not necessary for the decision of the suit in which they are raised (1)

Assuming there is otherwise no har, the question as to who may appeal is determinable by the common sense consideration that there can be no appeal when there is nothing to appeal about A person, therefore, who is no party (2) to the suit in which a decision is given can, as the decree does not affect him. have no ground to appeal therefrom Tho person appealing must also have been a party when the decree was passed Thus a person was once made a party to a suit, but the decree was set aride, the suit as against him dismissed. and the ease remanded for trial From this last decision he appealed, but the Court ordered the appeal to be struck off as made by a person no longer a party to the suit (3) A party, however, to the suit when the decree is passed, or when they have been brought on the record, his representative (4) or assigned (5), may appeal regarding their own rights invaded by the decree (6)

Ordinarily only the party against whom a decree is passed, that is the person ordinarily injuriously affected by the decree, can appeal For the same reason a person against whom a suit has been dismissed usually cannot appeal against the decree, as he is not affected otherwise than beneficially by it But in some cases a suit may be dismissed as against a defendant and yet the latter may have a right of appeal It is not because a suit is formally dismissed that no appeal lies but because such dismissal is ordinarily not merely no grievance hut an actual benefit to the defendant There is nothing to complain of If however, a party is aggreeved (7) by a decree then notwithstanding that the suit is dismissed against him he may appeal

⁽¹⁾ Ghola Ichharam v Sankalchand Jetha, 18 B 597 (1893)

⁽²⁾ See Caemmerer v Birch, 1 Mad H C R 8 (1862), where, however, an objection was taken to a next friend being heard on the ground that he was no party to the suit, it was held that the Court would not entertain the objection at the instance of the party through whose fault the error occurred, viz, that the next friend only and not the miner had been made respondent to the decree appealed from Bhobotarini t Sreo Ram Paul, 9 C 629 (1883) An exception also exists in the case of an auction purchaser who, as well as a decree holder and judgment debtor, may appeal from an order setting aside an execution sale, though he may not have been a party to the suit Hiralal Ghose t Chundra hanto Ghose, 20 C, 539 (1899) The case to the contrary reported at p. 511 was uncontested and is of no authority

⁽³⁾ Golool Pershad Deschite t Monce Debia, 24 W R, 259 (18"5).

W R. 133 (1866) (5) See Gajadhar Prasa Ir Ganesh Tewari,

⁽⁴⁾ See Jugoo Lal t Lalla Bhikun Lal 5

⁷ B L R 149 (1871) In Moheshwar v Aushabas 2B 248 (1877) which was decided under the Code of 1859, the transfer was before the second appeal, which was preferred by the transferor He died before the appeal was heard and the transferee applied but was not allowed to carry it on. This case is now provided for by O AXII r 10 See Ahmed bhoy v Valleebhoy, 8 B 323, 330 (1884) . Rajaram v Jihar, 9 B 151, 156 (1884) Tho case of Jaduputtee t Chunder Kant Bhatta chargee, 9 W R 309 (1868), was a rule Tho purchaser was not added, but substituted for the plaintiff, apparently without the latter a concurrence

⁽⁶⁾ Sm. Khermukree v \dumbur Mandal, 2 W R 227, at p. 231 (1865)

⁽⁷⁾ Musst, Pan Kooer v Bhugwunt Kooer, 6 Y W P 19 (1573) 'It must be held that in appeal, as well as in review, the appellant must be aggreeved by the decree, per Jardine, J , and see also per Pearson, J, and Stuart, C.J. at pp. 23, 25 Lachman Singh r.

Vohan, 2 4, 497, 499, 501, per Stuart, C.J. I am now quite ready to accept the principle that an appellant must be aggressed by the

The general question whether successful defendants in a suit can appeal from the decree in their favour has been raised in several cases, though under different circumstances In the first of the last-mentioned cases, which was one in which the defendants had no contention inter se, but on the contrary a common interest against the plaintiff who was the respondent in the appeal, it was held that as the appellants had no ground of complaint, and as the appeal was against a decree wholly in their own favour, the legal meaning of which was that the plaintiff's suit altogether failed, there was no appeal (1) In the under mentioned case (2) the plaintiff's suit had been dismissed. The defen dant appellants did not desiro that the decree dismissing the suit should be varied or reversed. The attempted appeal, which was disallowed, was by one defendant against another, the matter in issue being the authenticity and validity of a deed of conditional sale purporting to have been executed by one defendant as vendor in favour of the other as vendee So again a party cannot appeal to protect a possession which he has disclaimed to hold except on hehalf of another party whom he is not authorized to represent and who has not appealed (3) In such case he is not interested either on his or on such other party's hehalf (4) Inasmuch as an appeal hes from the decree and not from the judgment, (5) therefore a party cannot appeal from a decree which is altogether in his favour simply because there may he findings or expressions in the judgment which may he prejudicial to him (6) In a suit for rent in which the only real issue was whether one X was or was not hable for rent, and in which Y the alleged purchaser of the tenuro was held to have been wrongly made a party on the application of the tenant, it was held that Y had no light to appeal against a decree given against X praying for a declaration of her (Y's) hability for rent as purchaser from the tenant (7) On the other hand, an appeal has been held to be hy defendants against whom specifically no decree was made, but whose defence

decree, per Spankie, J., at p 504, and see 1p 507, "08, 2er Oldfiel i, J. This case dissents from Saroop Chunder Pal i, Dombal, 1 W R 72 (1501) which does not appear to be correctly decided

(1) Musst Pan Kooer t Bhugwunt Kooer 6 N W P 19 (1573) See on this case Jumna Sing t Kamar un msa, 3 V at pp 154, 175

(2) Jumna Singh r Isamar un m s, 3 A 152 (1880)

(3) Sheshavyar i Parruvaradayingar, 6

(3) Sheshavyar i Paffuvaranay ingu, VL 185 (1882)

(i) See also Dorga M bajuttur. Raha M hun Mitter, L5 W It soot (1871). Where a find in whose such jointly with her with bright was bomes by the dil in tailpeal, and it was both that he result from a wholad no see that the result fit aut wire not

competent to prefer a second appeal.

(5) Shama Soondureo Dobas i Digumbareo Dobas 13 W R 1 (1870), Must Pan Kooer, e Bhugwant Kooer, θ N W P 19 (1573), Ram Days Iushkar i Hurcchar Mookherjee, 23 W R 86 (1871), Muttu Kumarappa t

Arumuga, 7 M. 115, 143 (1883). Lefe inte. Decrees.

(6) Vide ante " Decrees

(7) Mu at Oognee Choudhran e Shakh keramute Bah, 17 W R 219 (1872), dist in Arshua Chandra Gol lar e Mohah Chan la Sha S A Cal. If C 330 (11902) in which the Jitutilis hal then dies all 1 the authon jurchaser alloging that le was a mechanical larger of the creaming the continuity at larger than the Lower Appellate Out word, by set as lo an irl e who had the appellate 1 at leasn a lumit neet to so of the furrical at leasn a lumit neet to so the furrical.

to the suit was necessarily disposed of by the decree (1) In order to see what the decree really means, the Court may look not only into the judgment but into the pleadings. If the decree, although apparently, and so far as it goes, favourable to the defendants, is yet imporfect and not self explanatory, and when read by the light of the record really unfavourable ond may prove injurious to them, then the defendants, being aggreed by it and having overy interest to appeal, may do so (2). In short, any person who being party to proceedings is injuriously affected by a decree passed therein is entitled to appeal (3). And if this be shown, it is immaterial that the suit may have been dismissed as against him.

Orduardy a case is decided upon issues between the plaintiffs on the one side and the defeudants on the other. Thus a defendant, whether interested or pro forms only, cannot appeal against a co-defendant (4) unless the Court has deaft with the case at the hearing as reising not only a question between the plaintiff and defendants but also is between the defendants, in which case one of the defendants can appeal against the decree as between hunself and the other defendant (5). When the decree of the Lower Court proceeds on a ground common to oll defendants the Appellate Court may, on oppeal by one of the defendants organist the whole decree, reverse the decree in so far os it affects the other defendants though they have not joined in the appeal (6).

97 Where any party aggreed by a preliminary decree paper from final passed after the commencement of this Code decree where no appeal does not appeal from such decree, he shall be from preliminary decree precluded from disputing its correctness in any appeal which may be preferred from the final decree

Mohinco Dossa, 7 W R 366 (1867), Ram essur Choos v Azeem Joardar, 17 W R, 373 (1872), Junna Singh t Kamar un nissa, 3 A 125 (1850), Kashee Chunder Ray t Sm Doorga, 11 W R 410 (1869), but if he is allowed to do so he is estopped from asking that the decreaon may be set aside for want of jurisduction b A person cannot however, appeal so as to affect another s rights under the decree unless he males that pther person a respondent Ram Mohun Dey t Kangaleo Gopco 20 W R 149 (1873) as to cross appeal see Sched I, O AkL r 21, Goono mome Dossa t Parbutty Dassia, 10 W R 326 (1868)

(5) Sorru Padmanath v Narayanrao, 18 B 529 (1893)

(6) Dhutta Coor : Paidigan Tam, 30 M

⁽¹⁾ Jamna Das v Udey Ram, 21 A 117 (1898), and see also Ram Golam v Shee Tahal, 1 A 260 (1876), in which an appeal was held to be on the ground that the respondent's sut should have been dismissed absolutely, and not in such a manner by negativing the defence, that the respondents were at blorty to come into Court again.

⁽²⁾ Luchman Singh t Mohan, 2 A 497, 500, 501 (1879)

⁽³⁾ See Mirhamdee v Nszerun, 6 C 19 (1880), which was a case under sect 28 of Act XI ol 18.9 (Guardian and Wards), which provides that all orders shall be open to appeal under the rules in force for appeals run miscellaneous cases (i.e. appeals from orders under sect 588 of the former Code) Similar language was used in that section and in as 540 and 584 of that Code

⁽⁴⁾ Gudadhur Bannerjes : Musst Mun

Preliminary decrees —A decree according to the definition in sect 2 may be either preliminary or final. And an appeal lies against a preliminary decree. It was, however, a matter of debate under the former Code whether in an appeal against the final decree, it was open to the appellant to question the correctness of the preliminary decree when no appeal had been preferred against it within the time allowed (1). The Legislature has now determined the question in the negative by this section. The object of this section is to prevent preliminary questions licing raised in the form of an appeal after the case has been decided on its merits (2). But an aggreeved party can only appeal if a decree is extant in a formal shape (3). Although there may be a preliminary finding, yet unless a formal decree is drawn up, there is no possibility of the appeal here contemplated (4). There is no provision enabling an Appellate Court to dismiss an appeal igunst a preliminary decree on the ground that a final decree his

Where in a

issues and ordered accounts to be taken on their basis, but drew up no preliminary decroe, and a Commissioner took the accounts, and on his report the suit was iliamissed, it was held that under this section plaintiff was not barred from appealing and now objecting to the preliminary findings, it was held also that no party or pleader is bound to move the Court to draw a decree and omission to do so cannot affect the right of appeal (6)

98 (1) Where an appeal is heard by a Bench of two or more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges.

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such decree shall be confirmed

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in

Khadem Hossen t I mda I Hossen,
 W N 017 (1001) and case there exted
 Govind t Vithal 36 B '36 (1912).

¹⁴ Bon, L. R. 560 (3) Bai Birah i Vishnay Man rdas, H Bon, L. R. 13-6 (190) 34 B 182, Sid banatha Gancab 14 Bom L. R. 16 (1914)

 ¹⁷ B (4)
 (4) Sakharam i Salashiv, 15 Bom L. R
 182 (1913), hrishniji i Maruti, 12 B ii

L. R. 7c2 (140) (a) Kuji isai ya Raja ah hai 24 M. L.J. 1 to (1412) | f B. was Pama cu a Verrajah 1 an 22 M. J. J. 217 (1411) | Lecuting

fr m Mackenzie i Narasingh, 36 C 762 (1909) See also Khirothmoyi Disi i Albar Chandra, 18 C L. J 321 (1913), Nistarini Lite Bai Mohun, 18 C L. J 211 (1913)

⁽e) Kaluram Pirchani I Gangaram Skibaram, 18 B. 331 (1913), and is only Skibaram Vishrum Survo i Sadashi Bidott Lodha 37 B. 180 (1913), following Hall Dividi v Vishnav Wan ribas, 37 B. 182 (1994), and distinguishing Cund Ram Can Kas 1 Withd, 30 B. 356 (1912), and is compared to the control of the contr

opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be deeded according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Procedure on difference of opinion.—The result of this provision is as follows -Where the Judges differ, but not on any question of law, there can be no reference and the decree is affirmed (1) But there is an appeal under the Letters Potent (tide post) If the difference is on a point of law, then the Judges may or may not (2) refer the point of law. In the case of reference the judgment on the point referred is according to the mojority of the Judges who first heard the appeal and the third Judge, and in the second case (that is, where there is no reference under this section) there is an appeal under the Letters Patent The effect of this section is to supersede the provision in the Letters Patent that in the case of disagreement the judgment of the senior Judge shall prevail, (3) a provision which is still in force as regards Letters Patent appeals,(4) but it does not take away the right of appeal Therefore when the judgment of a Lower Court has been confirmed under this section by reason of one of the Judges of the Appellate Court agreeing upon the facts with the Court below, an appeal will be against such judgment under the Letters Patent, notwithstanding the terms of this section (5) When the Judges of a Division Bench have concurred in a final decree, the fact that they differed on one point is no ground for an appeal under the Letters Patent (6) It was also held that where the Judge to whom an appeal was referred, concurred with one of the differing Judges as to the decree to be passed, but did not agree with bim as to the reasons therefor, there was no further oppeal to the High Court under clause (15) of the Letters Patent (7) See now as to amendment next paragraph but one Sect 617 of the Code of 1877 was held to extend sect 575 of that Code (which on the face

(4) Lachman Singh v Ram Lagan Smgh,

Jehangir v Secretary of State, 6 Bom
 R 135, 206 (1903)

⁽²⁾ See Sural Presad v Golab Chand 27 G 724, 762 (1900), 28 C 517 (1900)

⁽³⁾ Sr Gridhariji e Purushotum Gessamı, 10 C 814, 316 (1884), Appaji Bhiviav v Shivlal Khubchand, 3 B 204 (1870), Aara yanasami Reddi i Osuru Reddi, 25 M 648, 551 (1001) [data Husani Begam t Collector of Vuzaffurnagar 11 A 170, 178 (1889), where it was held that the Gods did not apply on the ground that there had been no hearing of the appeal, the Judges having differed on the point whether the appeal was time-barred]

²⁶ A 10 (1903)

⁽⁶⁾ Sr Gridbaru v Purushotum Gossam, supra, F B, Mohendro Chandra Gangul t Ashutosh Gangul 20 C 762 (1893), Lala Suraj Prosad t Golab Chand, 28 C 517 (1901) Deo Chand t Hra Chand 13 B 449 454 453 (1889), Acshav Pandurang t Venayak, 18 B 355, 362 (1893), Naraya masam Redda v Osuru Reddi, 25 W 548 (1901) Raghunath Prasad v Jurawan Rai, 8 A 105 (1886), Jadu t Hari Kar, 17 C L J 206 (1913)

⁽⁶⁾ In re Hurban Sahay, 10 C 108 (1883) (7) Jehangar : Sceretary of State, 6 Bom

L R 230 (1904)

Preliminary decrees —A decree according to the definition in sect 2 may be either pieliminary or final. And an appeal hes against a preliminary decree. It was, however, a matter of debate under the former Code whether in an appeal against the final decree, it was open to the appellant to question the correctness of the preliminary decree when no appeal had been preferred against it within the time allowed (1). The Legislature has now determined the question in the negative by this section. The object of this section is to prevent preliminary questions being raised in the form of an appeal after the case has been decided on its ments (2). But in aggreeved party can only appeal if a decree is extant in a formal shape (3). Although there may be a preliminary finding, yet unless a formal decree is drawn up, there is no possibility of the appeal here contemplated (4). There is no provision enabling an Appellate Court to dismiss an appeal against a preliminary decree on the ground that a final decree has been passed while that appeal was pending (5).

Where in a suit for accounts the first Court recorded findings on preliminary issues and ordered accounts to be taken on their basis, but drew up no preliminary decree, and a Commissioner took the accounts, and on his report the suit was dismissed, it was held that under this section plaintiff was not barred from appealing and now objecting to the preliminary findings, it was held also that no pasty or pleader is bound to move the Court to draw a decree, and omission

to do so cannot affect the right of appeal (6)

98. (1) Where an appeal is heard by a Bench of two or Decision where appeal more Judges, the appeal shall be decided in accordance with the opinion of such Judges or of the majority (if any) of such Judges

(2) Where there is no such majority which concurs in a judgment varying or reversing the decree appealed from, such

decree shall be confirmed

Provided that where the Bench hearing the appeal is composed of two Judges belonging to a Court consisting of more than two Judges, and the Judges composing the Bench differ in

Khadem Hossem v Emdad Hossem
 V N 617 (1901), and cases there cited
 Govind v Vithal 36 B 536 (1912),

¹⁴ Bom. L. R. 560
(3) Bai Divali t Vishnav Manordas, 11
Bom. L. R. 1326 (1909) 34 B 182, Sid
hanath t Canesh, 14 Bom. L. R. 916 (1912).

¹⁷ B 60
(1) Sakharam τ Sadashiv, 15 Bom L. R
182 (1913), Krishnaji τ Maruti, 12 Bom
1 R 762 (1910)

⁽⁵⁾ Kuj pus my i Ragmah Bar, 24 M. L.J. 100 (1912), fellown g Pamaien i Veerapud han 22 M. I. J. 217 (1911), dissenting

from Mackenzae v Narasingh, 36 C 762 (1909) See also Khirodamoyi Dasi v Adhar Chandra, 18 C L J 321 (1913), Nistarini Delu v Rai Mohun, 18 C L J 214 (1913)

⁽⁶⁾ Kaluram Pirchand i Ganguram Sakharam, 38 B 331 (1913), and see also Sal haram Vishram Survo i Sadashi Balshet Lodha, 37 B 480 (1913), following Bai Divali i Vishaw Manordas, 34 B 182 (1909), and distinguishing Covint Ramchandra i Vithal, 36 B 636 (1912), and see Ram Nath i Basuni Narum, 18 C I I 209 (1913)

opinion on a point of law, they may state the point of law upon which they differ, and the appeal shall then be heard upon that point only by one or more of the other Judges, and such point shall be decided according to the opinion of the majority (if any) of the Judges who have heard the appeal, including those who first heard it.

Procedure on difference of opinion -The result of this provision is as follows -Where the Judges differ, but not on any question of law, there can be no reference and the decree is affirmed (1) But there is an appeal under the Letters Patent (vide post) If the difference is on a point of law, then the Judges may or may not (2) refer the point of law. In the ease of reference the judgment on the point referred is according to the majority of the Judges who first heard the appeal and the third Judge, and in the second case (that is, where there is no reference under this section) there is an appeal under the Letters Patent. The effect of this section is to supersede the provision in the Letters Patent that in the case of disagreement the judgment of the senior Judge shall prevail.(3) a provision which is still in force as regards Letters Patent appeals.(4) but it does not take away the right of appeal Therefore when the judgment of a Lower Court has been confirmed under this section by reason of one of the Judges of the Appellato Court agreeing upon the facts with the Court below, an appeal will be against such judgment under the Letters Patent, notwithstanding the terms of this section (5) When the Judges of a Division Bench have concurred in a final decree, the fact that they differed on one point is no ground for an appeal under the Letters Patent (6) It was also held that where the Judge to whom an appeal was referred, concurred with one of the differing Judges as to the decree to be passed, but did not agree with him as to the reasons therefor, there was no further appeal to the High Court under clause (15) of the Letters Patent (7) See now as to amendment next paragraph but one Sect 647 of the Code of 1877 was held to extend sect 575 of that Code (which on the face

(4) Lachman Singh r Ram Lagan Singh,

26 A 10 (1903)

(5) Sri Gridhariji t Purushotum Gossami, supra, F.B., Mohendro Chandra Ganguh et labutosh Ganguh e De 7 62 (1893), Lala Sura) Provad i Golab Chand 28 C 517 (1991) Deo Chand i Hra Chand 13 H 49 454 453 (1883), Kesbax Pandurang t Venayah 18 B 355, 302 (1843) Naraya nasatin Reddi r Osuru Reddi, 25 M 518 (1991) Ragbunath Prasad r Jurawan Raj, 8 V 105 (1886) Jadu r Hari Kar, 17 C L, J 266 (1913)

(6) In re Hurban Sahay, 10 C. 108 (1583) (7) Jehangir e Secretary of State, 6 Boin

L R 230 (1.04).

⁽i) Johangir v Secretary of State, 6 Bom L. R 135, 206 (1903)

⁽²⁾ See Suraj Prosad t Golab Chand 27 C 724, 762 (1900), 28 C 517 (1900)

⁽³⁾ Sri Gridhariji t Purushotum Gossami 10 C. 814, 816 (1854). Appan lihivrav r Shvial Khukchand 3 B 204 (1879). Nara yansami Red h + Osuru Red h, 25 M, 548, 751 (1901) [duk Ilusami Regam r Collector of Muzaffurnagar 11 N, 176 175 (1859) where it was hel I that the Code did not a 11 ly + in the groun I that there had been no hearing of the appeal, the Judges having differed on the point whether the appeal was time-barred]

"Save where otherwise expressly provided."—The right of appeal is a substantive right of a very valuable nature, and the presumption is against the taking away of a substantive right of such a nature by mere unplication, and where the Legislature wants to take it away it will do so expressly duction of the word "expressly" gives effect to this view (1) Cf sect 19 (3) and sect 26 (3) Succession Certificate Act (2) (VII of 1889); sect 109 A Cl (3) Bengal Tenancy Act (VIII of 1885) (3) sect 153 Bengal Tenancy Act As to suits for arrears of rent under Act X of 1859, see note, (4) and as to appeal against the decision of the Court to which a reference was made under sect 15 of the Land Acquisition Act (5) (X of 1870), the decision of a District Court passed on appeal from the decision of a forest settlement officer, (6) the decision of the Political Agent of the Southern Maiatha Country passed in regular appeal, (7) the decision of a District Court on appeal from an order of a Talukdari Settlement officer under sect 16, 21 of Guzrat Talukdar's Act (Bombay Act VI of 1888), (8) Chota Nagpur Tenancy Act (VI of 1908, B C), sects 87 and 264, sub sect (1), cl (2),(9) see eases eited As to special appeals against decrees on awards, see second schedule.

"Shall lie."—As to who may appeal, see notes to sect 96, ante An appellant who was the respondent in the lower Court and did not appear in that Court is not deharred by reason of his non appearance in that Court from preferring an appeal to the High Court (10) In second appeals, the appellant has a right to question every order of the subordinate Courts leading up to the decree objected to, if it was made without the sanction of law (11) No second appeal, it was held, lay from the last order passed on an application for review of a former older (12) The question whether an appellant in second appeal can raise an objection to the legality of a remand order when he had not preferred any appeal against it,(13) is now dealt with hy the second clause of sect 105, post Before the passing of Act VII of 1905 a second appeal from the appellate decision of the District Judge of Sambalpur lay to the Court of the Judicial Commissioners of the Central Provinces, but now such an appeal lies to the

⁽¹⁾ Kamaraju v Secretary of State, 11 M. 30J, 312 (F B) (1888)

⁽²⁾ Subba Rao v Palamandi, 17 M 167 (1893), Rama Reddi : Rapi Reddi, 19 M. 199 (1895), Monmohini t Khetter, 1 C 127 (1870), s c, 21 W R 362, In the matter of petition of Nanuk: Nittya, 6 C 40 (1880), and see Atta Sundarı v Srinath, 20 C 611 (1893), as to orders for security against person obtaining a certificate.

⁽³⁾ Ram Bishen t Rajaram, 33 C 832, 837 (1906), Rameswar : Bhubaneshwar, JJ

C 837 (1906), s c, t C L J 138 (4) Sadar Naik : Serai Naik, 28 C 532

⁽¹⁹⁰¹⁾ (5) Mrn Bar t Arno Poarms, 8 C. 838 (1883), a c, LC L R 409

^{*(0)} Kamaraju : Secretary of State, 11 M.

^{309, 312, 314 (1868)}

⁽⁷⁾ Nilowa v Fakirappa, 6 Boni, H C R 75 (1869) A decision of a District Court under the Land Acquisition Act is not a decree It is an award and not appealable Nathubas v Manordas, 36 B 360 (1911), 14 Bom. L R 325

⁽⁸⁾ Jamsang t Goyabhar, 16 B 408, 412 (9) Raghubur : Sri Pratap, 39 C 211

^{(1911), 10} C W N 291 (10) Kali v Dhunanjoy, 3 C 228 (1877), Apudha Prasad : Balmukund, 8 1, 351

⁽¹⁵⁵⁶⁾

⁽¹¹⁾ Runglall t Takhun, 2 C 111 (1876) (12) Modhoomutty Debia t Dhunjut

Singh, 13 W. R 167, 168 (18.0) (13) Mohesh v Jamiruddin, 28 C 321, 328

⁽¹³⁰⁰⁾ See cases cited in sect 100, post

Calcutta High Court (1) A special appeal on the grounds given in sect. 160 hes to the Ifigh Court from the decision of the Civil Judge at Vinchur (2) When the lower Appellate Court passes separate decrees in appeals relating to tho same matter between the same parties, against the same person, separate second appeals must be filed, though the decision in one second appeal will govern the rest (3)

Scope of second appeal.-The grounds upon which a second appeal hes and the cases in which it is open to the High Court to interfere with the judgment of the lower Appellate Court, are those set out in sect 100, and sect. 101 expressly enacts that no second appeal shall be except on the grounds mentioned in the former section The Privy Council have, in more than one case, pointed out the necessity of adhering strictly to the provisions of those sections (1) And no Court in India or elsewhere has power to add to or enlarge those grounds (5) No second appeal has against a finding of fact. If the High Court poes through a case as a regular appeal it exceeds the statutory limits of its jurisdiction. It has no power to entertain a case except as an appeal from an appellate decree on the grounds stated in sect 100, which deprives them of the right to review findings of fact unless these are vitiated with one or other of the errors or defects stated in this section (6) The limitation to the power of Courts in a second appeal ought to be attended to and strictly followed, and the appellant ought not to be allowed to question the finding of the first Appellate Court upon a matter of fact (7) It cannot detract from the weight of concurrent fundings of fact, that different Courts, in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view bo taken of it, must necessarily lead to one and the same inference (8) The consent of parties will not give the High Court a jurisdiction which it does not otherwise possess, (9) so the High Court, even with the consent of the parties, cannot pronounce a decree on the facts in a special appeal (10) On

(5) Durga v Jawahir, 17 1 A 122, 127

(6) Lukhi Naram v Maharajah Jadunath. 21 1 A 39, 45, s c, 21 C 504 (1893)

⁽¹⁾ Balbhadra v Musst Bhawam, 11 C W N 956, 958 (1907), Baloram v Mangta Das, 11 C W N 959, 962 (1997)

⁽²⁾ Ram Chandra Anandrao v Pandu, 38 B 340 (1913)

⁽³⁾ Chathu : Kunhamed, 11 M, 280, 282

⁽¹⁸⁸⁷⁾

⁽⁴⁾ Ananga Manjari t Tripura Sundars, 14 C 740 (1887), s c, 14 I A. 101, 110, Pertap v Mohendra, 17 C 291 (1889), s c, 16 I A. 233, Durga v Jawahir, 18 C 23 (1890), s c, 17 I A, 122, Ram Ratan v Nandu, 19 C 249 (1891), s c, 19 1 A 1, Kameshwar Pershad v Amanutulla, 26 C 53, 70 (1898), s c, 2 C W N 649, 662, And the same was held as regards the Act of 1853 (XVI) Sevvan Vilaya t Chinna Nayana, 10 M. 1 1 151 (1864)

^{(1890),} s c, 18 C 23, 30, see also Non but v Chutter Dharce, 19 W R 222, 223 (1873)

⁽⁷⁾ Pertap t Mohendra, 15 I A 239 (1889), s c, 17 C 291, Balkrishna v Govind, 26 B 617, 622 (1902) , Luchman : Puna, 16 C 753, 755 (1889), Pandurang t Anaut, 5 Bom L R 956, 969 (1903), Sevvaji Vijaya t Chinna Nayana, 10 M. I A 151, 164 (1864), President Taluk Board Sevagunga v Narayanam, 16 M. 317 (1892)

⁽⁸⁾ Nilmon v Kirti Chunder, 20 L A 93, 97, 98 (1893), s c, 20 C 847

⁽⁹⁾ Ladambinee v Doorga Churn, Marshall 4 (1862), Minakshi v. Subramanya, 11 M. 26, 35 (1887), s c, 14 L A. 160

⁽¹⁰⁾ Kadambinee : Doorga Churn, supra

second appeal the High Court have no power to deal with the sufficiency of evidence, they have only a right to entertain questions of law. Their duty being thus confined, it seems that when evidence has been wrongly admitted by the Court helow the High Courts have, generally speaking, no right to decide whether the remaining evidence in the case other than that which has been improperly admitted is sufficient to warrant the finding of the Court helow. This question of sufficience of evidence cannot be decided without examining in detail that other evidence and determining as a question of fact, whether it is sufficient of itself to warrant the lower Court's finding (1).

In a special appeal, the general affirmation of a judgment below can only be on the points raised by the special appellant. By rejecting a special appeal it does not follow that the High Court necessarily affirms all the other findings of fact or of law which the lower Appellate Court may incidentally

come to (2)

If the judgment and decree of the lower Appellate Court centain findings which, though immaterial to the decision of the ease and unnecessary for the Judge to decide, jet, as they form part of the judgment and decree might give rise to the application of the doctrine of res judicata, the High Court on second appeal, may order that such findings shall be expunged from the record (3). There is no general rule that in every case when evidence is taken on a question of fact the parties are entitled to the decision of two Courts. Therefore when additional evidence is taken by the lower Appellate Court, the High Court cannot go into the facts as in the case of a first appeal (4).

The Code provides for the manner in which the judgments of Courts are to be invised and corrected and there is no other lawful mode by which decrees of Courts can be reviewed. Thus where a Court of Appeal directed a remand for a particular purpose, namely, to try the plea of payment, the Court of remand, it wis held, should try that plea only and had no authority to try any other plea, if the Court proceeded to hear and determine the whole case over a anu, the decree passed by it should be revised except as to the plea referred to on remand (5). A remand order conclusively determines the points of law involved in it, and these cannot be questioned on second appeal (6). The High Court in special appeal (6). The High Court in special appeal (6). The High Court in special appeal (6). The High Court in special appeal (6). The High Court in special appeal (6). The High Court in special appeal (6). The High Court had not in into a vigorial and the findings of the lower Appellate Court had not in into a vigorial and the findings of the lower over (7). If the facts found by the lower Appellate Court are sufficient to enable the High Court to apply

⁽¹⁾ Womesh Ch Chatterjee t Chunder 7 C _JJ _90 (1881) (2) Shaikh Ahmed t Must Bandce 15

^{(3) \}anda Lal : Bonomali 11 C 311

^{(3) \}anda Lal : Bonoman 11 C 512 (1885) (4) Gonal : Jhakri I (1885) Bal

Marsh 603 (1883) As to remand by mistake, see Mahomed Hashim t Kalco Churn, 13 W R M 3 (18 0) (6) I 1 -rbhai t Damodhar, 6 Bom

H. C 1 (J 146 148 (1508) As to dect. 10 law on an appeal from an or 2 see Gourt Shankar 1

Kart. V 113 (1533) (7) i + Ra 22 0 C, W N

any principle of law to the appeal before them, then they may dispose of the case without any remand, (1) hut it was formerly beld that if the lower Appellate Court omitted to record any finding upon a material part of the case, the second Appellate Court were not at liberty to draw any inference of fact from the evidence in the case, and should remand the case for retrial (2) But see the new sect 103, post (3)

The above observations as to the limitation on the power to deal with facts must now be read subject to the new provisions contained in sect

103, post

In adjudicating on issues of fact the first process is to determine as to their existence or non existence. In order to determine such an issue, inferences are necessarily drawn from other facts as to the existence or non existence of facts in issue. Such inferences and the conclusions to which they lead are inferences and findings of fact.

An erroneous finding of fact is not an error or defect in procedure, though, as herematter pointed out, the Court may in adjudicating on fact vitate its conclusions by errors of law and procedure. A simple finding of fact, however erroneous or unsatisfactory it may be, is not the subject of second appeal. There is no jurisdiction to entertain such an appeal on the ground of an erroneous finding of fact however gross or inexcusable the error may seem to be. Where there is no error or defect in the procedure, the finding of the first Appellate Court upon a question of fact is final, if that Court had before it evidence proper for its consideration in support of the finding (4)

There are however, decisions which held that if the judgment is not based upon the whole evidence upon the records, and the Judge does not take into consideration all the facts and circumstances of the case then, there is an error in procedure, (5) as also where the Judgo had erroneously assumed a fact to

⁽¹⁾ Dwarkadas v Adam Ma 3 Bom. M. C. R A J 105 (1866) Rampat Singh +

Balbhaddur, 6 C. W. N. 849 (P. C.) (1902) (2) Dwarkadas v. Adam Mr. supra

⁽³⁾ And Wargankar v Wadekar 5 Bom. H C R A C J 194 (1868) (4) Durga v Jawahir, 1" I A 122 127

^{(1890),} s°c, 18 C. 23, 30 Shirabasan av Sangappa 20 B 1, 12 (P C.) (1904), a. c., S C. W N 8°5 Rummoezceddeen e Joymala 15 W R. 303 (1871), Radha e Joymala 15 W R. 303 (1871), Radha e Pulls, 16 C. 753 (1889) Servaji Vijaya Chimaa Najana 10 M. 1 A 151 16 (1864) Fazal Kariu e Moula Bakab 18 C 448 (1891), a.c. 18 L N. 67 Waser Heera Lal 16 W R. 103 (1871) Savie Punchanun 2° W R. 503 (1871) [orinsson to draw 1 sired inferiors from conduct of the partil Ramatan e Nathu, 19 C. 21 (1841) s. e. 13

I A 1, Chamroo Singht Tota Roy, 19 W R 430 (1873), Kamoshwar i Amantulla, 6 C53 (1898) a.c. 2 C W N 619, Shirinbar v Kharselji 22 B 430 (1896) Merc Ma homealt Forbes 21 h.j. 6 (1874) luckh Narani Jadu Nath 21 C 504 (1893) s.c., 21 I A 39 Ananda t Parlati 4 C l. J 198 (1996) and see cases cited in three preceding notes. In Bal Krishna, Govin J. 26 Bom. 617 622 (1902) it seems to be suggested that the Court might interfar when the inference was wholly unreasonal.

⁽⁵⁾ Shundabun Mohant i Shurut Chunder 23 W R 160 (1575) Bhuput Bar e Kali Rai o C W N 35 3.9 (1.90) bblul Robonan r Bibes Sofy 24 W R. 23 (187) Huro Prosal Rov i W matara Bibes, 7 C 263 56 (1881) 6 oluck Nather Kurti Chun I r 16 C 615 56 57 (1889), Dena Nath Bannery e r Hari Davi H C 459 (1889).

exist which does not exist—as where a Judge came to a conclusion on the assumption that a document had not been filed whereas it was on the record,(1) or helicves there is no evidence of a fact when there is,(2) or proceeds upon a misconception of the facts proved, (3) or bases his judgment on evidence which is not on the record (4)

Tho last four cases of misconception offer no difficulty. This cannot, however, be said as to the first case. There is no doubt as to the principle, that in judging on the facts the Court must consider all of them, otherwise there is not a proper procedure in investigation. The difficulty, however, is in establishing its violation by showing in any particular case that a fact has not been considered even where it may not have been expressly mentioned in the Judgment. If the fact was present to the Judge's mind, but he has either not given it weight, or the degree of weight which it is alleged he should have done, it is sometimes loosely said that the fact has not heen considered. But this case is to be distinguished from those above inentioned, and is really tantamount to an appeal as to fact. The line distinguishing the two classes of cases is not infrequently a narrow one, and has perhaps in some cases been overpassed.

In, however, the actual determination of fact there may be error of law The High Court may consider whether the procedure adopted by the lower Appellate Court in dealing with the facts is proper or not (5) Thus its conclusion may be come to in the absence of all evidence, (6) or he hased on

kooldip Narain v Rummon Singh, 22 W R 278 (1874), Ram Das Saha v Mon Mohun Dass, 7B L R App 4 (1871), Nowab Khan v Rughoo Nath Das, 20 W R 474 (1873), Mohunt Deo v Moonsheo Mahomed, 24 W R 300 (1875) [disregarding exclusively one sude of the case], histo Churn v Dwarka Nath, 10 W R 22 (1863), Mt Roop Naraince v Rissal 24 W R 110 (1875), Mozzamanssa v Moorarce Dhur, 22 W R 314, 316 (1874), Appa Kalga t Mallu Mowna, 16 B 477

(1) Mohunt Hur Gobind : Joja Roy, 24 W R 116 (1575), Moizzunnissa : Moerarco Dhur, 22 W R 314, 316 (1874)
(2) Heera Lal v Kalee Das, 23 W R 65,

66 (1874)

(3) Mali Prasad Tewari & Prahlad Sein, 2 B L R, P C 120, 127 (1809), Goluck W Anant, 25 W R 38 (1875) [where issue was taken for granted], Acoldeep w Rummon, 22 W R 278 (1874), Ram Das w Mommohim, 7 B L R App 4 (1871), Nowab ishan t Rughoo Nath, 20 W R 474 (1873), in which last four cases there was a remand

(4) Non: Lal v Uma Charin, 19 C L J 541 (1914)

(5) Protap Narain v Raghurani, 6 C W N 185, 189, 190 (1901)

(6) That in whore, to use an English expression, "there is no cyulence to go to the jury," because that does not raise a question of fact such as arises on the 1 suc itself, but a question of law for the consideration of the Judge Anangamanjari: Frij urasundan, 14 A. 101, 109, 110 (1837), w. c., 14 C. 740. 747, Shavabasava v. Sangapi a, 20 B. 1, 12, s. c., S. C. W. A. S75, (1901), Hemantix Kumari: Hopendra 171, 405, 60, s. c., 17 C. S75, S82 (1850) [It is an error or defect in procedure], Baharce Lai 1 see Ram Roy,

to 11], Shiboo Soondures v Chunder kant Ghose, 21 W R 217 (1874) In Kooldeep t Rummon, 22 W R 278 (1874), Ram Das t Monmohiu, 7 B L R App 4 (1871), a remand was ordered, as also in Shagur Wohamaya, 25 W R 25 (1875), where the inquiry was beld to be inadequate In Nara yan a t Mun 10 M 363, 305 (1886), the Judge overlooke I a postscript in a document, and he was asked to take this fact into consideration and to submit a revised finding

what is not legil evidence,(1) or on facts to the exclusion of other facts rejected but admissible,(2) or on personal knowledge of the Judge,(3) or if there be admissible evidence the Court may err in law in its mode of dealing with it. In such case if the dealing involves the misapplication of principles of law such erroneous mode vitates the conclusion of fact which follows it (4). So the Court may decide the facts upon a wrong view as to the onus of proof,(5) and deal improperly with the presumptions which the law raises,(6) or may dispose of a suit on a case not ruised by the parties,(7) or upon irrelevant matters or issues,(8) or omit to consider evidence on the ground that the fact to be proved ought to be proved by evidence of another kind

20 W R. 259, 201 (1873) [assumption, without evidence, of identity of lands], Bibee Amee run v Shaikh Cherag, 24 W R 343, 344 (1876) [main fact on which credence given to the defendant had no existencel, foll in Bhupendra t Pears, 17 C W N 37 (1912), Damoo : Daya Coomarce, 25 W R 101 (1876) [decree based on plan neither admitted nor proved] Himmut 4h t Nyamutoollah 23 W R 200 (1875) [assump tion without evidence?, Peary : Jots Kumar, 11 C. W N 83 (1906), Belhu Wukhi v Kefvutullah, 12 C 93, 95 (1885), Kutee bash v Ramdhun, B L R , F B 658, 661 (1867) [acceptance of rent receipts without proof], Anund Chunder v Ramessur, 25 W R 50 (1875) [pronouncing against un rebutted case], Surbessur t Arizollah, 8 B L R 1pp 78 (1872) , Poorno v Chunder, 24 W R 171, 172 (1815), Vishvanath v Dhonduppa, 17 B 475, 482 (1892), Kali Prasad Tewari t Prahlad Sein, 2 B L R 120, 127 (P C), (1869) [substitution of speculation for proof foll in Mahomed Azaddı t Shaffi Mullah, 8 B L R 26 (1871)]

(1) Guru Das Day v Sambhu Aath Chuckerbutty, 3 B L. R A C J 258 (1869), Chunder t Showdammee, 9 W R 517 (1868), Shookram t Ram Lal, 9 W R 248 (1865) [Admasshulty of secondary evidence], Surnomoyee v Lutchmeeput 9 W R 338, 342 (1807), Vhohun t Andge, Varshall, 381 (1863), Palakdhari Rau t Manners 23 C 179, 186 (189a), Hunsa Kooer t Shee Cobund Rawat, 24 W R 431 (1873), Rohee Lall v Dindoyal Lall, 21 W R 257 (1874), Deaat Ranchod Das v Rawal Vathubland, 21 B 110, 115 (189a), Kisto Churn v Dwarka

nath, 10 W R 32 (1868), Mt Roop Narainco Rassal, 24 W R 119 (1875), Bordonath the Russack, 9 W R 274 (1868), Furan t
Grish, 9 W R 450 (1868) in these last two cases a remand was ordered), Nonab Khan t Rughoo Anth, 20 W R 474 (1873) (the high Court sent for documents which were not move lence before the first Court!

(2) Shaikh Charoo : Zobeida Khatoon, 25 W R 54 (1875), Mathoora e Ram Ruchya, II W R 452, 484 (1869), Mohm Chandra Roy e Kabiara Dohya, Il C W N 1028 (1907), if owing to rejection it becomes necessary to reconsider the whole case a remand may be ordered Shaikh Charoo v, Mt Zobeida, 25 W R 54 (1875)

(3) Sooraj Kant Achariit Khoodee Narain, 22 W R 9 (1874), Lakshmaya v Sri Raja Varadaraja, 30 Mad 103 (1913), 17 C W N cchi (but a Judgo may use his general knowledge)

(4) See per Phear, J, in Mohur Matoon v Umatum, 18 W R 499, 500 (1872)

Umatum, 18 W R 499, 500 (1872)
(5) Mahadevappa v Basagouda, 7 Bom
L R 258, 260 (1905)

(6) Surnomoyco v Lutchmeeput, 9 W R 338 342 (1867), Nilatatchi v Venkatachala, 1 V H C R 131, 134 (1862)

(7) Shivabasava t Sangappa, 29 B 1 (1994), Gopal w Tincource, 19 W R 348 (1873) kloo Bibee v Koonjo, 19 W R 287, 288 (1873), Meher Banoo v Kiramut, 22 W R 402 (1874) [findings meonsistent with

pleadings of parties]
(8) Ram Soondur t Kalee Pershad, 19
W R 267 (1873), Palamyandur Muthusami,
2 M. H. C R 441 (1865), cf Vishnu t
Gonesh, 21 B 325 (1893), Palakdhari t

Manners, 23 C 179, 185, 186 (1895)

than that produced,(1) or misdirect itself as to the nature of proof required hy law, as for instance in regard to the elements of a custom which has the force of law, (2) or misapprehend the real issue to be determined (3) and the legal position of the parties (4)

Further, if it he assumed that no error of law has been committed in the mode of dealing with the facts, that is in determining their existence or non existence, from the facts so found inferences may be drawn as to the existence of certain matters which are the subject of legal definition. In such a case there is a legal inference from the facts found. Though the finding of fact cannot be questioned, an appeal Court may accept the finding of fact and ques tion the accuracy of the legal inferences therefrom, for this is a matter of law and not of fact. The soundness of conclusions involving matter of law may be questioned (5) In such a case it is not any fact which is in question, but the soundness of the conclusions of law drawn from those facts. Thus upon the question whether there is a hinding agreement a Court may find certain facts and go on to hold upon those facts that they constitute in law an acceptance of the agreement. The finding as to the facts which are the basis of the inference cannot be questioned though the inference, being a legal inference on the facts found, may be (6) If the legal conclusion derived from the facts found is not consistent with settled principles of law, there is an error of law (7) So acquiescence is not a question of fact but of legal inference from the facts found (8) and so is estoppel, (9) and the question of the proper custody of documents, (10) though whether it is credible whether documents were in a particular custody or whether the facts rebut the presumption of authenticity are questions of fact (11) Construction of a document involves both the meaning of the words and their legal effect, or the effect which is to be given to them. The first is a

⁽¹⁾ Huro Prosad Roy : Womatara Debee, 7 C 263, 267 (1881) , see Ram Dhun v Ram Naram, 11 W R 311 (1869), where the suit was dismissed on the sole ground that the plaintiff did not prove his purchase by calling his vendor, but see as to this judgment of Markby, J

⁽²⁾ Ram Prosad Das & Rajo Koer, 5 C L R 94, 95 (1879) Desai Ranchod Das , Rawal Nathulibhal, 21 B 110, 115 (1895)

⁽³⁾ Chunder Monce : Madhoo, 23 W R 166 (1875)

⁽⁴⁾ Doorga Churn , Shamanund, 12

W It 376 (1879)

⁽⁵⁾ Ramgopal : Shama Khaten, 20 C 93, 99 (1892), s e, 19 I A 228, 231, so in Rampal Singh : Balbhad lar, 6 C W X 819, \$51, 855 (1902), it was hell that the Appellate Court did not reverse any finding of fact but merely applied the proper law to the facts found Nilmon r Kirti Chunder, 20 I A 15 97 94 B C _O C 817 (1893) [miss] 11

cation of legal principles to facts found) Krishna Kishore v Mir Mahomed, 3 C W N 255, 260 (1897), Sirvaji Vijaya : Chima Nayana, 10 U I A 157, 164 Chockilingam 1 Mayandi, 19 1 485, 493 (1896), Rudr Prasad v Ban Nath 15 A 367 (1893), Raja Rum : Ganesh Harr, 21 B 91, 94, 96 (1895)

⁽⁶⁾ A finding as to the existence of an implied contract has been held to be one of facts Semparapu : Mallikarjuna, 17 W 43 (1893)

⁽⁷⁾ Eshan i Shama Churn 11 M 1 A 7, 23 (1866)

⁽⁸⁾ Lala Bem Ram : Kundan Lal, 21 A 496 504, s c, 26 1 A 58, C5, Ananda :

Parhats, 4 C I J 198 (1906) (9) Narsing Das i Rahimanbhai 6 Bom

F P 140, 111 (1901)

⁽¹⁰⁾ Sharfudin r Govind 27 B 152, 463 (1902), Durga i Tawahir 18 C 23 (1891)

⁽¹¹⁾ 11

question of fact and the second of law (1) Unsconstruction of a document which is the foundation of a suit is ground for appeal (2). The question whether possession is adverse or not is often one of simple fact, but it may also be a conclusion of law or a unived question (3).

So again on the question of good faith a finding that certain vendors intended by a transfer to defeat their creditors and that their transferee was aware of an impending execution against them are as findings of facts conclusive But the conclusion drawn therefrom that the purchase was not in good faith is an inference of law which is capable of correction in appeal (4) So though a Court of second annual must accent the facts as found, the conclusion to be drawn whether, assuming such facts to be true, a sale did or did not hind persons is a matter with which it is free to deal (5) A notice to quit must be reasonable, and this is a question of fact, but it is a question of law whether there is evidence on which the Court can properly arrive at the conclusion of fact (o) So a conclusion from the fact of one person carrying on business and appearing to he the only partner that there could be no other partner was held erroneous as amounting to an assertion that in no case could there be a dormant partner (7) Where an Appellate Court had found that a grant of pasture-land beld under the special law relating to land tenure in Kumaun was inconsistent with the general wishes and well being of the village community it was held that this was a finding of fact and not to be disturbed by second appeal (8)

Lastly, the finding may not be conclusive because of the absence of reasons for it which are required to constitute a legal judgment (9) But the Court has

⁽¹⁾ Per Lindley, L.J., in Chatenay v Brazilian Submarin. Felegraph Co., 1 Q B 70, 85 (1801), and see Lala Fatch Chand t Ram Kishen, 99 I A 247 (1912), 34 A. 579, 16 C W N 1033 (P C), 14 Bom L R 1090, construction of documents is a question of law which may be considered in second app. al, and Bathamdee C Ram Naram, 19 C L, J 182 (1914), construction of sale

⁽²⁾ Nowbut Singh : Chutter Dharee Singh. 19 W R 223 (1873), and see Gannat Mar wari v Balmakund Behars 18 C L J 548 (1913), Rudr Prasad t Ban Nath. 15 A. 367, 371 (1893), Nilmoni : Kirti Chunder 20 I A. 95, 97, 98, s c, 20 C 847 (1893), Ramgonal v Shama Khaton 20 C 93 (1892), Chockahugam t Mayands, 13 M. 485, 493 (1896), Mookhya Hurruckrai z Ram Lal Gomastha, 14 W R 435 (1870) Inhere the effect of a sale certificate was wrongly limited] Doorga Churn v Shama nund, 12 W R 376 (1869), Wt Obedoon masa Bibee : Bepin Behary Dutt, 1 C W N. L. C. XVII. (1896), it was held that the ques tion what properties passed under a sale certificate was not a question of law, and in

Barhamdeo v Ram Naram, 19 C L J 182 (1914), it was held that this was a mixed question of fact and law

⁽³⁾ Luchmeswar Singh t Shoikh Mano war, 19 I A 48, 56, 8 c, 19 C 253, 263 (1891), see Raja Ram v Ganesh Hari, 21 B 91, 94, 96 (1893)

⁽⁴⁾ Ishan v Bishu, 24 C 825, 829, s c, 1 C W N 665, 669 (1897), see also Luchines war v Manowar, 19 C 253 (1891), Ramgopal t Shama Katon, 20 C 93 (1892)

 ⁽⁵⁾ Mafuzzul Hossam : Barid Sheikh, 4
 C J 485 489, s c 11 C W N 71 (1906)
 (6) Bidhumukhi v Kefyutullah, 12 C 93,

 ⁽⁶⁾ Bidhumukhi v Kefyutullah, 12 C 93,
 95 (1685)
 (7) Shoobul Chunder v Koylash Chunder,

¹⁴ W R 23 (1870) (8) Gata Ram v Kurpa Ram, 36 A. 257

⁽¹⁹¹⁴⁾ (9) Purmeshwar t Brijo Lal, 17 C 257 (1889), Kamat v Kamat, 8 B 368 (1884),

^{(1889),} Kamat v Kamat, 8 B 368 (1884), Vmgappa s Suvappa, 10 B 223, 326 (1894), Purshotam v Durgop, 14 B 452, 454 (1890), Pandurang v Anant, 5 Bom, L. R 556 (1903), Raghmath v Nitu, 9 B 452, 154 (1883), Shekk Goburdhuu v Sheikh Sadhoo, 1 W R 244 (1864)

refused to interfere simply because the Judge did not it mark upon every portion of the evidence that he excluded from his consideration,(1) as also where the judgment was sufficiently intelligible to enable the High Court to deal with the case (2)

Where a Judge states as a fact that an admission was made before him by one of the parties to the suit, the High Court cannot in special appeal inquire whether the Judge was right or wiong in making that statement. If he is wrong, the aggreed party's remedy is by a review of judgment in the Court below and not by special appeal to the High Court. If the Judge erred in supposing the alleged admission to have been made, the party's proper course is at once to bring the error to the notice of the Judge and to apply for a review of his judgment. If he does not do so, the High Court cannot, it was said, assist him in special appeal (3)

"From every decree"—As to the meaning of the term "decree," see notes to sects 2, 96 and 97, ante (4) An order rejecting or dismissing an appeal as out of time is a decree, and a second appeal hes (5)

Appeal as to costs -See notes to sects 35 and 96, ante

"Contrary to law "—The words of the last Code were "some specified" law which term was held to mean specified in the memorandum of appeal and was not limited to specified statute law. The present section omits the word "specified" as being redundant. And now, as herotofore, law is not to be limited in its meaning to statute law (6). This clause generally applies where the Court wrongly applies the law to facts correctly (that is without error or defect in the precedure) found (7), or fails to apply or refuses (8) to apply the law to the case, though of course there may be cases falling within more than one or all of the clauses. A pure point of law which does not depend upon evidence may be dealt with by the Court of Appeal, though no issue was raised as regards it (9). Objection as to the necessity

⁽I) Devan v Godadbhar, 2 B H C R 28, 32 (1864)

⁽²⁾ Shah Jughun v Shaikh Yuksood Ab, 6 W R 97 (1866) See Dovendra Nath v Annada Hada, 19 C L J 545 (1914), judg ment set asuk on second appeal because ambiguous

⁽³⁾ Bykuntnath & Prosunnomojee, 5

W R 196 (1866)
(4) As to sect 372 of the Code of 1859, sec

⁽⁴⁾ As to sect 372 of the Code of 1859, see Maharam Indrajit v Chokowei, B L R F B 1 (1863)

⁽⁵⁾ Samnatha i venkata Subha, 27 M. 21 (1993), s c, 13 Mad. L. J. 360 and cases there etted, an I I hoolharte i Baheshwar, 3 kgra 201 (1808), but see It ghoonath i Raj mohun 7 W. R. 20 (1807). In which how ever, Gopernath i Gopernath, 6 W. R.

Misc 106 (1866) was not referred to

⁽⁶⁾ Ram Gopal v Shama Naton, 20 C 93, 99, 100, s c, 10 I A 223, Durga Chowd hurant v Jawahir Sing, 18 C 23, s c, 17 I A 122, 124 (1891), Achha Vian v Doorga Chura Law, 25 C 140, 151 (1897)

⁽⁷⁾ Seo Hari Volum Misser v Sarindra, 11 C W N 791, 800 (1907), Ram Bahadur 11 t Ram Shankar, 27 A 688 (1905), Ajodhya Nath Chowdhury t heshab Chandra, 11 C W N 1127 (1907), Hari Mohun Misser v Surendra Narayan Singh, 6 C L J 19 (1907), 8 c, 11 C W N 791

⁽⁶⁾ Ram Bahadur t Ram Shankar, 27 1 688, 691 (1905)

⁽⁹⁾ Blum Singh a Sarwan Singh 16 C JJ, 36 (1885), but see Lalla Javahir a Court of Wards, 27 W R 211 (1872)

of notice to quit may be taken in second appeal (1) There is no appeal upon the question of the credibility of witnesses when the lower Court's views are based upon inferences from the facts proved or appearing, whether the reasons given be right or wrong (2) While the misconstruction of a document, the foundation of a suit, is a ground of appeal, there is uone because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of or effect to be given to it, (3) nor is there properly such a thing as the construction of a deposition of a witness. The word as so used means what the Court thinks is proved by it, and there is no appeal on this point (4) A misreading or misconception of the evidence is no ground for interference in second appeal (5) The bona fides of the parties is a question of fact (6) A special appeal does not he because some portion of the evidence may be in writing and the Judge makes a mistake as to the meaning of it For instance, a writing supposed to contain an admission may be put in as part of the evidence, but a mistake in its meaning is not a misconstruction of a document upon which a special appeal will lie if it is connected with other ovidence affecting its construction. The misconstruction of a document which is the foundation of a suit, and which is in the nature of a contract or a document of title is a ground of a second appeal (7) But to discredit witnesses merely for general reasons not affecting the particular credit of any individual dependent is to commit an error of law which can he subject of a special appeal (8) Thus where the ovidence for the plaintiff was disbelieved because his witness was a relative of his, there was (it was held) an error of law based upon a total misconception of the position of the plaintiff's lessor and substantially affecting the decision of the case on

Dodhu t Madhavarao, 18 B He, 113
 (1803), and cases three cited, see also Krishnaji t Antaji, 18 B 2-6, 259 (1893),
 Ganco t Shri Sidheshwar, 26 B 3-69, 362 (1900)
 But see Ram Nuffer t Dhol Gobind, 1 C, L R 421, 423 (1878), where tenant denuch landford's till and ford strip.

⁽²⁾ Dwarka Nath t Muddon 6 W R 292 (1860), Mt Putralu v Sheo Pershad, 24 W R 61 (1875) [cf Juggernath : Mahomed Mokam, 17 W R 161 (1872)], Sheo Dyal t Hodgkinson, 24 W R 342 (1875) [smeen seport] R is for the lower hypellate Court to determine the amount of credit to be at tached to pattendar prof Wuthra Dass t Magh Smoh, 2 N H C R 207 205 (1870), Munec Dutt i Camp bell, 11 W R, 278, 279 (1804), Dhoondh Bahasdoor t Prag Singh, 12 W R 314 (1872), Oomat Fattmax Bhujo Gorad, 13 W R 20, 257 (1870)

⁽³⁾ Nowbut Smoh & Chutter Dharee Smgh, 19 W R. 223 (1873). Luchman & hanbya Lal, 22 I A 51, 57, a. c., 25 C 609

^{(1894),} Lukhi Narain t Maharajah Jadu Nath, 21 I \ 39, 44, 46, 5 c, 21 C 604 (1893), Rudr Prasad v Baij Nath, 15 A 307, 374 (1893), Buzlul v Satis, 15 C W N 752 (1991)

⁽¹⁾ Himmut Ah : Nyamutoollah, 23 W R 250 (1875)

⁽⁵⁾ Ananda z Parbati, 4 C L J 198 (1996), referring to Hassan Kuliv Nakshedi, 33 C 200 (1995) Govind z Vithal, 20 B 753 (1895), Isaur z Satis, 30 C. 207, s c, 7 C W N 120, 129 (1992)

⁽⁶⁾ Bhuban : Sowdamm 5 B L. R 1p 59 60 (1870)

⁽⁷⁾ Nowbut ← Chutter Dharce 19 W R 222, 223 (1873), but see Lalla Imrit Lall r Wahomed 18 W R 447 449 (1872), Buzl il ← Sairs 15 C W N 752 (1911)

⁽⁵⁾ Sheo Purshun r Brun Pandey, 24 W R 251, 252 (1875), see also Juggurnath r Mahomed Mokeem, 17 W R 161 (1872), Mackenzie r Javahir, 25 W R, 137, 135

^{(1876).}

the ments, (1) as also where a witness was disbeheved not for anything he said nor for anything deposed to in the evidence of the other witnesses, but simply because he was a patinari (2) or by caste a weaver, (3) or beheved because he was a cultivator (4)

Discretion when used by a Court must be judicial and not arbitrary, and where a lower Appellate Court has exercised its discretion in a sound and reason able way, after a careful consideration of the facts, and not arbitrarily, the second Appellate Court has no power to interfere (5) But the discretion of a Court is hable to review or appeal where it is not judicial but arbitrary and perverse, caused by caprice or prejudice, or where the discretion is exercised without any proper legal material to support it (6). It has been held that there may be the exercise of so bad a discretion as to amount to an irregularity in law, and on this ground the High Court has looked into the grounds upon which the Lower Appellate Court has admitted an appeal after the lapse of the period allowed by the Limitation Act (7). But probably the correct rule in such a case or its converse is that the High Court will not interfere if the discretiou is judicially exercised, even though the course ultimately adopted be not that which this High Court itself would have taken (8)

The following have been considered matters of discretion —Refusal to summon plaintiff at instance of defendant, (9) passing further orders in regard to plaintiff who disregards Court s summons to attend, (10) refusal to add parties, (11) disallowing additional evidence, (12) or interest, (13) directing

(1) Huro Chunder 2 Gobind, 17 W R 255, 256 (1872)

(2) Mackenzie i Jawahir 25 W R 137, 138 (1876)

(3) Juggurnath : Mahomed Mokeem, 17 W R 161 (1871)

(4) 1b

- (3) Ram Bahadur v Ram Shankar, 27 A
 (5) Ram Bahadur v Ram Shankar, 27 A
 (688, 691 (1905), Tulseo e Gapra, 125 A 71, 72
 (1902), see suffer, Ranchooli v Lalla 6
 (304, 307 (1882), Parvatt t Ganpatt 23 B
 (313, 517 (1898), Hamid Ali v Gayadin, 26
 A 327 (1904)
- (6) Ranchodjit Lallu, 6 B 304, 307 (1898), Ram Bahadur v Ram Shankar, supra,

Puls o t Gajraj, suj ra

- (7) Mowri Bewa t Surindra, 10 W R 178 (1868), s c, 2 B L. R (A. C), 184 note, Chunder t Boshoon 8 C 251, 253 (1881)
- (8) Iulsto t Gajraj, 25 A 71 (1902), Haimid Ali v Gajadin, 26 A 327 (1904), Ranchodji t Lallu, 6 B 304 (1882)
- (9) Indro Lochun : Grish, 10 W R 134 (1808)
- (10) Narain Das : Mahtab Chand, 10 W R 174 (1868) Kisto : Gobind, W R 133

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(11) Gyaram Seal v Issur Chunder, 2 W R
158 (1865), Poran v Sham Chand, 1 W R
220 (1864), Juggodumha v Haran Chunder,
10 W R 108, 110 (1868), s c, 6 B L R
526, see Karman v Misri Lal, 2 A 004

(1880) (12) Ram Piari v Kallu, 23 A 121 (1900), see also Beckwith v Kishto Jeobun, Marsh 278 (1863), Golam Mukdoom v Hafeezoo ntssa 7 W R 484, 190 (1867), Mohesh t Soshec 6 W R 196 (1866), Radhanath v Kbellut, 17 W R 558 (1872), Kulpo Singh v Thakoor Singh, 15 W R 429 (1871), Rakhal v Protap, 12 W R 455 (1863), though a refusal to excresse the discretion vested would be an error of a recedure Plart & Kallu, st pra, where again the Court, though not satisfied that evidence is neces sary, allows it, the High Court may interfere, Hahz Abdul : Sri Kissen, 11 C 130, 142 143 (1881), Durga t Jai Narain, 33 A 37J (1911)

(13) Portsh Sath & Listo Mohan 1 B L.R

1pp 105 (186J)

local investigation, (1) arranging for execution of joint-dierce; (2) refusal of petition to amend plaint. (3) mode of execution: (1) dismissal of suit for specific performance for delay; (5) refusal to pass an order allowing an appeal by a father to stand as an appeal by his son who bad since come of age, (6) refusal to punish a recusant wituess (7)

When appeals in analogous cases are pending in a Superior Appellate Court, the Inferior Court of Appeal, if it decide the appeal without waiting for the decision of the Superior Appellate Court in the analogous eases, does not exercise a wase discretion (8)

"Or to some usage,"-Usage having the force of "law" means a local or famdy usago as distinguished from the general law (9) A finding upou the evidence on a question of custom is one of fact (10) The right of user is substantively a question of fact to be determined upon the evidence furnished by the htigants If the Lawer Appellate Court has not made any error of law in drawing an inference from the evidence produced to support such a right, then the High Court in second appeal will not interfere (11) A local usage or custom heing in its nature such as might necessarily affect not only parties to the particular litigation and their privies, but whole hodies of people, stands on a footing similar to a matter of law derived from other sources than usage. So, though this section disallows a second appeal with reference to findings of fact, yet the existence or non existence of a usage having the force of law is unaffected by such disallowance. Consequently it is the duty of the High Court, when it has to pronounce upon that question, to examine evidence bearing upon it, not only as to the sufficiency thereof to ostablish all the elements (antiquity, umformity, etc.) required to constitute a sahd usago having the force of law, but also the credibility of the cyidence relied on and the weight due to it (12) Whether or not a custom exists, is a

(2) Hera Roy : Gungadhar, 24 W R 286 (1875)

1867) (5) Mokund v Chotay Lall, 10 C 1061.

1067 (1884)

(6) Shama Charan Ghose t Tarak Aath Mukhopadhya, 3 B L R 115 (1869)

(7) Pran Kisto v Kalce Dass 7 W R 460 (1867) .

(8) Gobind Ramanuja t Lakhmt, 11 C W N 112, 116 (1906)

(9) Ram Gopal : Shama & haton 20 C 93 at p 99 (1892)

(10) Syed Alı r Gopal Das, 13 W R 420, 422 (1870), compare Kakarla Abbayya v Raja Venkata, 29 M. 24, 28 (1905), Hasim Ah v Abdul Rahman, 28 A 698 (1906) See Durga Charan v Raghunath 18 C L J 559 (1913), evidence of a custom

(11) Vahomed Ali t Jugal Ram, 5 B L R Ap 84 (1870), s c, 14 W R 124, see Wuzeerooddeen t Sheobund, 11 W R

285, 286 (1869)

(12) hakarla Abbayya v Raja Venkata, 29 M. 24, 28 (1905), seo also Hanumantamma t Ramt Reddi, 4 M. 272 (1881), Mirabivi t Velleyanna, 8 M, 464 (1885), Eranjoli Vishnu v Eranjoli Krishnan, 7 M. 3 (1883). contra, see Hureehar 1 Judoonath, 10 W R 153 (1868), Syed Ah : Gopal Das, 13 W R 420, 421 (1870), Hurry Churn : Nimai Chand, 10 C. 138 (1883), Bai Shirin

Bat v Khorsedji, 22 B 430, 433 (1896)

⁽¹⁾ Graham : Lopez 1 W R 141 (1864), Bykunt v Pearse, 1 W R 196 (1864) . Poorno : Chunder Nath, 1 W 11 249 (1864), Rash Beharce v Saheb Roy, 12 W R 76 (1869) [but the Court will interfere if very strong grounds are shown]

⁽³⁾ Watson v Digwar, 10 W R 87 (1868) (4) Dwarkanath : Unnoda, SW R 319

question of fact. But if the Lower Appellate Court has acted upon illegal evidence or has come to a decision upon evidence as to the custom which is legally insufficient to establish a custom, the High Court can irrest the question as one of law. Again, if it appeared that the Lower Appellate Court has clearly from its judgment disregarded legal evidence, the Court can interfere. But the High Court in second appeal is not hound to examine and consider the evidence in all cases when the existence or non existence of an alleged custom is the sole question at issue (1)

"Failed to determine some material issue"—As to failure to determine a material issue, see cases noted (2) The Lewer Appellate Court, if it does not accept, must displace the findings arrived at hy the first Court (3)

It is impossible to lay down any general rule as to when the Court should consider that the reasens for a particular finding by the Lewer Appellate Ceuit must he stated There may he many cases in which the omission to state the reasons would render the judgment so unintelligible that the Court, in second appeal, could not pronounce any opimon upon whether it was right in law In such a case a Court would no doubt require the reasons to be stated But there may he cases in which the Court would not think it necessary to require them and the case will not he sent hack. It is not the law that when ever the Judge of an Appellate Court thinks that one set of witnesses is trustworthy, he is bound to give his reasons for it (4) Where the Lewer Appellato Court fully adopts the reasoning and the conclusions of the first Court, it is not bound to set out the reasons for its decision with the same fulness as if it was deciding the case in the Court of first instance or as if it was reversing the judgment below It may supply some additional leasons, but the insufficiency of these additional reasons, or the absence of any, would not justify a second appeal (5) When a person has put forward his defence in a general way and allewed an issue to be framed upon it which has been found against him in the Lower Appellate Court, he will not be allewed to say, in special appeal, "here is a question of fact which the Courts below have not

⁽¹⁾ Hashim Ali v Abdul Rahman, 23 A 698 (1906)

⁽²⁾ Kanlash i Kunja, 4 C L J 86 (1906). Ramkar Gopalji v Gangarani, 10 B 545, 547 (1891). Gopal v Eckace, 8 W R 333 (1867). Wise i Hiera Lal, 16 W R 100 (1871) where this is by mistale application may by roriew). Bistoo i Lalla Byjnath, 16 W R 60 (1871). Goluch Nath v Kirtl Chunder, 10 C 645, 651 (1889). Kristo Gobind v Ganga Pershad, 23 W R 266 (1875). Google Sahoo i Prendia Sahoo, 7 C 118, 150 (1881). Moborum Sheikh v Nakowi, 7 B L R Appl 17 (1870). Kristo Churn v Dwarkanath, 10 W R 24 (1868)

⁽³⁾ Protop Narama Raghuram, 6C W N 185, 189, 180 (1901), Trailely a Mohim Dass

v Kalı Prasanna Ghose, 11 C W N 380, 389

⁽⁴⁾ Shumahurooddy : Jan Mahomed, 21 W R 260, 261 (1874)

⁽⁵⁾ Shamoo Mahomid ν Prothan Palec, 5 W R 178 (1866), but where the Appellate Court rejects oridence accepted by the first Court or comes to a contrary conclusion it should give its reasons for differing Shee dyal t Hodglamson, 24 W R 342 (1875), Salu Madhav t venhatesh, 10 B 546, 515 (1891), Abdul Rohman ν bofty, 24 W R 293 (1875), though as to the omission-to do so, see Makdum un mass t Nokly Singh, 25 W R 200 (1875), Luckhee Monce t Railassor, 4 W R 100 (1865)

found, and therefore I am entitled to have the decree reversed, "when, if the question had been raised before the lower Courts, there might have been a finding upon it (I).

"Error or defect in the procedure "-An error or defect in procedure may consist in the emission to settle issues, (2) improper remand, (3) dismissing a suit for false verification instead of disposing of it on the merits, (4) adjudicating in the absence of, and without notico to, the respondent, (5) allowing a review of judgment without inquiring into the existence of grounds upon which a review is permissible (6) The amount of damage is a question of fact unless such amount be he and legal limits if there he any (7) A mistake of account is not an error of law or procedure (8) though the principle on which it has been taken may be The Court has interfered where a commission returned unexecuted was not sent a second time (9) There is error where a Court which has ordered a local investigation proceeds to determine the case before its return (10) Refusal to take or record evidence (11) is an error of procedure. So is the omission to state the real question to be determined and to examine ovidence with reference to the right issues, (12) and to take notice of serious irregularities in the first Court and to render accurate its decree, (13) deciding a suit on a case not set up by the parties nor warranted by the cyldenee (14) For other eases see notes to the section passim It is not sufficient that there should be such error. It must have been substantial and such as may possibly have affected the decision on the ments (vide post)

- (I) Bykunt: Dhunput, 19 W R 104, 103 (1873)
- (2) Seo Mk Minna t Syud Farl Rub, 13 M. I A 573, 550, 553 (1879), Rewan Pershad v Jankee Pershad, 11 M I A 25, 27 (1866), Sheo Sahoy t Bechun Sugh, 22 W R 31 (1874), Jugodundíno t Sree Naran, 20 W R. 18 (1873), Gunga Moneo v Issur Chunder, 17 W R 465 (1872), Bankant v Guneshee, 6 W R 47 (1869), Owcownet Mootka 2 W R 181 (1865).
- (3) See Ram Lant : Guneshee, supru, Nanabhai Narotamdaat Ramshet, b B H C R A C J 156, 158 (1809)
- R , A. C. J 156, 158 (1869)
 (4) Shama Soondaree : Rohmooddeen, 24
- 11 R. 71 (1875).
- (5) Balajı Rau : Sithabhoy, 19 M. 414 (1890)
- (6) Bhyub Chunder Surmah t Madhub Ram, 20 W R 84, 85 (1873), Chunder Yuggodany t Loodon Ram, ... W R 3.4 (1876), Parfautty t Protaj, 23 W R, 273 (1875), Koleemooddeen t Heerun, ... 4 W R, 880 (1875).

- (7) Jogeshwar t Dinaram, 3 C L J 140 (1898), Banco Madhuh v Bholanath, 10 W R 164, 165 (1868), Johuroodeen t Dabco Pershad, 13 W R 22, 23 (1870)
 - 'ershad, 13 W R 22, 23 (1870) (8) Ram Kant : Kaleo Mohun, 22 W R
- 310 (1874)
 (9) Jhotee Singh v Gopal Singh, 22 W R
- 457 (1875) (10) Madho Singh t Kashi Sing, 16 A. 342,
- (10) Madho Singh t Kashi Sing, 16 A. 342, 343 (1894)
- (11) Mondal t Khiroda, 20 C 740, 743 (1893), Surm Rae t Ubhman Rae, 2 A II C R 209 (1870), Ramessar t Shib Aarain, 14 W R 419, 420 (1870) [procedure to be followed in such case, see also Raj Lukhee t Gokod, 13 M. I A 203, 225 226 (1869)], Wohun Singh t Jugbutty Noort, 24 W R 297 (1875)
- (12) Chunder Monce r Madhoo Is y, 23 W. R 100 (1873), where a remand was ordered. (13) Ram Coomar r Kalco Coomar, 10
- W. R. 273 (1808) (case remanded) (14) Shirabasapa v. San_bappa, 23 B. 1 (1804).

"Upon the merits"—This is one of several provisions in which the Legislature has indicated its intention that substantial justice and not technicality is to be looked to. An error in procedure which does not affect the decision of the case on the merits will not confer a right of second appeal (1). This is a matter which must be determined in each case according to its circumstances. In sect 372 (Act VIII of 1859) the word "possibly" did not occur. It ran as follows "which may have produced error or defect," and the word "may" was construed not to imply "may by some possibility" hut "may not improbably". It was for the High Court Judges to exercise their discretion in determining whether there was such a probability, whether there had been a fair and sufficient trial, and whether higation had reached a stage at which it ought to cease or not. The word "possibly" was accordingly introduced, (2) which avoided any necessity for the consideration of the evidence

Ex parte appellate decree—1 respondent in whose absence an appeal has been heard ex parte and against whom judgment has been given, may prefer a second appeal from the decree under this section, and his remedy is not himted to an application under O XLI 1 2 to the Court which passed the decree to rehear the appeal (3). The objection that the first Court did not make sufficient inquiry before admitting an application for rehearing and setting aside a former ex parte decree in favour of the plaintiff and dismissing the plaintiff is suit should be taken in the lower Appellate Court, and if it is not taken there it can not be raised in second appeal, because it would not be doing justice to restore an ex parte decree which the lower Courts have, on a subsequent trial on the ments, found should not be renewed. If the objection was a substantial one it should have been raised before the lower Court at the proper time (4)

Scope of appeal -The general rule on this point may he stated to he

⁽¹⁾ See Jugobundhoo t Sree Naram 20 W R 188 (1873), Buldeo Pershad v Golab Mhan 6 N W P , H C R 101, 103 (1874) , Gujraj Singh t Bijai Singh, 6 N W P 114, 117 (1874), Mohima Chandra : Atul Chandra, 24 C 540 (1897) [misjoinder of causes of action], Heera Lall : Bistoo Lal, 22 W R 288 (1874), Mahomed Hossem : Potnu. 20 W R 147 (1873) [1d], Hur Chunder: Wooma Soondurec, 23 W R 170 (1575)[document received without objection] Haran : Russick, 20 W R 63 (1873) [want of stamp], Jadu t Kailash, 37 C 6J (1909), Biswanath : Baidyanath, 12 C 199, 203 (1885), Bhagtatsangji i Pertahsangji, 4 B H C R 105, 108 (1807), Pran Kisto t halco Dass 7 W R 100 (1807) [defective jud,ments], Muthusami r Nalia Kullantha, 15 V 118 (1894), histo Churn : Dwarla nath 10 W R 32 (1868), Grania t

Larunakar, 24 M. 43 (1900) [error of valuation], Hukum un missa a Muckdoonum, W R. 246 (1864) [hearing of appeal before salo fixed pleaders present], Narambhait Narashahar, 7 B H C R, A C J 93, 102 (1867), [deposition read instead of oral examination see also Jadu Rai a Kanizak Husam, 8 i 376, 591 (1886)], Shoohal Chunder a Kojlash Chunder, 14 W R 23 (1870) [erronous conclusion of law], Shalth Lall Mahomed a Perr Nuzun, 18 W R 112 (1871) [dej ositions of witnesses not taken regularly]

⁽²⁾ Ram Chowdhury r Kashee Mohun, 21 W. R. 57, 53 (1873)

^{(3) \}quidha Prasad : Balmukund, \(\) \\
354 (1850)

⁽⁴⁾ Boro Khasia r Jata Sirdar, S B L. 1 78, 80 (1871), a. c., 15 W R 315

that it must coincide with that of the appeal before the Lower Appellate Court, as the latter should be limited to the case made in the Court of first instance. Ihroughout the litigation the same ground of attack and (save as mentioned) of defence should be put forward. A plaintiff appellant will not be allowed to present his case in an entirely new shape and raising fresh issues to fall back upon a new and different title or cause of action from that first asserted (1).

A case is not to be decided in special appeal upon a question which was not raised or tried or considered by the lower Courts Parties must not be allowed to come before the High Court in special appeal and raise a question or take an objection which, if raised or taken in the first Court or even in the Appellate Court, might have been met in those Courts by adopting a course which cannot be adopted when the case comes before the High Court in special appeal (2) But where there was sufficient reason for the question not having been raised in the lower Courts the ease may he remanded in second appeal with a view to have that question determined (3) An appellant is not entitled to raise a question of fraud which was not alleged in the written statement and us to which no issue was raised in the original Court (4) Where a specific title has been alleged but not proved and the plaintiff endeavours to succeed in the first Court or second Court of appeal upon a title by twelve years' adverso possession, he must be prepared to show that this other title by twelve years' adverse possession was raised in the Court of first instance with sufficient clearness to enable his adversary to understand that he channed to succeed as well by twelvo years' adverse possession as hy tho specific

(1) Madan : Malki, 6 A. 428, 430 (1884), Soorja r Gunja, 12 W R 80 (1869), Heman gineo : Pitambar, 5 W R 197 (1866) (though it is a different thing to vary the rehef given to a party who has proved his title See in this connection Tacoordeen a Nawab Sved Ah, 1 I A 192 (1874)], Muthu samı t Ramkrishna, 12 M 292 (1889), Kripa Nath v Saroda, 1 W R 283 (1864) . Sheo Das v Bhagwan Dutt, 2 B L R App 15 (1869), Gopal Narhar : Hanmant, 6 B 107, 110 (1881) [unless under very special circumstances], Puriag Dutt 1 Brojo Koon war. 9 W R 503 505 (1868), Terretput Sing Gossain Sudersan Das, 4 C 46, 50 (1878), Brindabun v Dhununjoy, 5 C 246, 250 (1879), Joytara t Mobaruck, 8 C 975, 980 (1882) . Secretary of State v Nurya, 5 M. 163 (1882). Jamsedn Sorahn : Lukshmiram Rairam, 13 B 323 (1888) It has, however been held [Judoo Nath Mullick t Kake Aristo Tagore, 22 W R 73 (1874)] that it is sufficient that the plaint should set out the facts necessary to support the 1les even though the plea stself be not expressly set forth Sree Dasseev Rance Lalun Monce, 12 M. I. A 470, 475 (1869), Mohummud Zahoor s Rutta Koer, 11 M. I. A 468, 485, 486 (1867); Indur Chunder t Radha Kishore, 10 C 507, 152 (1892), Ilalin Khun t Sher Alı, 26 A 331, 334 (1994), Tekatt Doorga Pershad v Musst Doorga, 13 W R 10, 11 (1870) The case of Sankana Kalana t Virupakshapa, 7 B 146 130 (1883), was desapproved in Perunal t Kater, 16 M. 121, 125 (1892)

(2) Shib Suhagi e Nursingh Lall, 22 W R 352, 354 (1874) per Couch, CJ see also Meer Bahadoor v Sunec Churo, 6 W R 157 (1866), Bunseo Lal e Shaikh Auladh, 22 W R 552 553 (1874) Jugdeep Naram t Deendyal, 20 W R 178, 176 (1873) This case went up to the Prit's Council where the decree was varied on other grounds 3 C 198, a.e., 4 I A. 247 (1877)

(3) Bonomalee v Kylash Vojoomdar, 24 W R 72 (1875)

⁽⁴⁾ Prayrag Bur Goukaran, 6 (' W N 787, 791 (1902)

title alleged (1) The plaint has been allowed to be amended and the case remanded for retrial (2)

As regards objections by defendants, such as are based on pure points of law, may be taken in second appeal for the first time provided that they do not involve the taking of any additional evidence on matters of disputed fact, (3) that is questions arising on the findings and not affected by any facts outside those findings, (4) and capable of being determined without the consideration of any evidence other than that on the record (5) And such a point may be taken after remand though not raised in appeal before the remand (6) Such as want of cause of action, (7) the legal status of the plaintiff to come into Court at all, (8) limitation, (9) want of jurisdiction, (10) res judicata (11), want of registration, (12) the legality of a translation; (13) the

Krishna Baisack v Protab Surma, 7 C
 560, 563 (1881), see also Shivo Kumari Debi
 Govind Tanti, 2 C 418, 423 (1877)

(2) Mohummud Zahoor v Thakooranee, 11 M. I A 468, 485, 486 (1867), Joseph v Sol ao, 9 B L R 441, 453 (1872), in Krishnaji v Wamanji, 18 B 144, 146 (1893), amendment was refused

(3) Gavdappa v Guimallappa, 19 B 331, 335 (1894), and see Ramtorak v Dmanath, 7 B L B 184, 185, s o, 24 W B 414 (1871). Kalı Mohan v Kalı Krishna, 11 W R 183. s o, 2 B L R app 39 (1869), Jan Ali v Khondkar, 14 W R 420, 421 (1870) [no ground of appeal allowed when it would have to be dealt with in connection with the evi dence in the cause or appears capable of explanation], Cajapathi v Vasudova, 15 M 503, 511 (1892) [it is not possible to lay down any precise rule and it is not always easy to say what matters of fact would have to be ascertained for the proper decision of each proposition of law], Ajedhya Nath Chowdhury v Keshab Chandra Mukberpee, 11 C W N 1127 (1907)

(4) Nagesh t Guru Rao, 17 B 303, 305 (1892), Sharfudin t Gound, 27 B 452, 405 (1902) In Rachawa v Shivayogapa, 18 B 679, 683 (1893), the Court refused to allow defendant to set up a new right differing in Lind and not merely in degree

(5) Fahir v Ananda, 11 C 586, 590 (1887)
 (6) Darimba t Nilmonec, 15 W R 181

(1871) (7) Lachman v Bahadur, 2 A 854, 887, 888 (1850), Spankie, J., discent , Jan Alt t Khondhar, 14 W R. 4.0, 121 (1870), contra, Buksh th t Joyamut, 11 W R 218 (1869), an lice per Markby, J., in Trilochun t Gugan, 24 W R 413 (1875)

(8) Id , Balaram v Mangta Das, 11 C W

N 959 (1907)

(9) Id., contra Shuvapa v Dod Nagaya, 11 B 114, 119 (1880), and m Raghu Nath t Pareshram, 0 C 635, 036 (1882), no objection under sect 561 of the last Code was taken as to objection after remand, see first Mirra Bahadoor, B L R, F B 429, 432 (1866), Dattu v Kasan, 8 B 535 (1884) See notes to O XLI r 2

(10) Id., Ramayya v Suhbarayadee, 13 M 25, 27 (1887), Sayad Nyamtula v Nana, 13 B 424, 427, Velayudam v Arunachalam, 13 M 213 (1880), Nudha Lal v Mazhar Husan, 7 A 230 (1881) In Bhikaji v Pandu, 10 B 43 (1893), Azuddin v Ramanagra, 14 C 605, 010 (1887), Biru Mahata v Shyama Chura, 22 C 483 (1895), the chipection was held not to go to jurashetion. As to objections after remand, see Keshav v Vinayak, 23 B 22, 26 (1897), Inmulji v Farvani, 6 B H C R, A C J 167 (1865)

(11) Muhammad Ismaal v Chutter Singh, 4 A 69, 71 (1881), some of Strachey, J'a, observations were held to be obiter dicta in Kanshai Kal v Sura, Kunwar, 21 A, 440, 444 148 (1899) [but not if it cannot be decided on the record and fresh issues are necessary], Ranchol v Bezanu, 20 B 86, 92 (1891) [Objection to pauper smill.]

(12) Comatool Tatimat Ghunnoo, IJW R 23 (1872), but see Joy Gopal : Thakoo

moneo, II W R 331 (1869)
(13) Kuppa Guru Kal't Dorasami, 6 M 76,
78 (1882) In Joytara Dissace t Ry
Chunder, 1 W R 116 (1864) the objection as
to the invalidity of the a lopton was not
taken in the grounds of appeal, nor in R y

irrelovancy of ovidence,(1) for an erroneous omission to object to the omission of irrelovant testimony does not make it available as a ground of judgment, an objection appearing on the face of a notice (2)

An objection on the ground of misjounder, (3) whether of parties or causes of action, must now under sect 99 show that the ments have been affected

But a mixed question of law and fact cannot be raised for the first time in ascend appeal. So an objection has been disallowed on a question of title, (4) as also that a suit was harred under sect 21 of the last Code the objection being one not of pure law but depending inport the facts (5) and as to the competioney of an agent to sue (6). And defendants will not be silowed to set up for the first time in second appeal a case which involves an inquiry into facts not ascertained in the Court below (7). A question of jurisdiction, or indeed any other question which depends upon a question of fact which has not been determined by the lower Court or admitted by both parties, will not be allowed to be raised (8). It has been recently held that the construction of a document is a question of law which Judges in second appeal are not precluded from considering by any finding of a lower Appellate Court based on such document (9)

A defendant may estop himself from setting up a defence. So a defendant has not been allowed to change the whole nature of his defence at the last moment and to set up in appeal a plea which he has directly and fraudulently repudated in the Court helow (10). So a party, who waives an objection to the use of depositions taken in a former his, ation cannot object in appeal that the winesses

Goodur t Dhunneshur 7 C L R 117 (1859) where the question was as to the execution of aliquot 1 prition of dicroc Lachman t Baliadur 2 \(\), 881 (1880) but see Bombay Burman etc Corp t \(\)milh 17 B 197 221 (1842)

- (1) Miller e Madho Das 23 I t. 100 (1890), Authors hydeneo het, 4th ed. p. 22, quare therefore as to Bajukhan iu e Baju Jiraji 14 B 3"2 3"" (1889)
- (a) Manulla : Hurse 13 1 A 131 1 hs s. c., 20 C. 80 (18 a)
- (3) No Wood in Kutti i Krishnan, 10 M.

 3... 3.9 (188) | Dhouddba'r Hamchandra

 518 o.d., 601 (1881), Mailar i Gulzar, 10 i

 130 (183), Iarir ee Humman 20 W. R.

 100 (1873), Majahiri i Narayana 3 M. Ser

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(1813)

- (4) Varanji e Lallu Mhu 9 B 285 287 (1885), Umrao Bibi e Mahomed Rojabi 27 C 205 207 (1899) a.e. 4 C W \ 70
- (5) Biru Mahata e Shyama Churn 22 C 483 (1893)
- (6) Soorendro Nath Roy r Rughoobur Dyal 15 W R 392 (1871)
- (7) Umb La + Nadur 11 W R 133 134 (1869)
- (b) Interfoonness : Poolin W. R. F. B. 31 32 33 (1864) see also The Court of Wards r Roop Moonjure 45 W. B. 209 (186). Ramanund : Urn kalee 2 W. R. 45 (1864) at lace where there are findings Auftration, Ram Rotton 5 C. W. A. 200
- (10) Satiyal lama Dasser Arabas (Laudr Chattery e 6 Cassis, of (199) see Dake America hamar lama at leal, 2 Cala la 200 (198), Northman Edmirama, 23 Cala la 201 (198), Northman e Emigrama, 23 Cala la 201 (198).

should have been called and examined (1) Pirties who allow a suit to be con ducted in the lower Courts as if a certain fact was admitted cannot afterwards in special appeal question it and recedo from the facit understanding (2) And if any irregularity has been committed at the instance of an appellant or with his consent he has no just ground of complaint in appeal (3)

The not taking or pressing an objection in the lower Court may not only satisfy the Court that the parties did not intend to take it as they knew there was nothing in it . (1) but may also act, where facts are involved, by way of estoppel For bad the objection been taken it might have been met On the same principle an objection for the first time in appeal that the plaint did not ask for further rehef has been disallowed, for if taken the plaint might have been amended and may be amended in appeal (5) An objection will not be allowed which, if taken at the proper time, might have been removed (6) On this principle, if secondary evidence is admitted without objection, the Court of Appeal will not entertain an objection that primary evidence should have been given (7) In the case of alleged irregularity it is a safe maxim for a Court of Appeal to be governed by, that an objection, which, if taken, might have been cured, and which was not taken in the Court below, shall not be taken in the Court of Appeal (8) An appellant will not be allowed to raise in the Court of Appeal a point which he did not raise in the Court below, even though there is some evidence in support of it, if the nature of that evidence is such that by any possibility, the respondent might have been able to rebut it if the point had been raised originally (9)

If an appellant in a second appeal was contented, and by his conduct he shows that he elects to take his chance of baving the decree of the first Court confirmed on appeal on the evidence before the Court, he cannot be beard sfterwards to complain in second appeal that there was a material irregularity in the conduct of the case, on the ground that all his evidence was not before the appeal Court which reversed the first decree It is his business to have brought to the notice of the lower Appellate Court that all his witnesses were not examined before the first Court, and not baving done so, he cannot in second appeal, take the objection in order to have the chance of a second trial (10) Such objection, if not raised in the Court below, and if it appears that

⁽¹⁾ Lakshman v Amrit 24 B 591 (1900), see also Wazeer Jemadar v Noor Alt, 12 W R 33 (1869) See Easin t Abdul 15 C W N 10 (1910), where second appeal allowed on the ground of waiver

⁽²⁾ Dwaji v Godadbhai, 2 B H C R 28 (1865), Mohima Chunder: Ram Kishore, 15

B L R 142, 155 (1875)

⁽³⁾ Maharajah Nitrasur v Nund I al Singh, 8 M J A 199, 220 (1860)

⁽⁴⁾ Soorendro Nath Roy v Rughoohir Dval 15 W R 392 (1871)

⁽⁵⁾ Limba Krishna i Rama Pimplu 13 B 548, 551 (1888) Chomu v Umma, 14 M. 46, 18 (18 ii) Similarly in the case of an object

tion that the case was not one in which a declaratory decree should have been made. Maganlal v Govind Lal, 15 B 697, 701 (1891)

⁽⁶⁾ Avudh Beharce : Ram Roy 18 W R 105 (1872)

⁽⁷⁾ See Authors Evidence Act 4th cd. p 32

⁽⁸⁾ Dhurum Das : Shama Soondri 3 M

I A 229, 242 (1843) (9) Px parte Tirth 19 Ch D 419 129

⁽¹⁸⁸¹⁾ (10) Gulam v Haji Balrulm 13 B 330

^{337 (1548)}

no application was made to have the witnesses examined the Court of second appeal will not entertain (1) And if the first Court declaring itself to be satisfied with the evidence of any one witness, does not think it necessary to examine any further witnesses whom the plaintiff may have adduced, and the Lower Appellate Court, on appeal not being satisfied with the evidence of that witness, dismisses the whole suit, the High Court on second appeal may send the case back for the examination of witnesses whom the Lower Appellate Court may think fit to examine The fact that the first Court did not think it necessary to examine other witnesses may be brought to the notice of the Lower Appellate Court by the party concerned, or it may appear in the judgment of the first Court (2) If the Court of first instance, being satisfied that the plain tiff's easo could not be established, refuses to examine defendant's witnesses and dismisses the suit, but the Lower Appellate Court, differing from the first Court, gives the plaintiff a decree, the objection that the proceedings before the first Court were irregular should be taken before the Lower Appellate Court, and if it is not taken there the Appellate Court in second appeal will not entertain it (3)

The second Appellate Court is not the Court in which errors of procedim, of the Court of first instance are to be remedied where the error has not been made the ground of complaint in the lower Court and the first Court of Appeal. Thus where any real give ance or other just cause of complaint sinces to a plaintiff from the first Court's refusal to examine his witnesses it is his first duty to bring the matter prominently to the notice of the Lower Appellate Court in his grounds of appeal Failing to do so he cannot he allowed to urge it as a plea in special appeal (4). If either of the lower Courts refuses to entertain any material issue suggested by the defeudant, it would afford him good ground of complaint against their proceedings. But when he did not raise the issue in the lower Courts which he wants to rate in second appeal, he will not be allowed to raise it in second appeal. A party will not be allowed, on special appeal, to go beland the issues hy which he was content to ahide in the Court below (5).

102 No second appeal shall he m any suit of the nature [
No second appeal in cogmizable by Courts of Small Causes, when certain suits.

the amount or value of the subject-matter of the original suit does not exceed five hundred rupees

Object of section —This section (6) is a reproduction of sect 27 Act XXIII of 1861 Suits trable by Courts of Small Causes are, speaking broadly suits of a comparatively simple character and of small pecuniary value

Somasekharar Subhadramay 6 B 124
 (1882)

⁽²⁾ Hurish t Gopal 20 W R, 203 (1873) Bapu e Sheikh Ahmed 13 B 337 (1874). (3) Goordas t Puran, 12 W R 163

⁽⁴⁾ Oncorrupt Heera Mance, H M. R. 419

^{(1869).} Osman Singh : Chummun 17 W R 87 88 (1871)

⁽b) Shaikh thired : Shaikh Sonaoollah, N R 5 (1807)

⁽⁶⁾ For the history of the section, see Soundaram Ayyar c Sennia Vaickan, 23 M, 547, 554 (1980)

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far as the C deutta and Madras High Courts are conceined, that the interpretation to be placed on the decision of the Prvy Council (1) is that this section does not touch the right of appeal given by the Letters Pitcht (2). These decisions consider that of the Prvy Council to be of general application, and proceed upon the construction that the scheme of the Code as to appeals is that they be from one Court to unother, and that therefore this section has no application to a case where the appeal is from one Judge of a Court to the Pull Court (3). As regards other sections it has been held that sect 597 (now 111) of the Code modifies sect 39 of the Letters Pitcht. (1) and that sect 15 of the Letters Patent is controlled by sect 629 (now O XLVII r 7) of the Code, which provides that an order of a civil Court rejecting an application for review of judgment shall be final (5)

105 (1) Save as otherwise expressly provided, no appeal shall he from any order made by a Court in the exercise of its original or appellate juris

diction, but, where a decree is appealed from, any error, defect or irregularity in any order, affecting the decision of the case, may be set forth as a ground of objection in the memorandum of appeal

(2) Notwithstanding anything contained in subsection (1), where any party aggreed by an order of remand made after the commencement of this Code from which an appeal hes does not appeal therefrom, he shall thereafter be precluded from disputing its correctness

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Appeal Au order may or may not he a decret (see sect 2) The former are appealable as such The latter orders may or may not be appealable under sect 104 or O XLIII r 1 which deals with what may be described as immediate appeals from orders (6) A party against whom an appealable order has been made may at once prefer his appeal. He is however not bound to do so There

^{375 (1889) [}order refusing leave to appeal as pauper see editor's notes giving earler cases] Muhammad Nami ullah v Ihsan ullah 14 A 226 (1892) [order directing amendment of decree]

⁽¹⁾ Hurrish Chunder v Kalı Sunden 9 C 482 10 L. A Sc (1882)

⁽²⁾ Toolsee Money v Suderi Dassee 26 C 361 (1899) Chappan v Moidin Kutti 22 M 68 (1898), Sabhapathi Cletti v Naraya nasami Chetti 25 VI. 555 (1901)

⁽³⁾ See per Subramama Ayyar J in Vasudeva : Visvaraja 20 M at 1p 417, 418

⁽i) Vasulevit V svaraja 20 M at p 413

per Benson J (1897)

⁽⁵⁾ Achaya e Ratnavelu 9 M 253 (1885) approved in Aubhoy Chura v Shamont Lochun 16 C "S8 794 (1889) disapproved in Toolsey Money v Sudovi Dossec 26 C 361 367 (1899) where bowever no mention is made of the fact that the first cited case referred not to sect USS but to sect USS because the section of the section of the section of the section of the section of the section of the section in question of the particular section in question.

⁽⁶⁾ See Luckn bas v Ebral m 2 B at P 648 (1878)

is no law in India which renders it imperative upon a suitor to appeal from every interlocutory order hy which he may conceive himself aggreed under the penalty, if he does not do so of forfeiting for ever the benefit of the consideration of the Appellate Court (1) Formerly though no appeal had been filed from an order which was a prelimmary decree within the period of limitation, that order might have been questioned on the appeal from the final decree (2) This, how ever, is not so now, see seet 97 In the case of orders not decrees, an order made under the Code from which an appeal is given under sect. 101 may be questioned under this section in an appeal from the decree in the suit, although no appeal from such order has been preferred under sect 104 (3) The same rule applies where, though the order is not one of those mentioned in sect 104, it is a judgment within the meaning of seet 15 of the Letters Patent Tho order may equally, as in the other eases, be questioned under this section (4) It has been held that where a suit has been remanded on appeal, an appeal from the order after the suit has been taken up by the first Court on remand and finally disposed of will not he and that this classe has no bearing on such cases (5)

Orders of remand have now, by the second clause, been excepted. As to

the previous law, see note (3), enfra

And where an order under the group of sections relating to representatives has been made excluding a person from the record, that person must seek his or her remedy in appeal against the order and is not entitled to appeal against the decree so long as the order stands the reason being that the question whether

(1) Maharajah Moheshar Singh v Bengal Government, 7 Moo L A at pp 302, 303 (1850), Sheonath v Ramnath, 10 M. I A 413 (1880), Forbes v Amecroomssa Begun, 10 M. L A. 340 (1850), Shah Mukhun Lall v Sree Aushen Singh, 12 M. I. A 157 (1868), Savitte v Ramp, 14 B at p 235 (1889)

(2) Id. [order granting review of judg inent], Biswa Nath Chali e Bem hants. Dutta, 23 C. 406 (1890) [order directing amounts], hhadem Hossen; 20 C 758 F B (1991) [prehumany decroe for partition], overruling Boloram Dey v Ram Chandra Dey, 23 C 279 (1895), Shah Mukhan Lal v Baboo Sree Aishen Singh, 10 M. I A. at pp 184, 185 (1868) [interlocutory decree as to interest]

(3) Sheo Nath Sungh v Ram Dm Singh, 18 A. 19 F B (1894), Forbes v Ameronoussas Begum, 10 V. I. A. at p 359 (1865), Cheda Lall v Badullah, 11 A. 35 (1888), Rameahur Singh v Sheodin Singh, 12 A. 510 (1889), Savitri i Ramji, 14 B 232 (1889), Kanto Prashad Ilazari v Jagat Chaudra Dutta 23 C. 335 (1895), Mohesh Chunder Das t Jahruddi Mollah, 5 C. W N 509 (1901), theso were all cases of objections in the final decree to previous orders of remand. Whether

illegal orders of remand affected the ments was a question to be determined in each case Savitri : Ramii, supra, at pp 235, 236, Mohesh v Jahiruddi, supra, at p. 515, if the order did not affect the merits, then sect 578 cured the defect, 1b 510 See now clause 2 of the acction. Googlee Sahoo v Premiali Sahoo, 7 C 148 (1881) [order under sect 32], Har Naram Singh t Icharag Singh, 9 A. 447 [order under sects 32, 356, 367], Goodell v Mussoome Bank, 10 A. 97 (1887) forder under sect 3721. Sheonath t Ramnath, 10 M. I. A 423 (1865) [order nominating arbitrators], Mowree Bewa t Soorundarnath Roy, 10 W R 178 (1868) [order admitting appeal out of time], Joy kishen Mookerjee v Parbutty Churn Ghoosal, 22 W R 183 (1874), Bhyruh Chunder v Madhub Ram. 20 W R 84 (1873) [order granting review which can only be challenged on the grounds stated in sect 629], Baroda Churn Ghose v Gobind Proshad Tewary, 22 C. 984 (1895), Dhamara Kumara t Buk Lapatnam. 34 M. 228 (1910)

(4) Jamsetu i Dadabhoy, 24 B 302 (1900), s. e., 2 Bom. L. R. 648

(5) Janoki t Promotha, 15 C W N 830 (1911) the order helow was light or wrong goes to the very root of the question as to the party's right to he a party to the proceedings helow, or to come up at all in appeal (1). If an order is non appealable, then it may be questioned under this section subject to the terms thereof. While sect 101 deals with what may be styled immediate appeals from orders, this section is in substance the grant of an ultimate appeal against any order affecting the decision of the case, but making such ultimate appeal contemporaneous with an appeal against the decree (2). It has been held that if there is an appeal against any order made under any rule, there is also an appeal against any order made under part of that rule (3).

Order must be under this Code—This section must he read with sect 104, and should be construed as if the words "under this Code" were inserted between the words "by a Court" and the words "in the exercise of "Io hold otherwise would have the effect of abidishing many appeals given by other Acts of the Legislature, some of which were passed before the Code came into force, for example, appeals from decisions in Companies cases (4) So also an order for attachment for contempt is not an order in exercise of the High Court's oval jurisdiction, and therefore does not come within the provisions of this section—Contempts are in the nature of offences, and therefore inder sect 15 of the Lietters Patent, 1865, an appeal hes from an order of committal for contempt (5)

The section contemplates two things—there being a regular appeal about something else, and in that appeal the insertion in the memorandum of appeal of a ground of objection under this section (6). This section does not enable a litigant to avoid huntation by coming up under this section when the only ground of appeal is an order made under sect 563, now O XLI r 23 (7). No appeal hes where no objection is taken to the decree as regards the ments of the case, those ments having been enquired into (8) but the grounds are solely directed against an interlocutory order passed in the suit (9). Where, however,

⁽I) Sankali v Murhidhar, 12 A 200 (1890), a party to the decree may formally appeal, but in this case the appellant was not a party, and the order complained of decided that she was not entitled to be a party, dist Har Marain v Kharag Singh, 9 A, 447 (1887), and see Balabai v Ganesh, 27 B 162 (1992) in which the Lower Appellato Court had dismissed the suit on the ground that one B was not the representative of the deceased plaintiff

⁽²⁾ See Lucknudas v Ebrahim, 2 B at pp 648, 649 (1878)

⁽³⁾ Eastern Mortgage and Agency Co t Fahruddin 17 C W N 16 (1912), Mohunt Anand t Rain Perkash, 14 C W N 183 (1909)

Wall τ Howard, 17 A 438, 440
 (1895), Umrao Chand τ Bindraban Chand,
 17 \ 475, 477 (1895)

⁽⁵⁾ Navivahoo v Narotamdas Candas, 7 B 5 (1882) In dealing with an appeal from such an order the Appellate Court will not go behind the order the disobedience to

Which constitutes the contempt 1b (6) Sheonath Singh : Rain Din Singh, 18 A 19 F B (1895), foll Sher Singh v Diwar Singh, 22 A 366, 367 (1900)

⁽⁷⁾ Ib (3) In Krishna Chandra Gotedar t Wohesh Chandra Laha, S A. 2310 of 1902, Cal. H. C 6 April, 1905, the Lower Appellate Court had refused to inquire into the merits because it illegally set aside an order which had been made under sect 108 restoring the suit.

⁽⁹⁾ Sher Singh v Diwar Singh, supra (appeal against an order setting aside the dismissal of a suit for default)

the order of the lower Appellate Court as to abatement was embedded in the judgment and decree, it was held that objection thereto was properly taken by way of second appeal against the decree. In this case the Court was asked to set aside the decree on the ground that the trial on the ments was contrary to law, but even if the order that by reason of the death of one of the respondents the appeal against her laided were treated as in order in the suit separate from the findings upon which the decree was based (which it was held not to be), then there was an objection that the appeal ought to have abuted altogether and not partially (1)

Order.-The words "prior to decree" which appeared in sect 363 of the Code of 1859, were omitted from the Code of 1877, as from the last and present Code, and thus the section is applicable to orders affecting the decision of the case whether such orders were made before or alter the decree (2) The words "affecting the decision of the case" did not apply to "such orders" in the former section, but to the previous words "error, defect or erregularity" So in an appeal from an ex parte decree in a summary suit upon a promissory note. it was held that an appeal lay from an order made after decree under sect 534 (now O XXXVII r 4), relusing to set eside the ex parte deerce (3) The Court also observed that if the Court made en order to set aside the decree, stay execu tion, and give iceve to the defendant to appear and delend, it "affects the decision," and by refusing to do so it elso "affects the decision" masmuch as it thereby upholds the deerce against the party applying to have it set eside (4) The word "such" has now been deleted The order must be one passed under the Code A decision under sect 5 of the Court Fees Act is not on order under this section (5)

Decree —I he section only applies where there is an appeal from a "deeree' as to the meaning of this term, see notes under sect 2, ante. Where the order appealed from wis not a decree nor an order under sect 588 of the former Code, it was held no appeal lay (6)

Error, defect, or irregularity—These words mean in this section error, defect or irregularity in procedure or in law, and not in matters of fact (7)

"Affecting the decision of the case"—These words mean "affecting the decision of the case with reference to the ments of it" (8) Therefore when an ex parte decree was set aside by an order under seet 108 (now O IX 1 13), and the sut heard upon the ments and disamssed, it was held that such order was not an order affecting the decision of the case under this section, it did

⁽¹⁾ Hem Kunwar : Amba Prasad 22 A. 430 (1900)

⁽²⁾ Luckmidas t Ebrahim, 2 B 644 at p

^{649 (1878)} (3) 1b

⁽⁴⁾ Ib at p 648

⁽⁵⁾ Balkaran Rai v Gobind Nath Tewari 12 A, 129 F B at p 158 (1890)

⁽⁶⁾ Hirdhamun Jha i Jinghoor Jha 5 C

^{711 (1880)}

⁽⁷⁾ Sankalı v Murlidhar, 12 A 200 (1890), Balabaı v Ganesh, 27 B 162, 187 (1902)

⁽⁸⁾ Chintamony Dassi t Raghoonath Sahoo, 22 C 931 (1895), Gulab Kunwar t Thakur Das, 24 A. 464 (1902), Tasadduq

Husan : Hayat un \1884, 25 \tau . 280 (1902), Balabai : Ganesh, 27 B 162, 187, 188 (1902)

not determine on the ments, but merely insured a hearing upon the ments (1) So an order readmitting an appeal which had been dismissed for default is not an order affecting the decision of the case,(2) nor is an order allowing a plaintiff to sue as a pauper (3). The orders which may be considered under this section are, in short, those by which the Judge may have been misled in deciding the case (4).

Clause (2) -See ante, notes, "Appeal"

What courts to hear appeal from any order is allowed, it shall what courts to hear appeal would be from the deeree in the suit in which such order was made, or *where* such order is *made* hy a Court (not being a High Court) in the exercise of appellate jurisdiction, then to the High Court.

Appellate Courts,—The provise to sect 589, which this section replaces has been omitted as the Code no longer deals with insolvency proceedings

GENERAL PROVISIONS RELATING TO APPEALS

- 107 (1) Subject to such conditions and limitations as may Powers of Appellate be prescribed, an Appellate Court shall have pourt.
 - (a) to determine a case finally;

(b) to remand a case;

(e) to frame issues and refer them for trial;

(d) to take additional evidence or to require such evidence to be taken.

(2) Subject as aforesaid, the Appellate Court shall have the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by this Code on Courts of original jurisdiction in respect of suits instituted therein

Appellate Court's powers—An appeal is a continuation of the original suit, and therefore the powers and duties of both Courts must be to a large extent

(3) Mumtaz in t Rasulan 23 A. 364, 367 (1901) In an early case however where a

⁽¹⁾ Chintamony v Righoonath 22 G 981 (1895), foll Krishna Chandra Goldar v Wolesh Chandra Saha, 9 C VN 584 (1995) dist Krishna v Ganesh 26 B 201, 203, Fasadduq v Hayat un Nissa 25 A 204 (1993), Kariman v Forbes 1 Cal. L J 27 N (1994) (2) Gulab kunwar v Thakur Das, 24 A

^{464 (1902)}

Court gave leave to sue as a pauper, a previous application having been refused, the sun was dismissed on appeal Bishessur Singh a Vulnessur Bahsh, S D N W 1864, vol n p 189

⁽⁴⁾ See also Sankalı v Murlidhar, 12 1 200 (1890). Balvbai i Ganesh 27 B 162, 187, 188 (1902), in which the order was held not to have affected the decision

the same. Thus the Appellate Court has powers as $m_{\rm e}$ ids the an endment (1) and return (2) of the plant and memorardum of appeal, the withdrawal (3) of the southed addition of parties (1) to the appeal, the reference of the subject matter of the suit and appeal to arbitration. (3) the abatement of the appeal, (6) assignment. (7) and stitution of parts, where metaber, (9) separation and trial

(II Preusal e C Bet at d C 1143 ° 2 ° 3) C 116 (124) P ary Velone Narrolla, 1 ° C W N 271, 27) (134) 260 also Bis Bis Majiralyae Magartal, 19 B 791 307 (184). Siyam Chand e Land W 1922e Park, 9 ° C 17, 6 ° (1884). Dham Hum e Bhagarali Slahs, 22 ° C 6 ° (184). Sebamma e Chengja, 20 ° M. 407 (1847), Krishnaya e Panda, 17 ° M. 187 (1843).

(2) Waln billibar Kanhaya Lal 25 A 474, 170 F B (1932) (overtaling Bind 1-6); Nan lu, 3 A 450), see also Chunra Naml billibar Karuji a Udayan, 21 M, 234 (1884). Pachomet Bilan A 4 475 (1884). Ger Bus Sah 50 + Brij Lal Benka 20 C 277 (1885). Raghunath Churan Singhi Shamio Keen D I C, 344-347 (1943) (dissenting fe in Kunla Kutti + Vehotti, 11 M, 402 (1954)). Sundart + Sariola Pressal, 2 C L, 1 402 607 (1964). Dalap Singh + Kunlan Singh, 56 A 54 (1954).

(3) Ganga Ham e Dala Ham 8 t. 82, 82 (1853), but a plaintiff cannot by withdrawing of his own free will air both ut primesion annul rights created by the decree of the first Court. Satyabhamabhar t. Ganish, 29 B 13, 18 (1901).

(4) Gyanananda + Kristo, S.C. W. N. 404, 400 (1901) (apart from the section the Court has inherent powers in this respect). Rangat t. Steo. Prasad, 2 N. 487, 491 (1879). Vasudey i. Salubai, 10. B. 227, 229 (1885).

(3) In re Sangarahngam, 3 M '18 (1889), Bhugwan Das i Nand Lall, 12 C 173, 175 (1835), Suresh w Imbies, 18 C 507, 509 (1801), soo also Russool Rebec i Jan All, 17 W R 31 (1871), as regards the effect of this section on sect 522 of the former Code see Shyama Charan i Problad, 8 C W N 390, 373 (1904), dissenting from Naurang Singh w Sadapal Sing 10 A 8 (1838)

(6) Gopal Gonesh v Ramchandra, 26 B 597, 606, 697 (1992) [death of appellant held also that the yno means follows that the right to appeal against a decres partakes of the nature of the original cause of action—

defan ato n suit]. P raman r Sur larja, 26 N 10 (1912) [d ath of appellant-out for scales as prose att no Bat Full r Adecand. 26 H 2-3 (1 ell) (al aten ent o ily as regards centain respendente). Chrismun r Gurga hat, 27 B 254 (PO3) [death of one appellant , il alorg with while case on appeal of sursi ver], (1 an lateing r hl imal hai, 23 11 719, 721(15)71[death of the appellant cannot affect malt of others to proceed with the appeal, ar I see Alla Halah r Ma iharam, 23 A 22 (I a) Ram weak | Lambur l'ande, 23 A 27 (1 xi2) Chintaman r Gungabai, 5 Bom L R (* (1997)], Hun Kunwat : \mla | 130 (1 00) [mght of appeal a t surviving against surviving respondent, lut against them and representative of deceased], and see Ray Chunder t Gunga Dass, 31 t' 457 (P t) 31 1 1 71, 8 C W N 142. Renga Srimiyasa e Gungaprakasa, 34 M 67, 68 (1906) , Dharanjit t Chandeshwar, 11 C W \ 504, 506 (1907); Joy Govand : Manmotha, 33 C 500 (1906) . Susya Pillas e Anyakanna Pillai, 29 M. 529 (1906) [second appeals], Muhammad Hussain 1 hhushalo, 10 1 223, 235 (1885) [ascertain ment of legal representative of deceased, Inherent power], Shyamananil t Rajmarain, 4 (L. J 568 570 (1906) [right to appeal surviving against surviving respondents]. Upendra Aunar + Sham Lal Mandal, 6 C L J 715 (1907) s c, 34 C, 1020, 11 C W A 1100 Madhuban Das a Vairan Das 29 1 535 (1907)

(7) In re Durga Prasad 22 A 231 (1899) dist Collector of Vuzaffarnagore t Hossan Begum, 18 A 86 (1895)]. In re Sarat Charder Sungh, 18 V 285 (1896), Raja Ram Jahn 9 B 151, Ranja t Ellis, 20 B 167 (1895) moreover O XXII r 13, has not now the qualifying words "arrising out of the death, marrage, or insolitency," etc.

(8) The decision in Dwarks Nath Biswas t Debendra Nath Tagore, 4 C. W. N. 58, 62 (1899), proceeded on the language of the former section, side post

,87,),]

and orders.

of misjoined suits, (1) sending for and examining an Ameen on his report, (2) power to award costs against the estate of a deceased plaintiff, (3) power to pass an order under sect 108 of the last Code, (1) and the hkc. An Appellate Court bas wider powers of remand thru under the last Code (5)

The words of the section confer and impose upon an Appellate Court very wido powers, (6) in fact, the same powers as those of the first Court as nearly as may be It was, however, sometimes a question whether the general powers thus stated in the first part of the section were controlled by the second portion, (7) which dealt with the death, marriage and insolvency of parties. This portion has now been removed to O XXII r 13, the object of which is to obviate the necessity of repeating the provisions of the order so as to make them applicable to appeals, and that order is itself stated in wider terrus, being no longer limited to proceedings arising out of the death, marriage or insolvency of parties to an appeal (8) The amended section, disencumbered of the portion referred to, should now make it clear that the powers of an Appellate Court are as nearly as may be the same as those of the first Court; that is, while they are as extensive, they are subject to the same limitations (9) This principle has been held to be applicable to all cases where the Appellate Court has a plenary, and not merely a limited, jurisdiction (10) The first sub clause is new, and has been inserted because it was thought desirable to have in the body of the Code a general pro vision about the powers of an Appellate Court The second sub clause is taken from the first part of sect 582 of the former Code

108. The provisions of this Part relating to appeals from Procedure in appeals original decrees shall, so far as may be, apply from appellate decrees to appeals—

(a) from appellate decrees, and

(1) Shoroop Chunder Paul t Mathoor Mohun, 4 W R 109 (1860), Auncerum t Wascebun, 12 W R 11; 13 (1869)

(2) Sheo Dyal Singh v Hodgkinson, 24 W R 342 (1875), though a Judge should not order a Subordinate Judge whose judgment is before him on appeal to go and inspect Roy Sultan: Lalco Kocer, 17 W R 300 (1872)

(3) Rajmonee v Chunder, 8 C 440 (1881), Lakshmibar v Balkrishna, 4 B 654 (1880), there is now no scope for the doubt expressed in the first case

(4) Sankara Bhatta v Subraya Bhatta 17

M L J 436 (1907), s c, 30 M 535 (5) Gora Chand : Basanta, 15 C L J 258, 262 (1911)

(6) See Muhammad Husain v Khushalo, 10 223, 233 (1888), as to the meaning of the term 'powers," see Kali Krishna Chandra v Harihar Chuckerbuttv, 1 B L R 155 (1868)

(7) See Dwarka Nath Biswas t Debendra Nath Tagore, 4 C W N 58, 62 (1899), where on this ground it was held that the earlier part of this section did not make all the pro visions applicable to suits applicable also to

(8) Collector of Munaffarnagar 1 Husaml Begum, 18 A 68, 81 (169.), though even under the last Code the power might have been found in the first part of the section, Is re Durga Prasad, 22 A 232 (1899), the present rule speaks of a planntiff including an appellant etc.," instead of "a planntiff appellant or defendant appellant, etc., but the meaning is the same, as an appellant may be a planntiff or defendant, see per Mahmood, J., in Naram Dasi Lagga Ram 7 A 693 699 (1885), and see as to the question of limitation there referred to, Mitra's Limitation, 4th edition, p. 1103

(9) See in illustration cases cited ante passim and Durga Prasad w Khairati, 1 A 345 (1878), where it was held that the Appellate Court should (as well as the Court of first instance) confine itself to deciding

matters put in issue by the parties
(10) Tej Mal : Papayumma 22 M L J

225 (1911)

(b) from orders made under this Code or under any special or local law in which a different procedure is not provided

"As far as may be "-lhese words mean" as far as is consistent with the principles on which appeals from appellate decrees [and orders] are idmitted and determined" In second appeal the Court cannot go into the facts So it was held that no objection could be taken under sect 567 of the last Code (1) corresponding with the present O XLI r 27 So also sect 565 (now r 45 of the same Order) was held not to apply to second appeals (2) So while sects 562 and 564 of the last Code were held strictly binding on all Courts of first appeal, cases frequently occurred in which the Court in second appeal remanded cases for reasons not contemplated in the former section (3) bo the appellate Court has set aside a decree where there was no proper sudement and remanded the case for a decision de noto, (4) and has made a remand where evidence was improperly admitted, (5) and for a finding on an issue (6) Where the first Court dismissed a suit on one of the issues, viz that of title, observing that it was not necessary to decide the other issues, one of which was an issue as to limitation, and the second Court decreed the suit by reversing the finding of the first Court on the issue of title, but omitted to record a finding on the issue of hmitation, the case was remanded to the Lower Appellate Court for findings on the remaining issues (7) And though there was no section strictly authorizing a remand, the Court was held nuder the circumstances warranted ex debito justilie in setting aside the pro ceedings and directing a retrial of the case (8) Sect 587 of the last Code was held to authorize an application to hing in a plaintiff respondent in second appeals and to extend to such appeals the provisions of sects 368 and 58. of that Code (now O XXII r 4, sect 107, O XXII r 11) (9) It was, however, subsequently held, though the Allahabad and Calcutta High Courts dissent, that the reference to sect 582 in the Limitation Act did not include by implication second appeals referred to in the section corresponding to this (10) This section may be read with sect 582, now 107 ante, O XXII r 11, post (11)

⁽¹⁾ Hande e Brayan, 7 M. 52 (1883) [as to the portion of this decision dealing with the treatment of additional ovidence by the Court of second appeal, see Gopal Singh v Jhakri Rai, 12 C 37 (1885)], Sohawan Edu Narid J. 4, 26 29 (1886), Kelu Mulachiri t Chenda, 19 M. 157 (1834)

⁽³⁾ Ganesh Bhikaji t Bhikaji Krishna, 10 B 398, 400 (1886), Habib Bakhsh t Baldeo Prasad, 23 A. 167, 170 (1901)

⁽⁴⁾ Sheosmbar Singh t Lallu Singh, 9 A 23 m., Sohawan t Balu Yand, 3 A 26 (1886) (5) Wazer Wir Kalee Coomar 11 W B 228 (1863)

⁽b) Lalia Ram Lall : Mohurput Roy, 21 W R 52 (1873)

⁽⁷⁾ Kailash Chandra Kundu i Kun Bihari Goswami 4 & L J 86 (1906)

Behart Goswam: 4 C L J 86 (1906)
(8) Durga Dihal v Anoraji, 17 A 2.)
(1894), and see Habib Bakhsh i Baldeo

Prasad, 23 A 167, 170 (1901)
(9) Valkalagadda t Vahizulla, 28 M 498

 ⁽⁹⁾ Vakkalagadda t Vahizulla, 28 M 498
 (1905)
 (10) Surya Pillai v Aryakannu Pillai, 29

M 529 (1906) dissented from in Madhuban Das t \aram Das, 29 A 535 (1907), and Upendra kumar Chuckerbutty t Sham Lal Mandal, 34 C 1020, 11 C W N 100, 6 C L J 715 (1907)

⁽¹¹⁾ Sarala Sundari Dasir Saroda Prosad Sur, 2 C L. J 502, 607 (1904)

APPLALS TO THE KING IN COUNCIL

What appeals lie to made by His Majesty in Council regulding appeals from the Courts of British India, and to the provisions heremafter contained, an appeal shall be to His Majesty in Council—

(a) from any decree or final order passed on appeal by a High Court or by any other Court of final appellate jurisdiction.

(b) from any decree or final order passed by a High Comt in the exercise of original civil jurisdiction, and

(c) from any decree or order, when the case, as heremafter provided, is certified to be a fit one for appeal to His Majesty in Council.

value of subject-matter of the subject-matter of the subject-matter of the subject-matter of the subject-matter of the subject-matter of the subject-matter of the subject on appear to His

Majesty in Council must be the same sum or upwards, or the decree or final order must involve, directly or indirectly, some claim or question to or respecting property of like amount

or value,

and where the deeree or final order appealed from affirms the decision of the Court immediately below the Court passing such decree or final order, the appeal must involve some substantial question of law.

111 Notwithstanding anything contained in section 100,

Bar of certain appeals no appeal shall he to His Majesty in Council—

(a) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1801, or of one Judge of a Division Court, or of a Division Court constituted by two or more Judges of such High Court, or of such High Court, where such Judges are equally divided in opinion, and do not amount in number to a majority of the whole of the Judges of the High Court

(b) from any decree from which under section 102 no second

appeal hes

at the time being, or

112. (1) Nothing contained in this Code shall be deemed— [s.

Savings. (a) to bar the full and unqualified exercise of His Majesty's pleasure inreceiving

or rejecting appeals to His Majesty in Council, of otherwise howsoever, or

(b) to interfere with any rules made by the Judicial Committee of the Privy Council, and for the time being in force, for the presentation of appeals to His Majesty in Council, or their conduct before the said Judicial Committee.

(A) Nothing herein contained applies to any matter of criminal or admiralty or vice-admiralty jurisdiction, or to appeals from orders and decrees of Prize Courts.

Appeal to His Majesty in Council.—This matter is dealt with both in the above sections and in O XLV. The provisions are substantially the same as in the last Code. Sects 613-615 of that Code have not been re-enacted, and r. 4 and 5 of O XLV. are new.

In the Common Law of England must be found the origin of the jurisdiction of the Sovereign in Council, but the Statute Law has recognized and aftirmed such jurisdiction. In 1726, by a charter granted by George I, an appeal lay in the case of the Mayers' Courts to the Governor or President in Council and in important eases (1) to the King in Council The appeal to the Privy Council from the Court of Sudder Dewany Adam ut (which the High Court on its appellate side represents) was granted by 21 Geo III c 70. The power to admit an appeal was first conferred upon the Sudder Dowany Adamlut by Reg. XVI of 1797, seet 2 (2) In 1833 the Judicial Committee of the Privy Council was created,(3) and by orders of Her Majesty in Council of the 10th April, 1838, passed in pursuance of 3 and 4 Wilham IV e 41, certain restrictions were placed upon the exercise of the power of the Sudder Dewany Adamlut to admit an appeal The practice of the Calcutta High Court in the admission of appeals has been regulated by rules of the Court made by the Sudder Dewany Adawlut on the 17th December, 1858, and by the High Court on the 30th July, 1870 (4) The Charter Act of 1861 (24 and 25 Vict. c. 104) substituted the High Courts of Calcutta, Madras, and Bombay for the Supreme Courts established under the Charters of 1774, 1800, and 1823 respectively Tho Rules now in force have been assued under the powers vested in the High Court by 24 and 25 Vict c 104, sect 13, by the Letters Patent of the High Court, 1865, and by the Code of Civil Procedure These Rules came into force from 1st July, 1891 (5) The right of appeal to the King in

⁽¹⁾ libert's Government of lndis, 2nd Ed. p 32.

⁽²⁾ In the matter of the Petition of Feda Hossein, I C. 444 (1876)

⁽³⁾ Safford and Wheeler's Privy Council Practice, 450.

⁽⁴⁾ In the matter of the Petition of Feda Hossein, 1 C 444 (1876)

⁽⁵⁾ Belchamber's Rules and Orders, Appellate Side Rules, Introductory Rule, also Pt.

I, Ch. II, r. vm, Pt 11, Ch. IV. etc.

Council now rests on clanse 39 of the Letters Patent of 1865, read with sects 103 and 110 of this Code, and O XLV (1) Though appeals from the High Courts in India are regulated by positive Statute, yet the Severeign in Council possesses by virtue of the Royal Prerogativo a clear appellate jurisdiction over the judg ments of all Courts of Justice established in any of the British dominions beyond the seas, and notwithstanding the express statutory rights of appeal from the decisions of the High Courts, it has been repeatedly held that, notwithstanding the statutes which prescribe the time and mode of appealing and the limits in point of amount, the power of the Sovereign in Council to entertain petitions for leave to appeal where the conditions imposed by the Statute have not been complied with, remains in full force. The jurisdiction was exercised in 1862 in an appeal from Oudh, where there was no positive Statute law, Regulation or Order in Council applicable to the idmission of appeals from the Court of the Judicial Commissioner of Oudh to Her Wajesty in Council (2) Thus also it is quite discretionary with the Judicial Committee to admit an appeal in eases far below the appealable amount mentioned in the Statutes and long after the period prescribed by the Statute for filing a petition of appeal in India has expired Such petitions have been admitted and have led to reversil of the judgment of the Courts below But the High Courts have no power to allow or cutertain a petition for leave to appeal, or to stay execution or to take security for costs of an appeal, except strictly in accordance with the terms of the Statute or with any order the Privy Conneil may make in the particular case (3) The Judicial Committee act only as advisers to the Crown and not is a Court of Indicature (4) and 'humbly recommend' their conclusions to His Vajesty But a commission appointed by the Governor General for the purpose of inquiring into the truth of an imputation against a Chief and of reporting to the Governor General in Council how far the same was true to the best of their judgment and belief was held to be a · commission appointed by the Governor General himself for the information of his own mind in order that he should not act in his political and sovereign character otherwise than in accordance with the dictates of instice and equity, and not in any sense a Court or if a Court not a Court from which an appeal lay to His Majesty in Council (5) Nor is there any appeal to His Majesty in Council from the Courts of Assistant Political agents Political agents in Kathia war or from the decision of the Governor of Bombay in Council (6) By the terms of the Charter (and also the Code) the appeal given is confined to Judicial acts namely from decrees and orders though special leave may be

⁽¹⁾ Chataprat Singh Dugar t Kharag Singh Lachmiram P C, 40 C 085 (1913)

⁽²⁾ Salık Ram ı Azım Alı S W I A 270, 272 274 (1862)

⁽³⁾ Sahl, Ram t Aznu Ali 8 M I A 270 272 (1862) (notc.) For right of appeal to the Privy Council in Craninal Case se Joy Kissen Mookherjee Petitioner, I W R P C 13 (1862) Gangadhar Tilsk t Queen lugress 2.5 I A 18 (1807) s c 2.4 B

^{528 532,} Maur Singh v R, 18 C L J 12I (1913) and Chintamon S ngh i King Lin

peror, 18 C L J 119 (1908)

(4) Safford an I Wheeler s Privy Council

Practice p I

(5) In re Waharaja Wadhana Singh 31

I A 233, 241 (1904), s c 32 C 1 4 5 8 C W V 841

⁽f) Hem Chand & \zam Sakarlal 10 C W N 301, 4-0 4-1 (1.05)

granted by the Privy Council (1) Thus it has been held by the Privy Council that no appeal hes to it under the Land Acquisition Act (I of 1894) sect 51. since au award by the High Court under that Act is neither a decree under sect 2 of this Codo nor a decree, final judgment or order within the meaning of the Letters Patent, but is the last of a scries of arbitration proceedings (2) Where a matter has been referred by His Majesty to the Judicial Committee which is not strictly an appealable grievance, their Lordships of the Privy Council may, under the reservations contained in 3 & 4 William IV c 41 advise His Majesty to grant the petitioner leave to appeal (3) Special leve to appeal was given in a case against an order made by the Judges of the Supreme Court of Madras dismissing the Master of that Court from his office for alleged official misconduct, hecause the order was not made in the course of a judicial proceeding (4) But in Ex parte Robertson (5) it was held that the Judicial Committee have no juris diction to take into consideration the propriety of the dismissal of a public servant, who held his office during pleasure nuless the matter is expressly referred to them by the Crown Following this case it has been held that the Privy Council bave no jurisdiction to grant special leave to appeal against an order of the High Court at Calcutta under sect 26, clause (2) of Beng Reg V of 1831, dismussing a Ministiff for corruption in the exercise of his functions as a Judge (6)

As stated, the King in Council, by virtue of the Royal Prerogative possesses an appellate jurisdiction over the judgment of all Courts of Justice established in any of the British Dominions beyond the seas, and it is quite discretionary with the Judicial Committee to admit an appeal in cases far below the appeal able amount mentioned in the Code, and long after the period prescribed for filing a petition of appeal in India has expired (7) Thus when the High Court in India has refused the necessary certificate, the aggree ed party may present a petition for the exercise of the prerogative right of the Crown to admit an appeal and the Judicial Committee in a fit case, will advise His Majesty that leave to appeal should be allowed on the usual terms as to security. In a fit case their lordships will advise His Majesty to grant (8) an order staying proceedings where the High Court in India refused to make such an order on the ground that the Code gave them no jurisdiction over the subject matter pending an appeal not certified by themselves (9) As a rule in cases under the appealable amount hefore special leave is petitioned from His Majesty in Council an application should be made to the High Court for a certificate that the care is nevertheless if t one for appeal (10)

⁽¹⁾ In re Minchin per Lord Brougham, 4 11 1 4 --0, -21 (1547)

⁽²⁾ Rangoon Botatoung to Ltd : Cell ctor Rang wn, P (, 40 to 21 (1312) and see Special Officer Salectio Building

Sten e Dossabhar Ikz 1 jr 37 B 506 (1312) (3) In re Minchin per Lard Brougham 4 M. 1 1 -20 -21 (154") Majane Leech

² M 1 A 4.5 (1541)

⁽⁴⁾ In re Vin hin sorra

^() II M P C cases _ N = O(INT N) (c) Intlematter f See M hunt latte L

¹³ VL L 1 343, 346 (1570)

⁽⁵⁾ Sahk Ram r Azım Ah S M I A 2"0 2"2 (4562) NY MCT 112

⁽⁵⁾ Rahimith y . furier 15 l 1 5 J (45 m) a c la B la Sant Miglar Ho. sem r Badha B b: 1" 1 112 111 (1594) (3) Mobreh Claudra e Naterahan 27 (4 4 (180) - - 201 1 251 , 40 15 / 11

⁽¹⁴ Mots Chande Canas Irasad Sanab

^{291 3, 4941 011}

Special leave, by the Privy Council, when granted.—The Privy Council will not advise His Majesty to exercise this prerogetive end to give special leave to appeal unless there is some substantial question of law of general interest involved (1) The petition for special leave to oppeol is not by way of appeal from the decision of the Court, but it is presented for an exercise of the preiogative right of the Crown to adunt an appeal Although it is not an appeal, it is perhaps a more convenient proceeding than an appeal because the Privy Council can then grout leave on any other ground, if other ground appears for the indulgence that is sought, and if it finds that, in a care in which the appeal is claimed as of right, the Court below has refused the certificate for a reason which appears to them to he an unsound reason, then they will advise His Majesty to admit the oppeal (2) The Privy Council is not bound by the provisions of the Code. Thus where in on appeal to it by one of the defendants, it set aside a decree of the High Court and restored that of the first Court, and it appeared from the wording of the decree of the Privy Council that the defendants generally were entitled to hove the benefit of the decree, held that the defendants generally were entitled to the benefit of the decree though there was no common ground such as is referred to in the Code (3)

Special leave without requiring further security -Where the High Court passed a separate decree on a cross appeal, identical in terms with those of the decree possed on oppeal in the same suit, and granted leave to oppeal in one and refused it in the other, their lordships granted special leovo without requiring further security thon had already been taken by the High Court (4)

Leave to appeal, granted without authority—special leave granted —An objection that an appeal hos come before the Judicial Com mittee without proper outhority, viz thot the leave to appeal should not have been given, ought to be taken at the earnest moment, for the obvious reason that the great expense of proparing for the hearing is thereby saved, which is uselessly incurred if, when the objection is ultimately taken, the Privy Council feel obliged to yield to it, but it is clearly competent to the Judicial Committee to hear such an objection at any stage of the appeal, and it is not unfrequently heard when the appeal is called on and before the arguments on the ments have commenced (5)

Special leave to appeal—contents of the petition —Such a petition should contain a full statement of the facts and legal grounds showing that there is a substantial case on the merits, and a point of law involved proper to be determined by the Privy Council Thus, where the statements contained in the petition were of a too general character to enable the Privy Council to judge of the propriety of granting the special leave prayed for, their lordships

⁽¹⁾ Mote Chand v Ganga Prasad, 29 I A 10, 42 (1901), s c, 24 A 174, 6 C W N 362, 364 , 4 Bom L. R 139

⁽²⁾ Rahimbhoy & Turner, I5 B 155, 158

⁽³⁾ Luchmeenut : Lhoobunnissa, 14

W R 280 (1870)

⁽⁴⁾ Mahammad Ikram ud din v Napilan 23 I A 167 (1896), s c, 19 A 95

⁽⁵⁾ Capadhur Pershad τ Widows of Γman Ah Beg 15 B I R 221, 223 (1875)

ordered that the petition should be either dismissed, with liberty to present another petition, or stand over to amend the petition (1) If a serious question of law is involved in the appeal, special leave will be granted by the Privy Council, though leave had been refused by the High Court (2). Special leave has been refused in the following caves—merely because the Judge had omitted to record any reason while grunting a review, which he should have done, (3) and where the High Court dismissed an appeal as harred by huntation, the Judicial Countities not being satisfied that the refusal of the High Court to admit the appeal out of time was wrong (1).

Rescission of special leave to appeal -Where there is an omission of any material facts, whether it arises from improper intention on the part of the petitioner or whether it arises from accident or negligence, still the effect is just the sinic if the Court has been induced to make an order which, if the facts were fully before it, it would not, or might not, have been induced to make (5) So an Order in Council made upon an ex parte application granting special leave to appeal upon an allegation as to the value of the property in dispute was rescinded, where there were ourssions in the petition of proceedings in the suit, which showed the true value of the property Generally an Order in Council obtained upon an ex parte petition, which ounts to state the true facts, will be' discharged with costs but if there has been laches in applying to discharge the order on the part of the respondent no costs will be given (6) Where special leave to appeal is granted upon a petition in which material misstatements are made, objections should be taken by the respondent by a prehimmary motion to rescind the leave to appeal, or at any rate before the hearing of the appeal, when called on, has been entered on Where it is not clear that the material misstate ments in the petition had been made with an intention to deceive, and tho chieetion to the appeal is taken at a late stage of the hearing, the Judicial Committee may decline to dismiss the appeal, but refuso the appellant the costs of the appeal But if their Lordships are satisfied that the misstatements were intentionally made to decrive them, they will, even at a late stage, dismiss the appeal (7)

Powers of High Court after admission—The question has arisen and been answered affirmatively whether the High Court after the admission of an appeal to the Privy Council, his amy further authority in the suit, and competence to do any judicial set relating to it. Thus on the death of a party on the record of an appeal pending before the Privy Council, evidence must be given in the Court from which the appeal has been preferred of the representative character of the person or persons by or aguinst whom revivor is sought. The

Gorce Monec v Juggat Indra, 11 W I A (1866)

⁽²⁾ Gooneshar : Gonesh Das 3 C W N CCXXXVIII (1899)

⁽³⁾ Shankar Buksh r Balwant Singh 27 I 1.79 (1899) s c , 4 C W N 203

⁽⁴⁾ Ram Naram t Pareneswar 30 C 309 (1902)

⁽a) Wohun Lal Sookul t Bibeo Doss, 8 W I A 193 (1861), per Lord Kingsdown p 195 Ameena Khatoor t Radha Benode Wisser 7 M I A 261, 263 (1859)

⁽⁶⁾ Ibid see also Mussoorio Bank , Raymor 4A 500, 508 (1882), s c, 91 1 70 (7) Ram Sabuk v Kaminee, 14 B I R (r c) 394, 406 (1874), s c, 23 W R 113

Court below should give its own opinion as to who are the parties who should he substituted upon the record, and should make and send a certificate or statement on which their Lordships can set (1) When only the petition for leave to appeal has been filed and before it is allowed, the High Court has jurisdiction to entertain applications relating to the appeal (2) Further, if the appellant has taken no steps towards prosecuting the appeal, the petition of appeal may he struck off the file by the High Court (3) The Judicial Committee have no jurisdiction to entertain any application in an appeal until the netition of appeal is lodged there, though the transcript has been registered in the Council office (1) If after the admission of the appeal no steps are taken by the appellant within reasonable time, the Judicial Committee, upon a certificate of the Registrar of the High Court that no further proceedings have been taken after the admission of the appeal, will dismiss it (a) It was considered that an appeal to the Privy Council having once been admitted, whether properly or erroneously, the High Court had no further jurisdiction to review its order and declare the appeal rejected (6) But in a later case Prinsep J , held that an order granting leave to appeal to the Privy Council was open to review (7) And an order refusing leave to appeal to the Privy Council can be reviewed by the Court which made it (8)

Rehearing of appeal by the Privy Council -It is unquestionally the strict rule, and ought to be distinctly understood as such, that no cause in the Privy Council can he reheard, and that an order once made, that is a roport submitted to His Majesty and adopted, by heing made an Order in Council, is final, and cannot be altered. The same is the case of the judgments of the House of Lords, that is, of the Court of Parhament, or of the King in Parliament as it is sometimes expressed, the only other supreme tribunal Whatever, therefore, has been really determined in these Courts must stand, there being no power of rehearing for the purpose of changing the judgment pronounced Nevertheless, if by misprision in embodying the judgments, errors have been introduced, these Courts possess, by Common Law, the same power which the Courts of Record and Statute have of rictify ing the mistakes which have crept in It is impossible to doubt that the indulgence extended in such cases, is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where by some accident, without any blame, the party has not

⁽¹⁾ Haidar Alı v Tassadduk Rasul 16 C

^{184 (1888)}

⁽²⁾ Hurro Soondery v Kistonauth, Fulton 10 (1842)

⁽³⁾ Gobardhan : Mani Bibi, 5 B L R .6 (1870), Thal oor Kapilnath v The Govern ment, 1 C 142 (1876)

⁽⁴⁾ Gungadhur v Radhamoney, 9 Moo P C 411 (1855)

⁽⁵⁾ Rabutty Dassee t Radhananth, 6

M I A 346 (1856) (6) Ameerunnista : Indurject, 6 W R 97

⁽⁷⁾ Gopmath Birbar v Goluck Chunder, 16 C 292 (1884) [this case on the interpreta tion of substantial question of law appears to be overruled by the Privy Council case] Fulst Persaud Bhakt t Benayek Misser, 23 I A 102 (1894), s c, 23 C. 918, Sukal butta v Babu Lal. 28 C 190, 193 (1900), 8 C, 5 C W N

⁽⁸⁾ Nand Lishore : Ram Golam, 39 C

^{1037 (1912), 16} C W N 1089

been heard, and an order has been madvertently made as if the party has been heard Under the peculiar circumstances of this case their Lordships recommended the restoration of the appeal dismissed cx parte (1) Even before report, whilst the decision of the Board is not yet res judicata, great crution has been observed in permitting the rehearing of appeals (2) After the respondent has had notice of a pending appeal, he is not entitled to further notice that the record has been transmitted or that the appeal is set down for hearing, and he cannot ask for a rehearing of the appeal on the ground that he had no such notice (3) The unusual judulgence of recommending a re hearing of an appeal to His Majesty ought never to be granted except under very special circumstances, and only where the cx parte hearing has not been occasioned by any default in the party applying for a re hearing (4) An Order in Council rescinding a previous Order in Council, granting special leave to appeal, may be discharged and the appeal restored (5) Also an appeal dismissed for want of prosecution (under Rule 5 of the Order in Council of 1853) has been restored on explanation of delay meurred and on conditions as to costs and sceurity to be given in England (6)

Appeals from decision given on second appeal—In an appeal to the Privy Council from a decree of the High Court made on a second appeal, the hearing before their Lordships minst be based upon the materials which were open to the High Court, and the findings of the Subordinate Judge on matters not involving questions of law must be taken as conclusive, (7) and in such cases the findings of fact by the first Court are binding on the Judicial Committee (8)

Concurrent judgments on fact—The Judicial Committee will not interfero with concurrent judgments of the Courts below on pure matters of fact, (9) unless very definite and explicit grounds for that interference are

Rajendernarain v Bijai Govind, I Moo
 A. 117, 126, 134, 142 (1836), per Lord
 Brougham

⁽²⁾ Venkata Narasınha v Court of Wards 13 I A. 155, 158 (1886), a v., 10 M. 73, 78, Yarlagadda Durga v Malikarujuna, 14 M 439 (1891)

⁽³⁾ Lalta Pershad v Azzızuddin, 24 I A 49 (1896), s c, 19 % 209, Surnomoyee t Shoshee Mokhee, 12 I A 257 (1868)

⁽⁴⁾ Rajender Narain t Bijai Govind, I Moo P C. 117 (1836), Surnomoyee t Shoshee Mokhee, 12 I A 257 (1868)

Shochen Mokher, 12 I A 257 (1868)
(5) Mohun Lall v Biben Dass, 8 Mon I A
402, 497 (1861), see ib , at p 193

⁽⁶⁾ Rabiabai v Vahomed Ismail, 24 I 4 128 a.c., 21 B 723 (1897)

⁽⁷⁾ Lachmeswar Singh t Manowar Hossein, 19 C. 253 260 (1891). s. c., 19 I. A. 48, 53 1 uchman Singh r Puna, 16 C. 753, 755 (1899) s. c., 16 I. A. 125, see Pestonji Modi r Queen Insurance Coy. 25 B. 332, 336 (1900)

⁽⁸⁾ Anangamanjari v Iripura Soondari, 14 I A 101, 110 (1887), s c, 14 C 740, ab p 748, Munnalal v Gajraj, 17 C 246 (1889), Durga Choudhrani i Jawahir, 18 C 23 (1899)

⁽⁹⁾ Young Tha Huycen v Moung Pan Nyo, 27 I A 166 (1900), s c, 28 C 1 4 C W N 808, Dharam Chand t Bhawani Misrani, 25 C 189, 194 (1897), s. c 24 I A 183, I C W N 697, Bireswar : Shib Chander, 19 L L 101 (1892), s c, 19 C 452 461, Ram Naram t Bhim Ganjhu, 3 C W A 249 (1893), Sundaralinga Swamı r Rama Suami, 26 1 A 55, 57 (1899), a c, 22 W 515, Harr Hart Uman Parshad 14 I \ 7 (1886) s c 14 C 290 Krishnan i Sudev: 12 M 512 (1859) Ram Lal e Mehda Husain 17 C So2 (15.0), Asghar Reza t Mehda Hossem 20 C 560, 572 (1892), s c. 20 1 A. 38, 47. Parbati Dasi r Baikunta Nath, P C, 19 C L J 1_9 (1913)

assigned,(1) and it is satisfied that there is miscarriage of justice or the violation of any principle of law or procedure (2) But where there are concurrent findings of facts and there is no substantial question of law in issue, their Lordships, in order to see how for the Courts have concurred in their view of the facts, will examine precisely what their findings are (3) Where the Courts in India have come to a certain conclusion on a certain issue, that is a fact which, considering the advantages the Judges in India generally possess, of forming a correct opinion of the probability of a certain transaction, and in some cases of the credit due to the witness, affords a strong presumption in favour of the correctue's of their decisions, yet that circumstance does not and ought not, to reheve the Judicial Committee, the Court of last resort, from the duty of examining the whole evidence and forming for itself an opinion on the whole case (1) But the duty of a Court of ultimate appeal is to judge from the evidence and not to infer from probabilities (5) In a recent case where in a mortgage deed a fictitious entry had been made (which if correct would have brought it within the jurisdiction of the Cilcutta High Court), and there was no evidence that there was an error it was held by the Privy Council that concurrent findings of error were not findings of fact, since a decision that there is no evidence to support a finding is a decision of law (6)

The Judicial Committee has refused to depart from the rule as to con current findings of fact, merely because the High Court has admitted documents tendered by the appellant which the first Court had rejected (7) It cannot detract from the weight of concurrent findings of fact, that different Courts in arriving at the same result upon the same evidence, have not been influenced by precisely the same considerations. A difference of opinion to that extent is only calculated to suggest that the evidence, whatever view be taken of it, must necessarily lead to one and the same inference, and there will be no interference by the Privy Council in such cases (8) Where no question of law, either us to the construction of documents or any other point, arises on the judgment of the High Court, and there are concurrent findings of the two Courts below on the oral and documentary evidence submitted to them, their Lordships will not entertain an appeal (9) When the question is not one of construction of one or more deeds, which would be a question of law, but is

⁽I) Moung Tha Huycen & Moung Pan Nyo, 27 I A 166 (1900), a c, 28 C 1, 4 C W N 808

⁽²⁾ Ram Srimati v Khajendra Narayan, 31 I 1 127, 131 (1904), s c, 31 C 871, 9 C W N 74, Mudhoo Soodun & Suroop chunder, 4 M I A 431 (1849), s c 7 W R P C 73, Meka Venkataramayya Apparow t Shri Raja Parthasarathy Apparow, 17 C W V 1222, F C (1913)

⁽³⁾ Asghar Roza t Mehdi Hossem, 20 C 560, 572 (1892), s c, 20 I A 38,

⁽⁴⁾ Mudhoo Soodun : Saroop Chunder, 4 M I \ 431, 433 (1849), Musadeo Mahome I Cazeem : Meerza Ally, b M. I 1

^{27, 49 (1854),} Chunder Woneo : Wunmo hinee S W I A 477, 489 (1861), Tayammaul

v Saschachalla, 10 \l I A 420 (1865) (5) Wise v Sunduloomssa, II M I A 177

⁽⁶⁾ Harendra Lal v Hari Dasi Debi, P C,

¹⁹ C L J 484 (1914) (7) Hurri Bhusan v Upendra Lal, 23 I A

^{97, 100 (1895),} s c, 24 C 1 (8) Mmon: Singh v Kirtichunder, 20 C.

^{847, 852 (1893),} s c 20 I A 95

⁽⁹⁾ Foolsey Persaud v Benayck, 23 I A 102, 104 (1896), s c, 23 C 918, see also Sukulbutti : Babulal Mandar, 28 C 190 (1901), s e, 5 C W N 455

a question as to the effect to be given to decrees, leases and other documents as evidence of certain facts (eg that of adoption and its consequences), the concurrent findings against the factum of the adoption will not be disturbed merely because the evidence largely consisted of leases and other written documents (1)

The well known rule of the Judicial Committee not to disturb concurrent findings of fact by the lower Courts, unless they are shown to be erroncous, sone the less applicable, although the Courts may not have taken precisely the same view of the weight to be attached to each particular item of evidence. Thus their Lordships declined to disturb such finding where one Court relied on the oral and the other on the documentary evidence (2) In boundary cases the appellant must come prepared to show clearly where the decree appealed from is wrong, and what other course is right, it is insufficient to raise doubts as to the correctness of the decision (3)

It has been recently held that the provisions as to concurrent findings on fact would be misconstrued if the Judges in India were by implication subjected to tha duty of making their narrative of circumstances minutely exhaustive, under the penalty of being presumed to have overlooked elementary considerations (4)

The Judicial Committee will not, on the ground that there was some imperfection in the pleadings set rade the decree of a High Court, when the High Court were right on the ments of the case (5) Nor will their Lordships allow any now point to be taken for the first time in the Privy Council (6)

Reversal of decree on preliminary question entry into merits—
In Fischer v Kamala Naicker (7) it was arranged, in the commencement of the
argument, with the consent of the counsel on both sides, that if their Lordships
should be of opinion that the decision of the Court below could not be sustained
ou the grounds on which it had been based, they should proceed to consider
the whole case on its merits, and finally dispose of it. And their Lordships,
being of opinion that the decision could not be sustained on the grounds on
which it had been based, considered the whole case on its merits and dismissed
the appeal without costs asymmy that is they dismissed the appeal on wholly
different grounds from those rehed on by the Court below the dismissal should
be without costs

Costs—When a cause is remanded by the Privy Council and the mis carriage of the suit was occasioned by the manner in which the issue was framed

- (1) 1 uchman Lal t Kanhya Lal, 22 I A 51, 58 (1894), a c, 22 C 639, 618
- (2) Anugra Narain t Hanuman Sahai, 30 C 303, 308 (1902), s. c., 30 I A. 41. 7 C. W N 225
- (3) Rajcoomar Ray r Gobind Chander 19 I \, 140, 147 (1892), a.c., 13 C 671
- (4) Mirza "ajjad v Mazir th, 39 I A 1.6 (1912), 16 C. W N 859, 14 Bom L R 1055.
- (J) Gunga Pershad r Moharam Bili, 12 I 1 47, 51 (1884)
- (6) Sundarshinga Swami t Ramaswami, 26 1 4 55, 5" (1899) a c 22 M 515; Sambhunath t Surjamoni, 24 1 4 191 (1897), a c., 25 C 157, 1 C. W N 643, Imambands r Kamaleswari Pershad, 21 C
- 1005, 1017 (1591), a.c., 21 L. 4, 118. (7) S.M. I. 4, 170, 188, 189 (1860).

by the Judge, the costs of uppeal should be directed to be costs in the cause (1) in the case (2) cited their Lordships, while remanding the case, ordered that if the respondent fuled to appear in the High Court, or if the appeal should be decided against him, the respondent should pay the appealar's costs of the appeal in England, and the costs (if any) paid under the decree of the High Court were to be repaid to him. When an appeal is heard ex parts in the absence of the respondent and it is dismissed, the respondent is entitled to costs up to, and including the lodgment of his printed case, and also to the costs of appearance for applying for the same (3)

Pauper appeal —In an early case (4) leave to appeal in forma paupers was granted on an application to the High Court on an unstamped paper, but certified by counsel that there was reasonable ground of appeal. It has been recently held that the High Court cannot entertain an application for leave to appeal to the Privy Council in forma paupers and to be exonerated from depositing the respondent's costs and the usual fees (5). The question whether it is necessary to apply for leave to prosecute an appeal in forma paupers in England although the Courts in India admitted such an appeal, was referred to in Yunni Ram v Sheo Churn (6).

Appeal pending, effect on rights of owner—The pendency of an appeal to England does not put the party who subject to that appeal is the owner of an estate under a legal disability to bring a suit in that character against third parties (7)

Decree —This term is defined in sect 2 (2) and under that definition a decree may be either prebininary or final. The distinction between the two is pointed out in the explanation to that section. Under sect 97, parties agginered by preliminary decrees are required to appeal therefrom. Sect 594 of the last Code ran as follows. 'decree includes also judgment and order. (5) Decree now includes a final order. Clauses (a) and (b) of sect 595 of the last Code spoke of "final decrees. Sect 109 now speaks of any decree or final order. Apparently then, an appeal will be from a decree which may be either final or preliminary and from an order which is final. This is in accordance with previous decisions. A final decree was always appealable. And the Privy Council held that 'final for this purpose did not ment the last.

⁽¹⁾ Rajah Saheb Perhlad Scm v Run Bahadoor 12 M. I. A. 289 (1869)

⁽²⁾ Kaleo Pershad v Binda Lall 12 W I A 343, 349 (1869)

⁽³⁾ Sambhu Nath v Surjamam 21 I A 1)1 (1897) s c, 25 C 187 189, 1 C W N

⁽⁴⁾ In re Jowad Mr S W R 48 (1867) Flus order was made on condition that the usual security for costs was to be given and the costs of translation deposited

⁽⁵⁾ Jagadanan I 1 Rajendra 17 C L J 381 (1912)

^{(6) 4} M I A 114 136 (1846)

⁽⁷⁾ Rajah Saheb Perhlad Sein v Budhoo Singh 12 W I A 275 342 (1869) s c 2 B L R (r c) 111 142 2 W R (r c)

⁽⁸⁾ Is has been held that therefore the provision in sect 588 of the last Code due to restrict the provision in sect 599 that an appeal might be brought to the lung, if Council from a final order Linshna Prasad v Motchand 40 I A 140 1° C J J 573 (1913) 17 C W N 637

decree but a decree determining rights finally, such as a preliminary decree establishing the liability to account and directing accounts to be taken (1) In the case cited it was said that, to decide whether a decree is final or not, the Court should look at what was the real question before the Court when the decree was made Where the plaintiff alleged that the defendant was accountable to him upon several claims, and the defendant alleged that he had got legal defences to every one of those claims and that he was not accountable at all, and the Court held that the legal defences put forward were valid as to some of the claums, and as to others of the claums they were invalid and therefore the defendant must account, and presed a decree for account, such i decree directing accounts was held to be a "final" decree under the list Code (2) "It is true," said Lord Hobbouse, "that the elected that was made does not declare in terms the hability of the defendant, but it directs accounts to be taken which he was contending unght not to be taken at oil, and it must be held that the decree contains within itself in assertion that, if a balance is found against the defendant on those accounts, the defendant is bound to pay Therefore the form of the decree is exactly as if it affirmed the hability of the defendant to pay something un each one of these claims, if only the arithmetical result of the account should be worked out against him. Now that question of liability was the sole question in dispute at the hearing of the cause. and it is the cardinal point of the suits. The irithmetical result is only a conse quenco of the liability. The real question in issue was the liability, and that has been determined by this decree against the defeudant in such a way that m this suit it is final. The Court can never go back agoin upon this decree so as to bay that, though the result of the account may be against the defendant, still the defendant is not liable to pay anything That is finally determined against him, and therefore in their Lordships' view the decree is n final one within the meaning of the Code (3)

An order of remand, where the first Court has disposed of a suit ou a preimmary point, is not a final, but an interlocutory decree (4). But where a remand was made under the wrong section and the order of the High Court decided a cardinal issue in the suit, which could never, while the decision stood, be disputed again, there was held to be a final decree, notwithstanding that there might be inquiries yet to be made in disposing of the suit, e.g. where the High Court, reversing the decree of the first Court held that a valid bequest

(1913)

⁽I) Rahimbhoy v Turner, IS I 1 6 7 s c . 15 B 155 (1890)

⁽²⁾ Rahmbhoy : Turner, 15 B 155 159 (1890), s c, 18 I A. 6 cf Aben Sha : Cassirao 6 B 260 (1882) Ishvargar : Caudasama, 8 B 548 (1884)

⁽³⁾ Rahmbhoy t Turner, 18 I A 6 7 (1800), s c, 15 B 155 See also Sayla Muzhar Hossem t Bodha Bib, 22 I A I (1894), s c, 17 A 112, 110, Hafiz bbdu t Hari Raj, 22 A 405 407 (1900), Shantaram

i Jamsetji, 4 Bom. L R 212 (1

⁽⁴⁾ Mahant Ishangur Budh, art canda sama Amarsang, 8 B 518, 551 (1884), Habub un masa t Munawar un masa, 25 A 629, 630 (1903), Korbes t Ameteromasa, 10 M I A, 340, 590 (1860), s c, 1 Suth P (621, 627, Turunrayana t Gopalasam, 13 M 319 (1889), Tusuduk Rasul t Farrand Hassan 2 C W A cect (1898), Manadt Gobud 33 \ 391(1911), Artshna Chaudra t Ran Natan, 18 C L J 124

was made by a will and remanded the case for the trial of other issues (1) Where the High Court aftermed the lability of the appellant, which could never be questioued again and was the cardinal point in the suit, (2) an appeal was held to be (3) Where a candidate at an examination for pleadership was erroneously declared by a notification in the Government Gazette to be qualified for admission as a valid of the High Court, but when the mistake was found out the notification was cancelled, on application for leave to appeal, held that Chapter XLV of the last Code had no application, and that the matter was not one in which the High Court was concerned to give or refuse leave to appeal (4) Where, after the admission of an appeal to the Privy Council, the Court below passed a judgment in review in the same case, which judgment was sent up and notified to the Council, and put on record in the appeal case, it was held open to the Judicial Committee to pass judgment on the appeal, without prejudice to the subsequent judgment which was based on review (5)

Final order.—As regards orders made prior to decree which are only 50 many steps towards the ultimate decree, they may be styled preliminary or interlocutory, and in this sense not final By final order is apparently meant an order which terminates the proceedings in favour of one of the parties (6) In the ease cited, Markby, J, said "I do not know any meaning to the word 'final' which can be applied to orders made subsequent to decree" Sed qu Such an order cannot, it is true, possess finality in the senso in which that term is opposed to orders which are steps towards the decree, for the decree has ex hypothess been made, but the order may be final as terminating the particular proceedings in which it is made, and the final character of such orders is recognized in sect 2 with reference to matters determined under sect 47, ante (7) It has been held that the question of finality must be determined with reference to the precise relation in which it stands to the proceedings before the Court (8) It is not always easy to distinguish between what is a final and what is an interlocu tory order The Court of Appeal (in England) has not attempted to give an exhaustive definition, and the Legislature in the Judicature Act, 1875, sect 12 has not given such a definition (9) Sect 2, clause (2), Explanation, of this Code, says that a decree is final when the adjudication completely disposes of the suit "No order, judgment, or other proceeding," says Brett, L J ,(10) "can be final

⁽¹⁾ Muzhar Hossen v Badha Bibi, 17 A (1 C) 112, 116 (1894) But see Bail Nath

Sohan Bibi, 31 Λ 545 (1909)
 Rahimbhoy Habibhoy v Turner, 15 B
 155 (1890), s c, 18 I A G, cf Aben Sha z

^{155 (1890),} s c, 181 A 0, cf Aben Sna i Cassirao, b B 260 (1882) (3) See Habib un missa v. Munwar un

nissa, 25 A 629, 630 (1'03)
(4) In the matter of the petition of

Sukhnandan Lal, 6 A 163 (1884)
(a) Toondun Singh v Pokhnaram, I I A

^{312, 315 (1874)} (6) Jagessur Sahai i Muracho koer, 1 C

L R 354, 358 (1877)

⁽⁷⁾ See Ram Taruk ν Mosahebah, 6 C W N 246 (1901)

⁽⁸⁾ Harish t Nawab Bahadur of Moor shedabad, 13 C L J 588 (1J11), 15 C W N 879, Secretary of State v B I S N Coy, 13 C L J 90 (1911)

⁽⁹⁾ Lewis v Williams, 31 Ch D 623 (1850), per Chitty J. p 627

⁽¹⁰⁾ Standard Discount Co v La Grange, 3 C P D 67, 71 (1877), s c, 47 L J C P 3, cf White v Witt, J Ch D 58)

⁽¹⁸⁷⁷⁾

which does not at one affect the status of the parties, for whichever side the decision may be given, so that if it is given for the plaintiff it is conclusive Lamst the defendant, and if it is given for the defendant it is conclusive against the plaintiff" "I conceive," says Fry, L.J. "that an order is final only where it is made upon an application of other proceeding which must, whether such application or other proceeding fail or succeed, determine the action Conversely, I think that an order is 'interlocutory' where it cannot be affirmed that in either event the action will be determined" When any further step is necessary to perfect an order (1) or judgment, it is not final but interlocutory (2) A judgment may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined (3) An order dismissing a petition, presented under the Indian Companies Act (Act XII of 1895) for confirmation of the

Judge, and directing that the proceedings be remitted to the Court of the Subordinate Judge, and that the application presented to that Court may be disposed of, is not a final order.(5) nor is an order refusing to appoint a Receiver in a suit (6) An order of a High Court setting aside an order of a lower Court refusing to set aside an ex parte decree is a purely interlocutory and not a final order. (7) and so is an order rejecting an application for stay of execution of a decree under appeal (8) An order under the Rules and Orders merely refusing to ro open a Registrar s report is not final. (9) nor is an order deciding only that the Respondent should be at liberty to sue in forma pauperts (10) But an order of the High Court based on the ground that the plaint does not disclose any cause of action against the defendant is a final order within the meaning of this clause .(11) and so is an order setting aside the decision of a lower Court as to the respective shares of the parties to a partnership suit and directing fresh accounts to be

⁽¹⁾ Salaman : Wadner, 1 O B 734, 736 (1891) s c, 60 L J Q B 624, 64 L T 33 N R (Eng) 547

⁽²⁾ Collins v 1 addington, 5 Q B D 368. 370 (1880), per Baggalla, L.J.

⁽³⁾ The Justices of the Peace for Calcutta 1 1ho Oriental Gas Company, S B L. R 433. 452 (1872), per Couch, CJ, and Markby, J cf. Rahimbhoy : Turner, 15 B, 155 (1890) . a c., 18 L. L. C. 15 B 155 (1890)

⁽⁴⁾ Bombay Burma Trading Co. r Dorabu. 5 Bom L R. 348 (1903) , a. c., 27 B 413 (5) Palakdharic Radha Prasad, 2 1. 65, 67 (1575)

⁽⁶⁾ Chundi Dutt t Pudmanund, 22 (1,5, 120 (1533)

⁽⁷⁾ Rai Radha husen i Cellector of

Jaumpore, 5 (W N 153, 157 (1900), s t 23 A 220 and the mere fact that the High Court apparently on the assumption that it was such an order have certified the suffi tienes of the amount and value of the buit. cannot make at pealable an order which does not fulfil the statutory conditions

⁽⁸⁾ Srimivasa i Acsho Prasad, 13 (L. J. tol (1911), hrishna Chandra v Ham Varain. ISC L. J 124 (1913)

⁽⁹⁾ Royal Insurance Co t Akhov Coomar

Dutt 6 L W \ 41 (1 +01) (10) Sakan Smah r Gopal Ch. Neon, 8

C # 25 256 (1304). (11) Harish r Nawab Bahadur of Moor shidabad, 13 C L J 655 (1911), 15 C W \

^{573.}

taken (1) The dismissal of in appeal to the Privy Council for want of prosecution is not a final order within the menning of Art 179, Sch ff of the Limitation Act (2)

Appeal under Letters Patent not falling within the Code—Where, by an Order in Council, a case was remitted to the High Court with a direction to take an account between the parties on certain principles, and it was further ordered that if, on the taking of the accounts, anything should be found due to the plaintiff, a decree should be made in his favour, and if nothing should be found due to him the suit would be dismissed, and when the case came back to the High Court, a Division Bench tool, the accounts and made a decree against the defendants, held that sects 595, 596 of the foimul Code did not apply to such a case, but a right of appeal to His Majesty in Council might be successfully claimed under clause 39 of the Letters Patent, the amount in dispute being over Rs 10,000, because it was a final decree of a Division Court of the High Court from which an appeal did not be to the High Court under clause 15 of the Letters Patent. The expression "a Division Court" in sect 39 (it was held) did not apply only to a Division Court sitting on the original side (3)

"Passed on appeal."—This does not mean the same thing as any order passed in the exercise of appellate junisdiction. So an order rejecting an application to review a judgment passed on appeal is not an order made on appeal from which an appeal lies to the Prevy Council (4). Nor is an order rejecting an application to amend a decree, (5) nor is an order refusing to admit an appeal presented beyond the presented period (6). Two essential elements to be considered in deciding whether an order is one passed in appeal are whether the relationship of a Superior and an Inferior Court exists, and whether the Superior Court possesses the power to review, affirm or modify the decisions ($\frac{1}{16}$) order passed by the High Court in the exercise of its revisional jurisdictic excet 115 or its power of superintendence under sect 15 of the High Court of 1851 is made or passed on appeal within the meaning of this clause (8) 12

"Or by any other Court of final appellate jurisdiction."—\\[\frac{3}{2}\] example, from the final order of a District Judge, when there is no apply the High Court (9)

⁽I) Dwarka v Haji Mahomed, 15 C W N 60 (1910)

⁽²⁾ Batuk Nath v Mt Mumi Do, P C, 19 C L J 574 (1)14), and see Abdul Majid t Jawahir Lal, P C, 19 C L J 626 (1911) (such an order in Counc list not an order afterning a

⁽³⁾ Guru Prasanno Lahur t Jotindra Mohun Lahuri, 32 C 963 (1905), s c, 9 C W N 566

⁽⁴⁾ Rajah Enact Hossem t Rowshun Jehan 10 W R (I B) 1 (1868), Souda monce Dassee t Mahatab Chand, 6 W R

Misc 102 (1866)

⁽⁵⁾ Sunder Loei v Chandeshwar Pros. 30 C 679 (1903)

⁽⁶⁾ Kassondas : (angabai, 9 Bom L 506 (1907), 32 B 108

⁽⁷⁾ Harish & Nawab Bahadur of Moor shidabad, 13 C L J 688, 15 C W N 879 (1911)

⁽⁸⁾ Harish v Nawab Buhadur of Moor shidabad, supra

⁽⁹⁾ Saadatmand Khan t Phul Kuar, 25 I 1 146 (1898), s c, 20 A 412, 416

"In the exercise of original civil jurisdiction."—There is no right of appeal from a decree made by the High Court in the exercise of original jurisdiction, if an appeal will he to the High Court itseff under clause 15, but there is a direct appeal from a decree made in the exercise of original jurisdiction by a Division Bench of two Judges. There is no appeal, under clause 10 of the Letters Patent, to the Prvy Council from an interlocutory judgment or order of a Judge of the High Court te g an order for inspection of documents), until such judgment or order has been subjected to an appeal to the High Court, under clause 15 of the Letters Patent, except in those excess, in which, by reason of the number of the Judges whe have made such order, an appeal under clause 15 is given directly to the Prvy Council (1). There is no appeal against the decision of a High Court has ed on appeal from an award of compensation made by the Court to which a reference had been made under sect. 18 of the Laud Acquisition Act, for such a decision is an award (2).

"Any decree or order, when the case is certified,"-I he certificate is given under O XLVI r J that the case is "etherwise" a fit one for appeal This provision is intended to meet special cases where the point in dispute 3 (3) In all cases below the is of importa to the Ifigh Court for such appealable v... i certificate. leave from the Privy Council itself (4) This clause includes cases where it cannot be said that the amount or value of the subject-matter of the sut is Rs 10,000 or upwards or that the amount or value of the dispute on appeal is of that sum or upwards, (5) where the amount or value of the subject-matter of the suit in the Court of first justance is below Rs 10,000, but the amount or value of the dispute on appeal is Rs 10,000 or upwards (6) and where the matter in dispute is under the appealable value Where the certificate of the High Court simply said, " Let a certificate be granted the li this is a fit case for appeal to His Majesty in Council, and let the usual notices of acts ucd," it was held to have been given pursuant to sect 595 (c) and the latter and a matric of sect 600 of the former Code (7) The discretion vested in the three t by this clause should be sparingly used (8) This clause is not to be rpreted as restricted to "final orders" (9)

"Fit one."—Thus an eider, rejecting a petition for confinuation of the alteration in Memorandum of Association presented under the Indian Confuse uses Act (XII of 1895) on the ground that no such resolution as required

⁽¹⁾ Sonbar : Ahmedbhar Habibbar, 9 Bom H. C. R. 398, 400 (1872)

⁽²⁾ Special Officer Salsette Building Sites

1 Dasabhai, 17 C W N 421 (1913)

⁽³⁾ Banarsı Prasad t Kashı Krishna, 28 I A 11, 13 (1900), Srimvasa t Kesho

I A 11, 13 (1900), Srimvasa t Kesho Prasad, 13 C L J 681, 686 (1911) (4) Moti Chand t Ganga Prasad, 29 I A

⁽⁴⁾ Moti Chand : Ganga Frasad, 29 1 A 40, 42 (1901)

⁽⁵⁾ BombayBurma Frading Co v Dorabp, 5 Bom L. R 348 (1903) Sceakso Banarai Prasad v Aashi Arishna, 22 I A 11, 13 (1900),

s e , 23 A 227

 ⁽⁶⁾ Amar Chaud v Shoshi, 31 C 305, 306,
 309 (1903), Moti Chand t Ganga Prasad,
 29 I A 40 42 (1901), s c, 24 A. 174, 6
 C W N 762

⁽⁷⁾ Webb v Macpherson, 31 C 57, 74 (1993), s c, 30 I A 238, Amar Chandra t Shoshi, 31 C 305, 310 (1993) But of Tassaduq Rasul v Kashi Ram, 25 A 109 (1992), 30 I A, 35

⁽⁸⁾ Srimivasa t Kosho Prasad, supra

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by law had been passed, can be certified to be a fit case on the ground that the financial and commercial position of the Company may be seriously affected by the questions at issue, and also that it is of great importance to Indian Compames generally that their rights should he precisely defined on this point The value of the question at issue between the parties, in such a case, is one to which it is impossible to give a numerical expression (1) No appeal hes from the judgment of one Judgo of the High Court, or of one Judge of a Division Court, or of two or more Judges of the High Court, where they are equally divided in opmion (sect 111) But in any such case an appeal should be made in the first instance to a Division Bench of the High Court under clause 15 of the Charter, hefore an appeal can be preferred to His Majesty in Council (2) The question whether an applicant had established that substantial loss might result to him if execution was not stayed pending the hearing of the appeal presented to the High Court is not a question which would justify a special certificate of fitness under this clause (3) Sections 17 and 18 of the Provincial Insolvency Act (III of 1907) do not interfero with any right of appeal to the Privy Council (4)

Conditions imposed on right of appeal (Sect 110),-This section requires that in order to give a right of appeal there must be in dispute either directly or indirectly an amount of Rs 10,000 If the decree affirms the Court helow, another condition is affirmed, namely that the appeal must involve soms substantial question of law The presence of such a question does not give a right of appeal, when the value is below the mark The requirement of it restricts the right when the higher decree affirms the lower (5) When it is laid down that the decree must involve, directly or indirectly, some claim or question to or respecting property of Rs 10,000 in value or upwards, the reference is to suits in existence and not to suits in gremio futuri (6) The reason for fixing the minimum appealable value is based on the principle of not allowing the litigants, who have not succeeded in the High Courts, to he harassed by further appeals, when there is nothing at stake but small amounts of moncy (7) But to meet special cases, not satisfying the conditions mentioned in sect 110, such for instance as those in which the point in dispute is not measurable by money, though it may he of great public or private importance, an appeal may be granted under sect 109, clause (c), when the High Court certifies that the case

⁽¹⁾ Bombay Burma Trading Corporation v Dorabji, 5 Bom L R 348 (1903), per Jenkins, CJ, 8 c, 27 B 415

⁽²⁾ Sri Gradharin Maharan t Purushotum, 10 C 814, 817 (1883). For cases prior to seet 6, Act VI of 1871, see In re Court of Wards, 7 B L R 730, 734 (1871). Surno moyeo: Luchmiput, B L R Sup vol 634 (1807), and Leclanund hingh t Luchme-sur Singh, 13 M I A 490, 103, 490 (18.0) [one Judgo of High Court miscarrying in gring effect to decree of Privy Council]

⁽³⁾ Srimivasa t Kesho Prasad, 13 C L J 681, 656 (1911)

⁽⁴⁾ Chattraput Dugar t Khara; Singli, 17 C W N 752 (1913), 17 C L J 547. (5) Banarsi Prasad t Kashi Krishna, 28

I A 11, 13 (1900), s c, 23 A 227, 5 C W N 193 Sco also Radha Krishna t Rai Krishna Chand, 5 C W N 639 (1901), s c, 23 A 415, 28 I 1 182 184 Husen

bhoy t Ahmedbhoy, 26 B 319, 325 (1501) (6) Hanuman Prasad t Bhagwati Prosad 24 A 230, 238 (1902), Moofti Mohummud

Ubdoollav Mootehand, 1 M. I. A. 363 (1837) (7) Banarsi Prasnd t. Kashi Krishina, 23 A. 227, 232 (1900), s. c., 28 I. A. 11, Clarke v. Brajendra, 13 C. W. N. 1127 (1909)

is fit for appeal "otherwise," that is when not meeting the conditions of sect. 100 (1) The mere assent of the respondent to an appeal cannot give to the appealant a right of appeal which the Code does not allow nor can it sustain a certificate which is obviously erroneous (3) The defendant will not be allowed to make a new case based on grounds which were not urged in the Courts in India nor specified in the petition to the High Court for leave to appeal nor suggested in the reasons contained in the case for the appellant (3)

"The amount or value."-The section incorporates the provisions of the Privy Council Appeals Act of 1874 (4) This does not mean the value as estimated for the payment of stamp duty, but the real or market value The stamp duties imposed for fiscal purposes are calculated on a certain rule fixed hy law, but the right of appeal depends on the value, which is a matter of fact (5) The words "The value of the subject-matter in the Court of first instance" do not in any way affect the right of appeal when the real value of the subject matter is Rs 10,000 (6) The Court has only to look at the value of the question at issue in the higation (7) As regards the Court of first instance the section speaks of the value of the subject-matter of the suit, and as regards the appeal to the Privy Council of the matter in dispute There is a distinction between the two, (8) what is such matter depends on the facts of each case (9) "And" in the first clause of sect 110 means "and" and not "or " Thus where the value of the subject matter of the suit in the Court of first instance was helow Rs 10,000, held hy the Privy Council that this section did not apply, for the case must comply with both conditions to justify the admission of an

Banarsi Prasad v Kashi Krishna, 23
 A 231 (1900), Moti Chand : Ganga Prasad,
 A 174, 178 (1901), s c, 23 I A, 40

⁽²⁾ Banarsi Prasad t Kashi Krishna, 28 I v 11, 14, s c, 23 A 127, 5 C W N 193 (1990)

⁽³⁾ Son Ram v kanhaya Lal, 17 C W N (05 (1913), 17 C L J 488 (P C)

⁽⁴⁾ Pichayee v Sivagami, 15 M 237, 239

<sup>(1890)
(5)</sup> Mohun Lall Sookal : Bibee Dass, 7 M.
1 \ 428 (1860). Gourmony Debia : Khasa

^{1 \ 428 (1869),} Gourmony Debua s Khaja Abdul Gunny, 8 M I A 20s (1869), Balu Lekraj Roy s Kambya Singh, 1 1 \ 437, 120 (1871) [see Manohar Gam h t Bena Ham Charan Das, 2 B 219, 2-9 (1871), Days Chand s Hem Chand, 4 B 315, 527 (1890), Manast Begam s Bhajan Lall, 8 s 438, 415 (1856), where the distinction between valuation lor purpose of Court fice and jurnal-citon respectively is pointed out See Harsher Prassad Singh s Shyam Lal Singh, 40 C 515 (1913) (case cannot be valued at different amounts for jurnsdation and Court fees), and Mohendra's Sandar r

Dunabandhu, 19 C L J 15 (1913), as to valuation for Court fees, see Harriett Teruot herr (in the goods of), 18 C L J 308 (1913) (6) Pechayco v Sivagami, 15 M 237, 230 (1800), Hari Mohun Misser v Surendra

Narain Singh, 31 C 301 (1903) [suit for perpetual injunction, value fixed for Court fees may be shown to be under real value] [7] Njnas Kooer v Mussamut Lutscefa, 18 W R 21 (1872) [ra, bt of urigation]

⁽⁸⁾ See Hilmat Mr. Wali un missa, 12 J. 506, 509 (1889). Lala Binguat Sahay r Pashapatr Nath Bose, 10 C. W. N. 561, 566 (1906). In Mussamut America Mattoon r Radhakened Misser, 7 Woo I. V. 501 (1885) the Pray Council appear to have held under the old order that the value of the matter of depute an appeal related to the whole matter maybrid in the suit. Oncroop Chunder Mookherjee e Pritab Chunder Paul, 6 W. R. Miss. 4 (1906).

^{(9) &}quot;ce Husenthoy r thmedbhoy, Lo B 314 325 (191), where the income only and not the corp us was held to be in dispute.

appeal (1) To determine the value the decree is to he looked at as it affects the interests of the party prejudiced by it. Where the detriment to the party seeking rehef is estimated at less than Rs 10,000, the amount of the matter in dispute in appeal is not of the prescribed value (2) In suits for partition the value is that amount of the whole estate which it is sought to partition, and not merely of the particular share which one of the parties may claim (3) The value of mesne profits subsequent to suit is to be taken into consideration in calculating the appealable value (1) In actions of tort where the damages are at large it is not easy to define the value (5) In a suit to enforce a mortgage security the value is the amount claimed if such amount falls short of the value of the mortgaged property, but it is the value of the property if this is exceeded by the amount due under the mortgage (6) Where the appeal is from the whole deerce, and the decree has given an amount, including interest up to the date of the decree, which exceeds Rs 10,000, it is clear that the matter which is in dispute in the appeal must exceed the sum of Rs 10,000, for the question to be tried upon the appeal must be whether the decree is or is not right, ¿ c whother the decree has or has not properly ordered payment of a sum exceed ing Rs 10,000 Where, therefore, at the date of the judgment, the sum which 13 1ccoverable is an amount (including interest) exceeding Rs 10,000, there 18 an appeal to the Privy Council But interest accruing subsequent to the date of the decree cannot be added by the High Courts in estimating the appealable value, and it is a question for the discretion of the Judicial Committee, whether such interest should be added or not (7) But the costs of a suit are no part of the subject matter in dispute, and cannot be used for the purpose of estimating the appealable value, if they were allowed to be added to the principal sum claimed, it would be in the power of every higant,

⁽¹⁾ Moti Chand : Ganga Frasad, 29 I A 10, 11 (1901), S c, 0 G W N 362, 364, 21 V 174, hut of Ram Kirpal : Rupkuar, 3 V 633, 635 (1881)

⁽²⁾ De Silva v De Silva, 6 Bom L R 403 (1904) [surt seeling declaration of title to inporety valued Rs 12,000, rehef sought by establishment of title to undivided third share (value 4000) and a partition on that bass with mesne profits]

⁽³⁾ Lala Bhugwat Sahay v Pashupatr Nath Bose, 10 C W N 564 (1996), s e, 3 C L J 257, but see De Silva v De Silva, 6 Bom L R 403 (1994), Motbhau v Hari Das, 22 B 315 (1896), and Nebu Goundan v Kumaravchu Goundan, 20 M 289 (1896) (this last suit, however, did not involve a general partition)

⁽i) Dalgleish : Damodar Naram Chow dhry, 33 C 1286 (1906), Moheden Hadjear : Pitchey \ C 193 (1893), Gooroo Daws : Cholam Muwlih, Marsh 24 (1862), see

Ihramul Huq t Wilkie, 33 C 893 (1906) where damages clumed, but not ascertained were considered in determining the appeal able value

⁽⁵⁾ See Amrita Nath Vatter 1 Abboy Chunder Ghosh, 9 C W N 3.0 (1995) [bhol] where to twas held that the plaintiff cannot ensure an appeal to the Prvy Council by merely placing his damages at a sufficentry luck figure

⁽⁶⁾ Benoy v Kamalapoti, 13 C L J 505 (1911)

⁽⁷⁾ Gooroo Prosad Khoond t Juggul Ghandra (1800), s c, 3 W R P C 14, 13, 8 M I A 166, 168, 163, Durga Das t Ramanath, 8 M I A 262, 264 (1860), Mulusaw my Jagavera t Vencataswara 10 V I I 3 313, 320 (1865) Brandabun Dutta Beharce, 21 W R 442 (1845), Aand Kishore t Ram Golau, 16 C W A 1081 (1912)

by swelling the costs, to bring any suit up to the appealable value (1) If a certificate he granted or leave to appeal given by the proper Court in India in a matter in which they have no jurisdiction, the Judicial Committee will dismiss the appeal as meompetent. But if an appeal is competently made, and it appears to their Lordships after argument, or is admitted at the Bar, that the greater part of it must fail, it is the constant practice of their Lordships to give relief in respect of the portion in which the appellant succeeds, notwithstanding that the subject matter of that portion of the appeal may be less than the prescribed hmit. Thus where a certificate was given in the presence of the parties that the value of the matter in dispute on appeal exceeded Rs 10,000, but the appellant's counsel, being satisfied that the appeal could not succeed as to the whole demand, had by his printed case and at the Bar, confined his argument to the question of a sum below Rs 10,000, held by the Privy Council that the value of the subject matter on appeal was not reduced below Rs 10,000 (2) It was held in the case of a large number of suits tried together and dealt with in one judgment that masmuch as although, if each case were taken separately, the value was below Rs 10 000, yet if taken collectively the aggregate reached that amount and the cases were all dependent upon the same judgment leave to appeal should be given (3)

Or the decree must involve "directly or indirectly '-It is not enough that the question decided by such decree is a question of title which may possibly affect the title of persons not parties to the decree, to property not the subject-matter of the suit in which the decree was passed and concerning the title to which property there is no litigation pending (4) In a recent case, however, where the value had been over Rs 10,000 in the Court of first instance and less than that sum on appeal to the Privy Council, but the decision by the Privy Council would suvolve the validity of an award concerning larger sums at was held that a certificate should be granted and that it was not necessary that a dispute respecting other property to a value of more than Rs 10 000 should be pending at the time of the application (5) As to whether such a claim is or is not involved must depend on the circumstances of each case, (6) as to the consolidation of suits, see O XLVI r 4

"Affirms the decision'-The question has arisen whether these words in the last clause of sect 110 are limited to a mere affirmance of the decree of

⁽I) Durga Dass v Ramanath S W. I A 262 264 (1860) Nilmadhab r Bishumber 13 M I A 85 103 (1869) s c . 3 B L R

⁽²⁾ Ivalka Singh : Parasaram 22 I 4 68, "3 "4 (1594) s c 22 C 434 (3) Deonaram Singh : Guni Singh 34 C

^{400 (1907)} (i) Hanuman Prasad t Bhagwatt Prasa 1 24 A 236, 238 (1902)

⁽a) Sri Kishan Lal t Kashmiro 3. A 445

^{(1913),} Macfarlane : Leclaire, 15 Vico P C

^{181 (1882)} Vit Alman , Mt Hasiba I C W Y 93 (1897) Ananda Clan Ira Bose t Broughton 9 B L R 423 (1872)

⁽⁶⁾ See Dalgleish t Damodar Narain Chowdbry 33 C 1286 1289 (1906) In re Khwais Muhammad Yusuf 18 A 196 (1896) Bhagwat Sahar t Pashupatr Nath Bose 1 (W N 564 566 (1906) [but see De Silva : De Silva 6 Bom J R 403 406 (1904) . Aliman : Hasiba I C W N 1777\III (1897)

the Court helow Can a "decision" be said to be affirmed when, although the "decree" is upheld, the High Court in its judgment disagrees with the findings of the fact of the Court below? There is no definition of the word "decision" in the Code, but this word means the decision of a suit by the Court, or the decree, and not the "judgment," ie the statement of the grounds on which the Court makes a decree Thus, when a decision is affirmed it is not necessary that the Appellate Court should not only affirm the decree made by the Court below, but should also affirm the grounds of fact upon which that judgment was passed Where an Appellate Court dis missed an appeal, but the reasons given by it in respect of some matters of fact were not the same as given by the lower Court, it was held by the Puvy Council that the decree of the lower Court had been affirmed by the Appellate Court The words "decision of the Court" in this section mean the decree and not the judgment (1) A petitioner for leave to appeal claimed Rs 77,000 odd as the value of the land taken under land acquisition proceed ings The Collector assessed the value at Rs 28,287, the Judge upheld the Collector's award On appeal to the High Court (valuing the speeal st Rs 49,000 and odd, 10 the difference between the Collector's award and the amount claimed) the High Court allowed the petitioner an additional sum of Rs 7000 On an application for leave to appeal it was held that the decree was a decree of affirmance of the first Court's decree, and there being no substantial question of law, leave was refused In giving judgment the Court said, "No doubt, in one sense it may be said that this Court did not affirm the decision of the Court below But we must look to the substance of the case What 15 the decree from which the present applicant now desires to appeal to the Privy Council? He desires to appeal only against the decision of this Court so far as it affirmed the decision of the Court below, nothing else This seems to be, in substance, as far as the subject matter of appeal goes s decree of affirmance If the decree of this Court had been properly drawn, it would have dismissed the appeal except to the extent that the additions sum was given (2)

"Substantial question of law"—In the first place it must appear that the question is one of law (3) It does not follow that hecause it would be such a question in Ingland it is so here. Thus according to English law it is for the Judge and not for the jury to determine what is reasonable and probable cause in an action for malicious prosecution. The jury finds the facts,

was raised, but it was not necessary to decide it Banga ? Pul ai, 13 C L J 501

⁽¹⁾ Tassaduq Kasul Khan v Kashi Ram, 30 I A 35 39 (1902) s c, 25 A 109 114 7 C W N 177, 5 Bom L R 100 practically overruling Ashghar Reza t Hyder Reza, 16 C 287, 209 (1889) Sec also Thompson t Calcutta Tranways Co, 21 C 523 525 (1894), Beni Rai t Ram Lal han 20 A 367 (1898), Is re Vishwambhar, 20 B 609 (1890), Sundarbibi t Basachar 9 A 93 (1850) Fin Banko Lall i Jagat Arrain 23 A 94, 97 (1900), this question

<sup>(1910)
(2)</sup> Sree Nath Ray v Secretary of State
for India, 8 C W N 294 (1904)

⁽³⁾ See as to this limitation In re Teda Hossem, I C 431 (1896) which was held not ultra arres of the Indian legislature as a curtailment of clause 39 of the Letters Patent.

the Judge draws the proper inference from the findings of the jury. In that sense the question is a question of law. But where the case is tried without a jury there is really nothing but a question of fact, and a question of fact to be determined by one and the same person Where the Courts in India come to the same finding about the existence or non existence of reasonable and probable cause there is a concurrent finding on a question of fact, and no certificate, under sect. 600 certifying that the appeal involves a substantial question of law, should be given (1) Where no question of law, either as to construction of documents or any other point, arises on the judgment of the High Court, and there are concurrent findings on the oral and documentary evidence, no appeal will be entertained (2) Where the order allowing leave to appeal ran, "There seems to be a point of law, which, however, does not appear to have been argued here," the appeal was dismissed as the leave was granted contrary to the provisions of the Code (3) The question of law involved must be a "substantial" (1) one, which in the easo eited was suggested to mean a question of great public or private importance (5) Whether, however, the question is "substantial ' or not must depend upon the circumstances of each ease, and the reported decisions are of value only as illustrations of the application of the general principle. The construction of a deed of Hebanama was hold to be such a question (6) flut the rejection of an application for admission of additional evidence in the Appellate Court is not (7) The Ifigh Court bes refused an appeal upon a mero question of practice such as on order for inspection of documents (8) Lastly if there is a point of law which is elso "substantial ' it must be "intolical ' in the appeal The word 'involvo" implies a considerable degree of necessity. It does not mean that in certoin contingencies a question of law might possibly arise. The proctice of the Privy Council is not to interfere with concurrent findings of fact of the Courts below (9) If the Ifigh Court is right in holding that there are concurrent findings of fact the inference is that the Privy Council will decline to go behind these findings No doubt it was held by Pontifex, J (10) that the

703 (1895)

⁽¹⁾ Pestonji Modi t Queen Insuranco Co. 25 B 332 336 (1900) See also Harish v Nishikanta 28 C 591 593 (1901) Ramayya v Sivoyya 24 M. 549 553 (1900)

⁽²⁾ Toolsey Persaud v Benayek Visser, 23 I A 102 105 (1896) B c 23 C 918 In the matter of the Petition of Feda Hosse n 1 C 431, 441 (1876) Nirbhai Dass v Rant Kuar 16 A 274 (1894) Sukalbutti Man drant t Babu Lal Mandar 28 C 190 194 (1901), s c 5 C W N 455 But concur rent findings that there is no evidence are lecisions of law Harendra Lal v Hari Dasi Debi, P C, 19 C L J 484 (1914)

⁽³⁾ Karuppanam v Srinivas 25 M 215 (1901) s c, 6 C W N 24 4 Bom I R

⁽⁴⁾ In re \ishwambhar Pando 20 B 699.

⁽⁵⁾ Shuja Mi t Ram Kuar 20 A 118 (1897). Hanuman Prasad v Bhagwati Prasad 24 A, 236 238 (1902)

⁽⁶⁾ Ahman v Hosiba 1 C W N LXXXXIII

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⁽⁷⁾ In the goods of Prom Chand Moonshee Upendra v Gopal 21 C 484 486 (1894) in which it was also held that the costs of a rejected application for leave to appeal to Privy Council should not be included in the costs of the appeal already dealt with

⁽⁸⁾ Sonbar v Ahmedbhar 9 Bom H C R 398 401 (1872)

⁽⁹⁾ Cheman Lal t Harr Chand, P C., 18 C L J 71 (1913)

⁽¹⁰⁾ In Moran : Mittu Bibee, 2 C 228 $(18^{-}6)$

questions of law referred to were not limited to questions arising out of the facts concurrently found by the Courts below. That view was subsequently accepted by Garth, CJ and Prinsep, J.(1) but it seems with some doubt Phis view was accepted by Ranade, J. (2) though Jardine, J., refrained from expressing any opinion on the point. But when once it is borno in mind that the last paragraph of seet 110 has reference to the practice of the Prvy Council, it is impossible to say that a question which only arises if the concurrent findings of fact of the Courts in India are disregarded, a question which never can arise so long as the Prvy Council maintains those concurrent findings of fact, is a substantial question of law, which the appeal to the Prvy Council "involves" (3) Where a discretion is vested in a Court the Privy Council will not allow an appeal against the exercise of that discretion, e.g. in appeal against a mere decree as to costs (1)

 Gopmath Birbar v Goluck Chunder Bhose, 16 C 292, 295 (1884), note

(2) In re Vishwarabhar Pandit, 20 B 699
 (1895)
 (3) Banko Lall v Jagat Naram, 23 A, 94,

(a) Danke Lish v Jugat Naram, 23 A. 9, 98 (1900) Further in Sukalbuth Mandram i Babulal Mandar, 28 C 190, 193 (1900), it was held that Gopinath Birbar v Golnek

Chunder Bhose, supra, must be taken to have been overruled by the Privy Council in Tails Pershad Blank t. Benapok Misser, 23 C 918 (1899). Mela Venkataramayya Apparow t Shri Raja Parthasarathy Apparow, P. C., 17 C. W. N. 1222 (1911).

[43] Keenneo Bate t. Jucliman Das, 5 W. R. P. C 59 (1837).

PART VIII

REFERENCE, REVIEW AND REVISION

Subject to such conditions and limitations as may be [s. High prescribed, any Court may state a case and refer the same for the opinion of the High Reference Court. Court, and the High Court may make such order thereon as it thinks fit.

Reference -See notes to O XLVI r 1

114 Subject as aforesaid, any person considering himself is aggrieved-

Review (a) by a decree or order from which an appeal is allowed by this Code, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed

by this Code, oi

(c) by a decision on a reference from a Court of Small Causes, may apply for a review of judgment to the Court which passed the decree or made the order, and the Court may male such order thereon as it thinks fit

Application for review of judgment -Save for the words in italics this section corresponds with a portion of sect 376 of Act VII of 1859 as modified by a portion of sect 623 of Act X of 1877 In Act VIII of 1859 the clauses (a), (b), and (c) ran "bj a decree of a Court of original jurisduction from which no appeal shall have been preferred to a Supreme Court or by a decree of a District Court in appeal from which no appeal shall have been admitted by the Sudder Court or by a decree of the Sudder Court from which eather no appeal may have been pre ferred to Her Majesty in Council, or an appeal having been preferred no proceedings in the suit have been transmitted to Her Majesty in Council Their present form was given by the Code of 1877 save that by the present section the words "bu this Code 'have been substituted for 'hereby and 'deer ion" for "judgirert" The remaining words in it shes are new

22.]

The terms of this section are repeated in O. XLV11. r. 1, where the remainder of sect. 623 of the Codes of 1877 and 1882 is given. Order XLVII. substantially contains the provisions of the Chapter on review of judgment in the Codes of 1877 and 1882. See notes to O. XLVII., post.

115. The High Court may call for the record of any case
which has been decided by any Court subordinate
to such High Court and in which no appeal lies
thereto, and if such subordinate Court appears—

(a) to have exercised a jurisdiction not vested in it by

law, or

(b) to have failed to exercise a jurisdiction so vested. or

(c) to have acted in the exercise of its jurisdiction illegally or with material irregularity,

the High Court may make such order in the case as it thinks fit.

Revision.-The revisional power has been held to be not an inherent power, but one conferred by statute; and that while a power of super intendence is given to the High Courts over all Courts, the revisional power in the case of each branch of jurisdiction is the creation of separate and distinct legislation.(1) Jurisdiction has been generally divided into original (whether ordinary or extraordinary) and appellate jurisdiction. Differing views have been held upon the question whether the power of revision under this section, and of superintendence under clause 15 of the High Courts Act. 24 & 25 Vict. e. 104, comes or does not come under the head of appellate justs diction.(2) In the former view, the capital distinction is between juris diction which is original, and jurisdiction which is not original, irrespective of the circumstances and conditions in which the latter is to be exercised. Appellate jurisdiction may thus be exercised in a variety of forms—as in what is commonly known as appeal, revision, or superintendence (3) In the latter view, appeal, revision, and superintendence, though distinct from original jurisdiction, come under different heads of jurisdictions-viz. appellate, revisional, and superintending (4) The Code of 1859 gave the Courts no

⁽¹⁾ Salig Ram r. Ramij I.al, 28 A. 554, 556 (1966), and therefore, on the latter ground, it was held that the High Coart could not, in the exercise of criminal revisional powers, interfere with a sanction to prosecute given by the Cvul Court; Mazhur Hasan u. Said Ilasan, 31 A. 38 (1908).

⁽²⁾ See judements of Fall Bench in Chappan r. Moidin, 22 M. 68 (1898); and see Show Prosad Bungshidhur r. Ram Chunder Haribux, 41 C 323 (1913).

⁽³⁾ Chappan r. Moidia, sugar, per Subramania Ayyar, J., at pp. 80-83.

^{(4) 1}b . per Davies, J , at p 85; and see

Sarat Chandra v. Brojo Lal, 30 C. 956, at P. 958 (1903). "Revisional jurishetion of the Court is not necessarily a part of its stret-

per Sale, J.; a. c., 7 C. W. N. 848. It has also been held that a power of revision if not an incident of appellate powers, bit, on the contrary, can only be exercised where there is no appeal; Khoja Shirji r. Hashari Gulara, 20 R. 480 (1803). See 704, note on "Appeal."

revisional powers. By clause 15 of the High Courts Act, 21 & 25 Vict c. 104, which was pas ed on August 6, 1561, each of the High Courts which were thereafter to be established under that Act were given a power of superintendence over all Courts subject to their appellate jurisdictions. The Presidency High Courts were not established until the roug of their first Letters Patent in 1862; but before that date, Act XXIII of 1861. which was passed on August 22th of that year, gave in sect 35 powers of respoon in a very restricted form to the Sudder Court Under that Act, the Sailder Court might call for the second of any case decided on appeal in which no further appeal has if the Subordinate Court, on hearing the appeal. appeared to lave exercised a jurisdiction rot vested in it by law. When, therefore, the High Courts were established, among the powers vested in it were those of revision given to the Sudder Court under sect 35 of the Act of 1861, which is the lesis of the present section (!) The power of revision was thus limited to cases decided on appeal where the lower Court had exceeded its jurisdiction (2)

The question then arose as to the nature of the jurishiction given by clause 15 of the High Courts Act It was held by a I ull Bench of the Allahabad ligh Court that the Letters Patent conferred no powers of toxision, that in such matters the High Court had only such powers as the Sudder Court had, and that the power of "superintendence ' conferred by the High Courts Act gave the Court no revisional power no power to interfere with or set aside the judicial proceedings of a Subordinato Court, but that clause 15 conferred on the High Court administrative authority and not judicial powers (3) In a subsequent I'ull Bench of the same Court (1) the Judges said that they would mefer not to use the terms "administrative authority" or "judicial powers," or "judicial superintendence," as without giving exhaustive definitions of the words which it might fail to do the Court might by using them lead to future difficulty and that each case must be considered as it arose That the authority of the High Courts under this clause is not merely administrative, appears from a decision of the Privy Council approxing the judgment of the Calcutta High Court, which, holding that it could laterfere with orders passed without jurisdiction, stayed proceedings on one order and quashed another (5) There has been no doubt a disinchantion, and rightly, on the part of some Judges to rigidly define what they can or cannot, do by way of their powers of superintendence,

Seo Chappan v Mordin, 22 M. 68, at p 93 (1898), and Shew Prosad Bungshidhur v Ram Chunder Hambux, 41 C 323 (1913) and Vasudovad v Sankaran, 22 M. L. 1 60 (1911)

⁽²⁾ Whilst the Act of 1881 deals with excess of jurisdiction, the present Code cutends equally to a refusal of jurisdiction by a Court through a misconception of its authority. Shiva Nathaji v. Joma Kashmath, 7 B at p. 352.

⁽³⁾ Tej Ram t Harsukh, J 1 101, 104

^{(1875), 1} B, see Chappan 1 Mordin, 22 M 68, at p 29 (15 is)

⁽⁴⁾ Muhammad Sulaiman t Tatima, 9 A 104, 106 (1886)

⁽⁵⁾ Numera Singh + Taranath Mookerjee, 9G. 29a, 297, 299 (1882), P. O., and see cares cited past and see Goband + kunja, 10 C. L. J. 107, 413 (1999) (clause 15 of the High Courts Act authorizes the High Court to rouse orders of subordinate Courts), Shew Prosad Bungsbulbur + Ram Chunder Harbux, supra

which have been said to be very wide (1) Certain limitations have, however been laid down which will ordinarily govern the Courts, there being a residue of undefined jurisdiction to which the Court may have recourso in cases of an unusual character (2)

Sect 622 of the Code of 1877 was the same as that of the last Code, except that the words "or to have acted in the exercise of its jurisdution illegally, or with material irregularity," were not in it. It thus extended the power of revision, which was no longer limited to eases deended on appeal, and which might be exercised not only where the Court exceeded its jurisduction but declined a jurisduction which was vested in it. Lastly, by sect 92 of Act XII of 1879, the words italicised were added, since when the section retained the same form. As regards the amendments now effected, which are of an unimportant character, vide post

As regards the Charter Act, it has been held that the High Court interfere where the Court has wrongly declined jurisdiction,(3) or his exceeded its jurisdiction,(4) that is in the first two contingencies mentioned in this section. It, however, the Court has jurisdiction it will not (ordinarily at least) interfere merely because the order passed in such jurisdiction is erroreous either in law or fact (5). An erroneous decision by a Court having jurisdiction can only proporly be corrected by appeal, and if the right of appeal does not exist the same results which an appeal would give cannot be arrived at indirectly (6). While these rules are of general application in cases of an ordinary character there is a residue of jurisdiction which the Courts have left undefined. So where the Court had jurisdiction to entertain a suit, but passed a decree therein which was contrary to law and was incapable of

⁽¹⁾ In re Siddeshwar Boral, 4 C W N 36, 38 (1899) In re Madho Ram, 21 A 181, at p 182 (1899), Mohunt Bhagwan v Khetter Moni, 1 C W N 617 (1893) (the lan baxwag advesedly and widely left this power unlimited, it is not desirable to limit it by any hard and fast rule, but a party s claim to interference is very much weakened when he has another remedy provided for him by law]

⁽²⁾ Vide post

⁽³⁾ Seo cases collected in editors note to Teq Rame I Harsukh, I. A. at p 104. In re Gobind Koomar Chowdhry, B. L. R. (F. B.) 714 (1867), In re Muthra Parshad I. A. 296 (1876), In re Lukhykant Boes, I. C. No, at p 182 (1875), Ram Lall v Janks Mahatoon, 4 C. L. R. 14 (1879), Gridhart Singh v Hurdeo Naran, J. I. A. 2°0, 238 (1876) (refusal to confirm sale). And see Mohendra Sundar v Dinabandhu, 19 C. L. J. 15 (1913), jurndiction refused by mistaken return of plaint.

⁽⁴⁾ Admont Singh v Taranath Mookerjee, 3 (295 297, 299 (1882) P C, In re I ukhykant Bost 1 C 180 at p 182 (1875),

Ram Lall v Janki Mahatoon, 4 C L R H
(1879) in the case In re Siddeshuar Boral
4 C W N 36 (1899) the Court passed an
order without any ordered and thus without
unsidetion, and see cases cited in editor's
note to Tey Ram v Harsul h, 1 A at p 104

⁽a) Tej Ram v Harsukh 1 A. 101 (187a) In re Chunder Nath Sen, 2 C 203 (1876), Muhammad Sulaman v Fatimo, 9 A 104 (1886) In re Lukhykant Bose 1 C 180

claims or acts beyond its jurisdiction], In

¹e3 Ram v Harsulh 1 A at p 104
(6) Seo Venkubar v Lakshman, 1 2 B 617
(1887) [clause 15 does not give a right of appeal where none exists at law], In re Da Costa, B L R (1 B) 432 [listo], In re I listh) 1 R (1 B) 432 [listo], In re

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execution, the High Court interfered to set matters right (1) Generally, the High Court will direct a Subordinate Court to do its duty of to abstain from taking action in matters of which it has no cognizance (2) It will direct it to do that which is legal, and correct that which is illegal in its proceedings (3) and will correct abuse of powers by a Subordinate Court (4)

From the above review of the case law it will appear that to a large extent clause 15 and this section cover common ground. In neither case will these extraordinary powers he exercised where matters can he corrected by appeal In neither case (in that of the Charter ordinarily at least) will the Court interfere in such a way as to give a party the henefit of an appeal when the law says that he is not to have one. In both cases the Court will inter fere where jurisdiction is concerned. The section applies also expressly to cases of illegal exercise of jurisdiction and material irregularity. It will therefore be, as regards judicial matters, only necessary to resort to the Charter Act in cases in which the revisional powers given by the Civil and Criminal Procedure Codes do not apply, (5) or where it is doubtful (6) whether they do apply hy reason of the nature of the proceedings sought to he corrected, (7) or where the order passed in pioceedings which considered apart from the matter complained of are subject to the ordinary revisional powers is of a very peculiar character (8) or in cases where the administrative authority of the High Court is required to be invoked. Courts in the exercise of superintending powers will not ordinarily interfere except in cases of grave and otherwise irreparable injustice (9)

As regards other revisional jurisdictions, the Bomhay High Court has interfered under Reg II of 1827 (Bom) (10) Sect 25 of the Provincial Small Cause Courts Act (IX of 1887) provides that the High Court for the purpose of satis fying itself that a decree or order made on any case decided by a Court of Small Causes was according to law (11) may call for the case and pass such order with respect thereto as it thinks fit. In a recent case in the Calciutta High Court where an application (under sect. 41 of the Presidency Small Cause Courts Act) for the recovery of the possession of immoveable property had been refused on

⁽¹⁾ Abdullah v Salaru 18 A. 4 (1895), where the Court described the circumstances of the case as extraordinary

⁽²⁾ Fe₁ Ram v Harsukh 1 A. 101 (1875), Yuhammad Sulaman v 1 atima 9 1 104 (1886)

⁽³⁾ In re Golund Loomar Choudhry B L

R (F B) 714 (1867)
(4) In re Siddeshwar Boral 4 C W N 36

⁽c) See In re Madho Ram 21 A 181 at p 182 (1899) where it was held that the case was not a criminal proceeding and dril not fall under this section.

⁽⁶⁾ In re Suddeshwar Boral 4 C W N 30 (1899) where it was left under led wheth r this section at plied.

⁽⁷⁾ See In re Madho Pam sugra

⁽⁸⁾ Seo Abdullah v Salaru, 18 A 4 (1895) (9) Ismaljı v Macleod 31 B 138 (1996)

Amjad Ah t Ah Hussam 15 C W N 356 (1910) Chandi t Kripal Lo C W N 682 (1911)

⁽¹⁰⁾ Girdharlai v Lallu Jagjivan 20 B 50 (1894), but see repealing Act \II of 1873

⁽¹¹⁾ That is to see whether there has been a material misapplication or misappreclination of law or material error in procedure. Mu hammad Balar : Bahal Singh, 13 A. 277 (1890), but see per Fulition J in Bai Jasoda : Bamaniha 23 B 334 (1898) at p. 310. As to erroneous decision of fact see Bai, Jasoda to Bamaniha 23 B 334 (1898) at p. 338. Turner : Jagmohan Singh, 2 * L. J. 297 (1994) where the Court interfered.

the ground that the relationship of landlord and tenant had not been established, and it had been held by a single Judge sitting on the Original Side that (assuming that this refusal was erroneous) the High Court was not justified in interfering under this section, it was held on appeal that the High Court had a right of sevision and that this order was a judgment (1) It is generally agreed that this provision gives no right of appeal either on law or fact, (2) that the exercise of the power given is discretionary,(3) and that the High Court will be slow to interfere when substantial justice has been done, though technically the plaintiff or defendant may have a legitimate ground of attack or defence (4) It is also established that there is no rule that a Court cannot get under sect 25, except in cases in which it might act under the present section (5) The High Court's power of interfering in revision conferred by the Provincial Small Cause Court Act is wider than the power conferred by the present section (6) The Allahahad High Court has, however in several cases considered that the discretion to be exercised under sect 25 should be ordinarily guided by the same considera tions as those which governed the application of this section (7) though a Judge is not absolutely bound to refuse any application under sect 25, which could not be admitted under the present section (8) The Bomhay High Court how even. has held that the provisions of the present section do not afford a safe guide for the exercise of jurisdiction under the Provincial Small Cause Court Act, since the wording of the two sections is wholly different that of the Small Cause Court Act being of the widest description and conferring the most ample discretion on the High Court, whilst this section ought to he construed in ? restricted and limited sense (9) What the order should be where the Court determines to interfere must depend entirely on the eircumstances of the case (10) Sect 4S of the Guardians and Wards Act is subject to the provisions of this section (11)

As to analogous remedies in English law, see case noted below (12)

⁽¹⁾ Shew Prosad Bungshidhur v Ram Chunder Haribux, 41 C 323 (1913)

⁽²⁾ Muhammad Bakar v Bahal Singh, 13 A 277 (18°0), Poona Mumapahty v Ramp, 21 B 250, 254 (1895)

 ⁽³⁾ Muhammad Bakar v Bahal Singh, supra. Poona Mumcipality v Rampi, supra
 (4) Poona Municipality v Rampi si pra, at p 255, Muhammad Bakar v Bahal Singh,

⁽⁵⁾ Sarman Lal v Khuban, 16 1 476 (1894)

⁽⁶⁾ Turner v Jagmehan Singh, 2 A L J 207 (1905), McCarron v Welti, 27 A 192 (1904) See Shew Presad Bungshidhur i Ram Chunder Haribux 41 C 323 (1913)

⁽⁷⁾ Sarman Lal t Khuban, 16 1 4"6 (1804) (the Court added before the decision of the Privy Council in Amir Hassart 5 shee Baksh supro], Raghu Nath v Official Laquidator, 15 A 131/(1803), Sarman Lal t Khuban, 17 A 4.2 (1805) in which last two

cases as in the next the Court refused to interfere on the ground that the lower Court

had erred upon the question of limitation
(8) Vias Ram v Ralla Ram, 21 A 89

⁽⁹⁾ Poons Municipality v Rami, 21 B ...0 (1895), and see Bai Jasoda v Bamansha, 23 B 334 (1898)

⁽¹⁰⁾ Bai Jasoda t Bamansha 23 B 334 (1898) at 1 340 where the Court, instead of remitting the case for a new trial reversed the decree dismissing the suit and passed a decree for the plannial see Behram t Yucshir 27 B 563 (1903), at p 574

⁽¹¹⁾ Nagardas Vachraj : Anandrao Bhaj. 9 Bom L. R. 195 (1907) [and an order made under that Act can be altered, resemded, or set aside, s e 31 B 590], Sectharama Bhagavatar : Venkatajiri, 17 M L J 199 (1907)

⁽¹²⁾ Shava Nathaji z Joma Kash nath, 7 B 311 (1883), at p 353

High Court.—The power of revision under this section belongs to the High Court only, it being intended that it should be exercised in correction only of such errors as were not open to appeal, and within certain specified limits (1) Under the Charter Act the Chief Justice determines what Judges shall constitute Benches to hear suits and applications (2)

"May call for."-The section gives di cretionary power to the High Court to interfere or not (3) In the case cited below, (4) Sir Arnold White, CJ, stating that he "would be glad to find some mode of escape," yet considered that if ho was satisfied that the Court of first instance or Court of Appeal had exercised a jurisdiction not vested in it by law, ho was bound to interfere and exercise the powers conferred by the section This, however, it is subinitted, is not so The word "may" governs the wholo section, and indicates a discretion whether the ground upon which interference is sought is one of jurisdiction or illegality, or material irregularity, and the concluding words are, that the Court may pass such order as it thinks fit So where an order was passed without jurisdiction, but no objection was taken before the District Court, the High Court declined to interfere, as if it were to set aside the order of the District Court it would have the effect of placing the opposite party in the position of being obliged to hring a suit to establish the right which he claimed, though the period within which he was entitled to bring that suit had clapsed , in other words, it would be placing him under an obligation to hring a suit that prima facie would be harred under the Limitation Act (5) So also in an earlier easo tha Calcutta High Court observed as follows -" Now, as the order of the Judge in this matter, although passed without juri diction, was really a right order, and had merely the effect of getting rid of the decision of the first Court, which was wrong, we think we ought not to make any order in this case '(6)

A fortion the same freedom exists as regards illegalities and irregularities. So the High Court, in the under mentioned case, (7) declined, under the circumstances, to interfere, even though the orders complained of were made irregularly. Thus a Munsif granted a review on a ground on which it was held it could not legally have heen granted. His order in review, however, had the effect of making the decree wight, instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to seet 629.

⁽¹⁾ Raghuuath Das v Raj Kumar, 7 1 2-6, at 1 281 (1884)

⁽²⁾ Ramadhin v Scubalak, 37 C 714 (1910), but see Ilaladhar Vlastir Choytoma Matit, 30 C 588 (1903) [revision of order of Presidency Small Causo Court] and see It t Har Prasad Das, 40 C 477 (F B)

⁽³⁾ Muhammad Naum ul lah t Ihsan ul lah khan, 14 A 226 (1992) at p 232, Cooke r Lquitable Coal Co S C W A 621 (1994), at p 624, Shiva Nathan t Joma kashmath, 7 B 341 (1883)

⁽⁴⁾ Ramasamy Chettiar t Orr, 26 M. 1°6, 178, 179 (1902), and see Sarnam Tewam r

Salma Bib: 3 1 417 (ISSI) at p 122 per Straight J

⁽⁵⁾ Dayaram Ja_ojivan : Govardhandas Dayaram, 28 B 458 (1904) See also Na theka: Abdul Viii 18 B 419 (1893) at p 452, where, however it was said that the applicant was not without his remedy by

⁽⁶⁾ Bhoyrub Chunder : Wajedunnissa Khatoon, 6 C L. R 234, 236 (1880)

⁽⁷⁾ In re Basharat M: 24 C. 133 (1896), and see Ramrao τ Balaji, 20 B 630 (1895), where the Court declined to further the execution of an irregular decree

of the last Code, were, it was held, not open to hum. On application for revision of this Appellate order, it was held that the proper course was to set aside only the District Judge's order, and to leave standing the order of the Munsi granting a review, which order, though wrong in principle, was, it appeared, right in its results (1). In an application under this section, the extraordinary jurisdiction is invoked, and the Court must be on its guard against its being abused, merely because the lower Court has fallen into formal error (2). Again, the Court does not interfere if the result of any irregularity on the part of the lower Court has been to promote the justice of the ease (3). In short, it is this justice of the case and not any mere technicality which will influence the Court's interference. It has been held that the Court cannot interfere under this section on the ground that an order is inexpedient (4). Assuming that the section applies, the Court is not hound to act under it in every case (5).

As the power is a discretionary one, the Court may refuse to interfere where there has been laches or delay in moving the Court, (6) inasmineh as delay, in less explained, is evidence of absence of real injury and ground for complaint, and may, where it is considerable, prejudice the position of the opposing party, and if by his laches a party has failed to avail himself of other remedies open to him, he has no claim to invoke the extraordinary jurisdiction of the Court. The Court will, in all cases, regaid its exercise of the extraordinary jurisdiction as discretional, and subject to considerations of the importance of the particular case, or of the principle involved in it, of delay on the part of an applicant, and of his merits with respect to the case in which the interference of the Court is sought (7)

The Court will not, as a rule, interfere in revision with an exercise of discretion, though it may not approve of it (8). It was held that even if a party were not entitled to appeal to have a decree against him set uside, the error of the lower Court could he corrected under this section by a direction to exercise the discretionary powers given by sect 554 of the last Code (9)

(7) Shiva Nathaji i Joma Kashmath, 7 B 341 (1883), F B, Maharajah of Burdwan v Apurba Krishna Roy, 15 C W N 872 (1911)

⁽¹⁾ Abdul Sadıq v Abdul Azız, 21 A 152 (1898)

^(4.) Nana Bayan w Pandurung Vasuder, 9 to 97 (1884), at p 99, per West, J So also in execution proceedings the Court will look at the substance of the transaction, and will not disposed to set them sade upon mere technical grounds when they find them to be substantially right. Narayanasam w Natesa, 16 M. 424 (1893), at p 428

⁽³⁾ Cooko v Equitable Coal Co, S C. W N 621, 621 (1904) But see Eryphyla t Gurudas, 3 C L J 293 (1906), and Gopel t Notobar, 16 C W N 1029 (1912)

Petition of Nowal Singh, 34 A. 393 (1912)
 Ram Singh v Sahg Ram, 28 A. 84, at p. 86 (1905)

⁽⁶⁾ Durga Prasad : Shee Charan, 1 1 151 (1891) [in which the Court refused to interfere there being a delay of nearly seventeen

months], Subbaya : Yellamma, 9 M. 130 (1885), at p. 133 [where the pretitioner had not tasken the proper steps in the District Court], Shina Nathaji : Joma Kashinath, 7 B. 341 (1883). In Balmakund : Shep Jatan, 6 A. 125 (1883), the petitioner was held not fairly charge rible with laches Funnal Lal v Seth Coursi. 25 P. R. 1914

⁽⁸⁾ Vasudeva i Chinnasami, 7 M. 584, 589 (1834). Bat Devkort i Lalchand Jivandas, 19 B 790, 793 (1891). Rayachand Mayachand w Sultan Rahumbai, 18 B 347 (1893). In re Venkateswara, 10 U. 08 (1885). Jagammal i Chinno Venkatemmal, 6 M 227 (1853). Ramanathan i Ananthanarayana, 33 M. 113 (1990)

⁽⁹⁾ Seshadir r Krishnan, S M. 132 (1881)

The High Court can interfere under this section of its own motion, and without an application inside to it by a party to the sunt (1) Revisional power has been exercised on the application of a pre-emptor in regard to a sale, (2) of a Collector in regard to an order under sect 412 of the last Code, (3) and on the report of a District Judge (4) But the High Court will not interfere on a reference by the Collector with a Mamlatdar's decision in a possessory suit. The aggree of party can hunself apply to the Court (5)

"Any case"—The watter must be a civil one, and also one in which there is no remedy by way of appeal. Mahmood, J, was of opinion that the word should be understood in its broadest and most ordinary sense, including all adjudications which might constitute the subject of appeal or rovision (6). It has, however, been a matter of dispute whether the section applies to interlocutory orders when there is an appeal from the final decree. The Calcutta High Court has held that there is nothing in this section which prevents the High Court from setting isside an interlocutory order, and that the word "case" is wide enough to include such an order, and the words "records of any case" include so much of the proceedings in any suit as relate to an interlocutory order (7). The Bombay,(8) Allahabad,(9) and Madras (10) High Courts answer the question in the negative, and in a recent case in the Calcutta High Court to question has been considered doubtful (11).

It may be that the word "case" is wide enough to include an interlocutory order, but it must be controlled by due regard to the purpose with which this section was framed, which was to enable the party to a suit to get a decision or order of a lower Court rectified where there would otherwise be no remedy It is on this ground, therefore, that it has been held that an application under this section cannot be entertained in the case of those interlocutory orders against which, though no immediate appeal lies a remedy is supplied by sect

⁽¹⁾ Andrew Anthony v Dupont, 4 M. 217 (1881), Golam Mahammad t Saroda Mohan, 4 C W N 095 (1900) [dist, Mahomed Poyez t Goluck Das, 7 C L R 191 (1859)], Puran Male Janks Pershad, 28 C 609 (1901) s c, 6 C W N 114, Secretary of State t Julo, 21 \ 133 (1898), Debt Das v Ejar Husain, 28 A 72 (1905), Baikanta t Satu 38 C 421 (1911)

⁽²⁾ Bisbeshar Kuar t Hari Singh 5 A, 42 (1882)

⁽³⁾ Collector of kanara t krishnappa Hidge, 15 B 77, 78 (1890), diss from, In re Secretary of State 2 C 1 R 461 (1876) (4) Andrew Anthony t Dupont, supra

⁽⁵⁾ Pandu t Bhavdu 21 B 806 (1896), and see Vora Isaballı t Dandbhar, 14 B 371

⁽⁶⁾ Chattarpal Singh t Raja Ram, 7 A 661 (1885)

⁽⁷⁾ Dhapi v Ram Pershad, 14 C. 768 (1887), but see Omrao Mrza r Mary Jones,

¹² C L. R. 148 (1882)

⁽⁸⁾ Motifal Kashibai t Nana, 18 B 35 (1892), Damodar t Raghunath, 26 B 551

⁽⁹⁾ Harsaran t Vuhammad Rara, A 3 (1881) [repction of application to appeal as pauper, and Vuhammad Ayab v Vuhammad Vohmud 32 A 623 (1910), but see Glattar pal Singh v Rapa Ram, 7 A 661 (1885)], Chattar Singh t Ganga Sahat 5 A 203 (1883) Gorder setting asude award), Farid Ahmad t Dubart Bibs, 6 A 233 (1884) [order transferring such] see Raghunath Das t Rering such] see Raghunath Das task Kumar, 7 A 276 (1884) Surta t Ganga, 7 A 411 (1885), per Oldfield, J [order amending diccree], but see judgment of Vahmood, J. in Chattarpal Singh t Raja Ram 7 A 661 (1885).

⁽¹⁰⁾ In re Nizam of Hyderabad, 9 M. 256 (1886)

⁽¹¹⁾ Chandi t Kripal, 15 C. W N 682 (1911)

591 (now 105), which provides that they may be made a ground of objection in the appeal against the final decree (1)

The High Court has revised, under this section, proceedings under Reg of 1806, relating to forcelosure, (2) adjudications under sect 407 of the last Code, (3) an order under sect 335 of the same Code, though provisionally final, (4) an order under the Bombay Hereditary Offices Act, (5) an order under sect 5 of the Religious Endowments Act, (6) an order under sect 195 of the Code of Cruniual Procedure, (7) a lunacy matter (8) Whether in order under the former sect 310a was subject to appeal or revision depended on the circumstances of each particular case (9) A decision under sect 5 of the Court Fees Act is not a decision in a case within the meaning of this section (10) The matter of amending a decree does not by itself constitute a "case," but forms part of the proceedings in the suit in which the decree is made (11) On the same principle, viz the order being of an inter locutory character only, the High Court has refused to deal with an order relating to an award, (12) though in other cases relating to awards it has interfered (13) It has been held that an order passed under the Legal Practitioners Act is not a criminal proceeding, nor one within the powers of civil revision (14) Semble, that it was the intention of the Legislature that the Court which originally heard a case should be the Court to decide whether an application to review its former judgment should, or should not, be granted, and where that Court rejects such an application, its decision should not be open either to appeal or to revision by a higher Court (15) Iu a recent Full Bench decision of the Calcutta High Court, the case of an order passed by a Civil or Revenue Court under sect 476 of the Criminal Procedure Code was considered, and it was held that sect 439 of the Criminal Procedure Codo did not apply, and that the High Court could exercise

⁽¹⁾ Motilal Kashibai t Nana, 18 B 35 (1892)

⁽²⁾ Hazari Lal v Khem Rai, 3 A 576 (1881), fell in Nand Ram : Bhopal Singh,

³⁴ A 592 (1912)
(3) Chattarpal Singh v Raja Ram, 7 A
(61 (1885), Muhammad Huwan v Ajudhia
Prasad, 10 A 467 (1888), Debe Das v
Mohunt Ram, 2 C W N 474 (1898), Gopal

Chandra t Bigoo Vistry, S C W N (0 (1903) (4) Sheoraj Singh v Banwari Das, 6 A 172 (1884)

⁽⁵⁾ Collector of Thana : Bhaskai Waha dev, 8 B 264 (1884)

 ⁽⁶⁾ Gopala Ayyar v Arunachellam Chetty,
 26 M. 85 (1992)

⁽⁷⁾ Bent 1 Sarju 33 A 512 (1911), Ramadhin 1 Sewbalak, 37 C 714 (1910) (a Civil Court acting unler sect 165 of the Criminal Code is not evercising Criminal Jurisdiction)

⁽⁸⁾ In re Basharat Ah 24 C 133 (1836) [on the ments the Court refused to interfere]

⁽⁹⁾ Kedar Nath : Uma Charan 6 C W

N 57 (1900) (19) Balkaran Rai v Gobind Nath 12 1

⁽¹⁰⁾ Balkaran Rai v Gobind Nath 12 129, 157 (1890) per Edge, C J

⁽¹¹⁾ Raghmath Drat Raj Lumar, 7 \ 276 (1884) Surta v Ganga, 7 \ 411 (1885) 10 Oldfield J, contra Mahmood, J, who held the order to be a separate a ljudication and so capable of revision

⁽¹²⁾ Chattar Singh v Ganga Sahai, 5 \ 293 (1883), Damodar Trimbak z Raghunath Hari 26 B 551 (1902)

⁽¹³⁾ Pugardın v Moidin 6 M. 414 (1882), Dagdusa İılakohand v Bukhan Govind 9 B 86 (1884), Mana Vikrama v Malhekeriy Kristnan 3 V 68 (1880), Ganga Charan c Sartı Yandal, 6 C V N 614 (1901)

⁽¹⁴⁾ In re Madho Ram, 21 A 181 (1899) In In re Siddeshwar Boral, 4 C W N 36 (1899), the point was left undeeded

⁽¹⁵⁾ Ram Lal & Ratan 1 sl, 26 \ 572 (1901)

the powers vested in it by this section and by sect. 15 of the High Courts Act, and that the Beach excreising Criminal Juri-diction could not (as such) deal with the matter on revision, but could be specially authorized to do so by the Chief Justice under sect. 11 of the High Courts Act (1) An application under this section to set aside an award is incompetent (2). A decision of a Subordinato Court on a question of a blustion determining the amount of a Court fee is, not withstanding its declared finality, subject to revision under this section, and sect 5, Reg. If of 1827 (3). Proceedings under sect. 206 of the former Code terminated in an order, and could thus he dealt with in revision (4). Sect. 153 of Act X of 1859 does not preclude revision by the High Court of an order of a Collector, which is final within the meaning of that section (5). An application to a Judgo of a Presidency Small Cause Court for sanction to prosecute a plaintiff for making a fulse claim in a suit before him is a case within the meaning of this section (6).

"In which no appeal liea."—The Court cannot act under this section where there is an appeal, (?) even where the petitioner has to invoke the provisions of sect 5 of the Limitation Act (8). The reason of the rule is that there is another and more complete remedy. It is a matter of dispute whether in the case of interlocutory orders, against which there is no immediate appeal, the Court can interfere under this section, seeing that a remedy is supplied by sect 105, which provides that such orders may be made a ground of objection in the appeal against the final decree. In such cases it is said the appeal is merely deferred (9). In a recent case it has been doubted whether interlocutory orders como within the scope of this section (10).

On the same principle it has been held that the Court will not exercise its rovisional jurisdiction so long as there is any other remedy open to the petitioner, viz by regular suit or otherwise (11) Probably it is more correct to say that

- R v Har Prasad Das, 40 C 477 F B
 Land Chatterjoo t Bhuban Mohini, 8 C W N "3 (1903), R t Gopal Barick 34 C 42 (1900)
- (2) Ghulam Jilam t Muhammad Ahmed, 6 C W N 226 (1901)
- (3) Vithal Krishna v Balkrishna Janar dass, 10 B 610 (1886) F B But see Balkaran Rai t Gobin 1 Nath, 12 A 120 (1890) I B, and see Omrao Uirza: Mary Jones 12 C L R 148 (1882)
- (4) Bai Shri Vaktuba t Agarsangir 9 Bom L. R. 547 (1907)
- (5) Mohant Cobind Ramanuja Das t Lakhun Parida, 11 C W N 112 (1906)
- (6) Ramadhin v Sewbalak, 37 C 714 (1916)
- (7) Raynor v Mussoorse Bank 7 A 681 (1880), Ram Kristo V Nail Tara 12 C L. R 449 (1883), dist in Mohant Gobind Ramaus v Lakhun Parula 11 C W N 112 (1900), Azar Husam t Kesri Mal, 12 A 631 (1890), Sali Man v Kanagasabpathi U N. 20 (1892), Ourao Vurza v Mary
- Jones, 12 C L. R 148 (1882), Gulab Rai v Manghi Lai, 7 A 42 (1884), Rahimat Aopal Rai 14 A 520 (1892), Trupati Raju t Visram Raju 20 V 155 (1896), Baldeo Das v Gobind Shankar 7 A 914 (1885) per Tyrrell J (the grounds upon which Petic ram s, C J., 1udgment proceeded do not ap pear], Williamat Brown, S A 108 (1886) but seo Nad Rain t Bhopal, 34 A 502 (1912) Hessan Ah Shah t Sahg Ram, 125 P R (1892)
 - (8) Visvanathan Chette v Ramanathan Chetti 24 M 646 (1901)
 - (9) See note to Case, supra, p 465 (10) Chandi t Kripal, 15 C W N 682 (1911)
- (11) Guse t Jasra; 15 A 406 (1893) (the headnote has been said to be miskeading see Dehi Dast Ejaz Husan 28 A 72 (1905)], hashmath Sakharam t Nana, 21 B 731 (189°) Sheo Prasad e hastura huar, 10 A 119, 122 (188°) [in which proper remedy was held to be an api jection under s 103, or a suit under s. 283 of the former Code],

there is no absolute rule in the matter such as exists in the prohibition relating to appealable cases, and that while the Court will in general discourage applications under this section when some other remedy has been provided, the exercise of the revisional powers is discretionary according to the circumstances of the particular case. In some cases justice, therefore, may require the Courts interference (1)

Sect 588 (now 104) by enacting that the orders passed under it shall be final only bars appeals from these orders, but does not intend to bar any interference with them by revision (2)

In some cases, where an appeal was preferred but no appeal lay, the Court has dealt with the case as though an application has been originally made to it under this section and allowed the appeal to be treated as an application under it (3). Conversely, a civil revisional petition has been treated as an appeal on the Court fee being paid (4). It seems reasonable that appellants should be permitted to rely on the provisions of this section without putting them to the expense of making a separate application to get the benefit of it (5). Some Indigs, however, take a structer and more formal view of the matter, and require a separate and distinct application to be made (6). It is as well, therefore in cases of doubt whether an appeal lies to file concurrently (7) both an appeal and an application under this section to be heard and disposed of together.

Court - This must be understood in its ordinary legal sense as "a place

Sunder Das v Mansa Ram, 7 N 407 (1884) Venkataraman v Mahalingayyan 9 M 506 (1886), Raghu Math v Rai Chatrapul 1 C W N 033 (1897) Subhaya v Nellamma, 9 M 130, 132 (1885), Ramrao v Babaji 20 B 630 (1895) Ismalji v Maelcod 31 B 133 140 (1996)

(I) Debi Das t Ljaz Husain 28 A 272 (1905) Shiva Nathaji i Joma Kashmath 7 B 341 (1883), F B [in which it was sail that the question did not admit of a precise categorical reply], Ghulam Shabbir : Dwarks Presad 18 A 163, 168 (1895) [10 which the Court interfered under this section it being doubtful whether a suit would he], Golam Mahammad : Saroda Mohan 4 C W \ (95, 698 (1900) [in which it was held that there was no reason un ler the circumstances why the petitioner should be driven to a regular suit], Iiruchittambala Chetti i Seshayyangar, 4 M 353 at p 384 (1881) Balmakund : Jatan Lal 6 1 125 (1882) at p 128, per Stuart CJ . Sree krislin i Chandook Chand, 32 M 334 (1908)

(2) Mathura Nath r Umesh Chandra I C W N C-6 (1897), at p 631

(3) Annanialai Chetti e Muthulinga Pllui (M. II (R. 360 (18*1) lin which the petition of special appeal was given effect to as a petition under a. 35 of Act XXIII. of 1801]. Bboyrub Chunder v Wajeduniasa Khatoon, 6 C. L. R. 234 (1880), Venhatamma v Chingalrayappa 7 M. 555, 506 (1884) Dayaram Jaguyan v Govardhandas 28 B 485 at p 460 (1904), Godu Ram v Surajula 27 A 480 (1904) Seetharama Bhaga vatar v Venhataguri 17 M. L. J. 199 (1907) Vieralt Visram v Sheriff Down 36 B 10 107 (1911)

(4) Srdharan Somayajipad v Puramathan Somayajipad 23 M. 101 (1899), Venky tamma v Chengalayappa, 7 M. 5.5 do (1834) [where the application was presented as an appeal then amended and received as an application under this section, and ultimately it being held that an ajreal lay treated as an ajreal.

\ath 9 C W \ 01 +09 (1 10)

J 1 p not consider the case one for interference under this section

⁽⁶⁾ See Ganga Charan r Sasti Mandal, b

C. W \ 614 (15 (1901) (7) See Suden thee Naram r Col m la

where justice is judicially ministered." A District Registrar is therefore not a Court, and the High Court caunot revise his proceedings (1)

"Suboidinate."—The Court referred to in the words "If the Court" of the former section was a Court other than the High Court The section therefore did not apply to a case where the order of which review was sought was made by the High Court (2) It applies to subordinate Courts as the amended section now makes clear. The High Court has jurisdiction under this section over the Presidency Small Cause Courts, and applications can be dealt with by a specially constituted Bench (3) or, according to the existing rule in the Calcutta High Court, by a single Judge sitting on the Original Sude (3) This section applies to a Mamlatdar's Court in Bombay, (5) and a Court acting under the Dekkan Agreediturists Rehef Act, (6) and the Court of the Resident at Aden in the excresse of his everly jurisdiction under the Aden Act (7)

A decision under sect 5 of the Court Fees Act is not, it has been held, (8) the decision of a Court within the meaning of this section. A District Judge and the first sect 23 of the Bombay District Junicipal Act Amendment Act (II of 1884) is not a "Court" under this section, and the High Court has therefore no jurisdiction to revise his order refusing to set aside an election (9) Notither is a Collector acting under sect 11 of the Land Acquisition Act "a Court" (10). This section does not apply to a Revenue Court in Madras, (11) or in the North-West Provinces (12). The High Court at Bombay under clause 29 of the Council Order relating to Zanzibar of the year 1897 has power of revision over all the Civil Courts of Zanzibar (13).

Jurisdiction —The word "jurisdiction' is used in two different senses it may either mean what is ordinarily understood by the term "jurisdiction"—that is, jurisdiction local, pecuniary, personal, or with reference to the subject-matter of a suit, (14) or it may mean the legal authority of a Court to do certain things, to make a particular order in a case over which it has jurisdiction in the

- (1) Manavala v Kumarappa, 30 M. 326 (1907), 17 M L.J 313 S C
- (2) In re Premji Trikumdas 17 B 514 (1893) (3) Ramadhin t Sewbalak, 37 G 714
- (1910), and see Rangiah Naidu v Rungiah, 31 M. 490 (1908) (4) Sarat Chandra v Broto Lal. 30 C. 986
- (4) Sarat Chandra v Brojo Lal, 30 C. 986 (1903), s c, 7 C. W N 843
- (5) Sce Nanabayan v Pandurang Vasudev,
 9 B 97 (1884), Purshottam t Mahadu
 14 Bom L R 947 (1912) 37 B 14
 Kashiram t Rajaram, 35 B 487 (1911)
- (6) Seo Gurubasaya v Chanmalappa 19 B 286 (1894), Lakshman Baban t Ramchan dra, 23 B 321 (1898), Rayachand Mayachand v Sultan Rahmbai, 18 B 347 (1893)
 - (7) Rhimbai : Mariam, 34 B 267 (1909)
 (8) Balkaran Rai : Gobind Nath, 12 A
 12J, at p. 157, per Ldge, CJ
- (9) Balaji Sakharam t Menonji Nowroji 21 B 273 (1835)

- (10) British India Steam Navigation Co v Secretary of State for India, 38 C 230 (1910), 15 C W N 87
- (11) Velh Perna t Mondin Padsha, 9 M 332 (1886), Appandar t Suhari Joishi, 16 M. 451 (1892), Venhatangrasimha t Suranna, 17 M. 298 (1893), having regard to the provisions of s. 4 of the Code
 - (12) Ram Dayal v Ramadhun 12 A 198 1890)
 - (13) Meral: Vistam v Sheriff Dewii 36 B 105 (1911) See contr: Khoja Shivji v Hasham Gulam, 20 B 480 (1855) (14) Mohesh Chander: Jahruddi Mollah,
- o C W N 503 512 (1.00) Har Frasad t Jalar At: 7 1 317 3.00 (1885), Dhan Singh t Basant Singh, 8 1, 519, 529 (1886), Sheo Prasad t Kastura huar, 10 A. 119, 121, 122 (1837), Amtrav Airshan : Balkrishia Ganzah, 11 B 488, at pp 491, 492 (1887), and see Sukh Lat i Tara Chand, 2 C L. J 241, 241 (1903)

sense stated. So if a Court has juri-diction to deal with an appeal in the former sense, it is only in the litter sense that an erroneous order of remand by an Appel lite Court can be treated as an order without purisdiction (1) It was held in the case first cited that the word "jurisdiction" is used in the former sense in sect 578 of the former Code (non 99) In some cases at has been held that the term is used in both senses in the pre ent section (2). In other cases it has been said that the word "jurisdiction" is used in the first mentioned sense and refers to the forum for the institution of a suit (3) It would probably tend to clearness in the law if the word were used in the nirrow and more ordinary sen e,(4) though, is his been pointed out, (5) the extent to which the restraints attaching to the mode of exercise of paradiction should be included in the conception of the jurisdiction itself is a question of nicety upon which there has been consider able difference of judicial opinion A Judgo cannot assume as a matter of law that which in fact has no existence in law, and so give himself jurisdiction. He cannot, by wroughy determining a que tion, give himself juri diction, and the High Courting thus inquire whether such question is rightly or wrough decided (6)

On the principle omnia rite acta, the Court will not presume that a Judge has acted without jurisdiction (7) Indeed, it has on the contrary been said, that unless the facts from which want of jurisdiction on the part of a Subordianto Court may be interred are pitcul upon the face of the record, the High Court will not interfere in revision (8) The High Court may interfere where the lower Court appears to have exercised a jurisdiction not vested in it by law (9) or to have

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(1) Mohesh Chunder : Jahuruddi Mollah, o C W N 8005, 512 (1901), and seo Har Frasad : Jafer Ih, 7 & 31a, 350 (188a), Dhan Singh : Basaut Singh, 8 & 319, 529 (1880), Amritra's Krishna : Balkirshna Gancah, 11 B 185, at pp 491, 492 (1887)

(2) Har Frasad t Jafar th, 7 h, 345 (1850), Dhan Sungh t Basant Singh, 8 A 519 (1850) per Mahmood, J , see cases ented post, and Mohant Bhagwan i Ahatter Mona, I C W N 671 (1950), at p c.21, where it was said that excess of, and fadure to excrete a mode of procedure not applicable to it or refusing to apply it is a mode of procedure and applicable to it or refusing to apply it is a mode of procedure and applicable to it.

(3) Ross Alston : Pitambar Das, 25 L 509 (1903), at p. 526, per Baurge, J., Vanisha Erah : Sivah Koja, 11 M. 20 (1887), at pp. 227, per V. Myar, J., p. 232, per Brandt, J

(4) See Shew Prosa I Bangshidhur e Ram

Chun ler Haribux, 41 C. 323 (1913)
(1) Sukh Lal 1 Tara Chan 1, 2 C. L. J.

-35, 244 (1905)
(1) Manusha Lradi et Swali heva II M.
2-3 (1887), at 118, 222, 223, -34, and to where
jurish is not declined. Vichymath Gound
t Tumbhat, 15 B 148, Lot (1830) [Tho

Subordinate Judgo has refused to exercic a jurisdiction which, if he is wrong is by law vested in him, and we can examine his order to see if he is right in his refusal. I

(7) Sheo Prasad e Kastura Kuar, 10 L 119 (1857)

(S) Mibr Mr & Muhammad Husen, 14 L

(9) In re Suljan Oslagar, B L. R (F B) 331 (1860) It a, where the Court exertest a jurisdiction when it has none, or execeds it when it has jurisdiction]. Bur Mohun: Rat Ums, 20 C S, 11 (1892) [order actting aside sale under Code]. Lak.hmana: Najumbin, 9 W 143 (1894) [order actting asi to executions aside, though no impury prov. cl.]. Blograd Chunder: Wajedumssa, o C b. R. 234 (1890) [hearing aj peal where none]. Kirist Inder: Royalmes, b W R, bet X, 30 (1896)

Bux: \undo Lal, 14 C 321 (1887) [Bengal femancy \text{ \text{ to power to act as a least}. Lal Mohum \understand \ failed to exercise a jurisdiction so vested,(1) the Courts sometimes underrating

1841, after parties referred to regular suit], Gossam Money v Gour Pershad, 11 C 146 (1884) [order restraining execution pending appeal), hunhamed t Chathu, 9 M 137 (1886) [no jurisdiction to order refund under s 315], Dagdusa Tılakchand v Bukhan Govin 1, 9 B 82 (1884) [order filing award, arbitrators without authority, deal with costs], Dhapi i Ram Pershad, 14 C 763 (1887) [no jurisdiction under s 136 unless s 134 complied with], Muhammad Husain v A100dhia Prasad, 10 A 467, 470 (1888) forder under a 407], Luis t Luis, 12 M 186 (1888) forder setting asido order under s 494]. Sadasook : hannayya, 19 M 96 (1895), Sas soon : Hurry Das Bhukut, 21 C 455 (1896) , s c, 1 C W N 41 [Small Cause Court, new trial], Giddayya v Jagannatha, 21 M 363 (1897) [reversal by District Munsif of decree of Village Munsiff, Manomohim Chaudhurans v Nara Naram, 4 C W N vxm (1899) [set ting aside decree which was not ex parte] Va homod Hamidulla : Lohurennissa Bibi, 25 C 155, 158 (1897) [id.], Ningapa t Dodapa, 21 B 585 (1806) [decree passed by Karkun in possessory suit]. Luchmun Singh v Sham shers Singh, 2 I A. 58 (1874) [application for roview], Raja Har Narain v Chaudhrain Bhagwant, 18 I A 55, s c, 13 A 300 (1891) [invalidity of award when not made within time fixed by Court], Chinaya v Gangava, 21 B 775 (1896) [order in execution for ouster of person not party to suit], Bhau v Dade, 21 B 777 (1896) (Mamlatdar, decree by. remedy as between joint owners], Babaji Ramit v Babaji Devil 23 B 47 (1897) [Mam latdar no jurisdiction to determine questions between riparian proprietors], Lakshman Baban v Ramchandra Parashram, 23 B 321 (1898) [Dokkan Agriculturists Relief Act., jurisdiction of Special Judge], Muhammad Yusuf v Abdul Rahman, 16 I A 104 (1889) [setting aside non appealable indgment]. Hazarı Lal v Aheru Rai, 3 A 576, 579 (1881) [order dispossessing mortgagee], Nalmak shya Ghosal : Mafakshar Hossam, 28 C 177 (1300), s c, 5 C W N 132 [order amending decree], Puran Mal : Janki Pershad, 28 C. 680, 683 (1901) forder of Court taking over management of properties], s e, 6 C W. N 114, Golam Mahammad t Saroda Mohan, 4 C W N 695, 697 (1900) [issue of successive writs of possession without inquiry], Halad

har Mastay Choytouna Masta, 30 C 588 (1903) [jurisdiction of Registrar Small Cause Court], Diwahbal t Sadashivdas, 24 B 310 (1899), s e , 1 Bom. L R. 836 [meompetent reference under s 646a], Krishnasami Pannikondar v Muthu Krishna Pannikondar, 24 M 364 (1900) fappointment of curator, omission to take evidence before making order], Rama samy Chettiar t Orr. 26 M. 176 (1902) [suit brought on ordinary side of Court, though maintainable on Small Cause sidel. Amrita Lal kolay v Nibaran Chandra, 31 C 340 (1901), s e, 8 C W N 246 [Jurisdiction S C C . title to immeveable property] , Dayaram : Govardhandas, 28 B 458 (1904) forder passed without jurisdiction in execu tion], Ramanadhan Chetty v Narayanan Chetty, 27 M. 602, 607 (1904) [decision of review petition during pendency of appeal], Ganga Charan v Sasti Mandal, 6 C W N 614 (1901), Corporation of Calcutta v Cohon, 6 C W N 480 (1901) [Jurisdiction of Small Cause Court to declare old valuations to be stdl in force], Monomohim Chaudhurani v Nara Narayan 4 C W N 456 (1899) [no jurisdiction to set asido ex parte decreo of Superior Court], Shankarbhai Khojahhai v Somahhai Ranchhodbhai, 3 Bom L R 129 (1900) [Judge deciding Small Cause Court suit under ordinary jurisdiction], Peary Mohun Ghosaul v Harran Chunder, Il C 261 (1885) [S C C, trespass to immoveable property Court held to have jurisdiction], Sarnam Tewari v Sakina Bihi 3 A 417 (1881) [decisions of both Courts without jurisdiction]. Yule & Co v Mahomed Hos sam 24 C 129 (1896) [reference by P S S C under a 69 of its Act, and a 617 of Code, liberty given to withdraw suit after disposal of reference instead of entering judgment for delendants! Horananda Bancrice v Ananta Dasi, 9 C W N 492 (1904) [s 153, Bengal Tenancy Act], Menat Ah t Amdar Ah, 9 C W N 605,607 (1905) [amended decreen]. Janokey Nath Guha : Brojolal Guha, 33 C 757, 770 (1906) [no appeal, no jurisdiction to reluse filing ol award], Bai Shri Vaktuba t Igarsangu, 9 Bom. L. R 547 (1907) , s e , 31 B 447 [order passed under s 206 making sdditions to the decree], Baikanta r Sita, 38 C. 421 (1911)

(1) Gobin Presad v Chandar Sekhar, 9 A 186 (1887) [declining to hear suit on merits], their powers, and the High Court is cilled upon to enlarge their too narrow views (1). If a Court allows an application or decrees a suit which is in fact time barred, without considering whether it was so or not, it can be said to have failed to exercise a jurisdiction vested in it by liw, so as to bring the matter within the scope of this section. But this cannot be said of a Court merely because it has omitted to consider ex proprio mote the question whether a higgint was entitled to proceed ont of time by reason of some special provision of law, when such a question had not been raised by him or on his behalf (2). The High Court can interfere under this section when the Court below refused to exercise the jurisdiction vested in it by reason of an erroneous interpretation of a provision of the Code (3)

Rampwan Mal v Chand Mal, 7 A, 227 (1884) [refusing jurisdiction on ground suit triable by District Court], Badami Knar v Dinu Ru, 8 A 111 (1886) [erroneous view of his juris diction taken by Munsif, return of plaint], Mohendra Sundar v Dinabandhu, 19 C L J 15 (1913) (return of plaint), Vishvanath Govind t Rambhat, 15 B 148 (1890) [return of plant on ground ant governed by s 539], Mana Vikrama t Mallichury, 3 M. 68 (1880) [refusal to file award], Birj Mohuu v Rai Uma, 20 C 8, 11 (1892), s c, 19 I A 154 [refusal to confirm execution sale], followed m Radhasyam Kar v Dinobundhoo Biswas, 18C L J 533 (1913), Navalchaud Nemchand 4 Amiohand Talakchand, 18 B 734 (1893) [re jection of application for execution], Amar chandt Javalya, 21 B 738 (1886) [Mamlatdar erroncously holding ho could not receive a suit against heirs], Kammuthi t Mangappa, 16 M. 454 (1892) [Judgo dechning to entertain application for leave to sue in forma pauperis, erroneously supposing a succession certificato was necessary], Shamrav Pandoji e Ndoji Ramaji, 10 B 200 (1885) [refusal to enter tain application for execution). Benode Yo hini t Sharat Chunder, S C. S37, S41 (1882) [application for revival of suit], Rama v Kunji, 9 M 375 (1886) [jurisdiction held to be declined, the Legal Practitioners 4ct being no har to suit], Subbaji Rau t. Srimiasa Rau, 2 M 264 (1880) [jurisdiction to refuse to confirm execution sale declined], Seshadri t Krishnan, S M 192 (1884) [direction to excreise power given by a 544], Mussamut Jameela t Luchmun Panday, 1 C L. R 71 (1879) [refusal to investigate claim made in execution], Josodanund Singh t Amrith Lal, 22 C 707 (F B) (1895) [refusal to set aside sale under . J10a], Nathubhai i Mulchand t Nana Balu, 19 B 514 (1891) in final to crant execution). Collector of

Vizagapatam t Abdul Isharim, 21 M. 113 (1897) [fadure to exercise jurisdiction in con sequence of misconstruction of s 4121. Ma habir Singh t Behari Lal, 13 A. 320, 323 (1891) [refusal to hear and determino appeal], Gerindra Kumar v Rajeswari Roy, 27 C 5 (1899) [order refusing to amend pro bate], Raghunath Charan t Shamo Koeri, 31 344 (1903) [refusal to hear appeal], Gobind Prasad t Chandar Schhar, 9 4, 456 (1887), at p 402 ['The Judge failed to exercise his jurisdiction, and probably acted with material irregularity in dismissing this suit on the ground that the representatives of M. C had not been made a party," per Edge, CJ], Vishvanath Govind : Rambbat, 15 B 148 (1890) [returning plaint upon erroncous construction of s 539], Vishnu t Ram chandra, 9 Bom, L R 936 (1907) frejecting complaint under s. 328], Zamuan t Fatch Ah, 32 C 146 (1904) [refusing to accept plaint], Ganesh Singh v Kashi Singh, 28 4 621 (1906) [arbitration failure of Court to decide as to validity of reference], Willis t Jawad Husun, 29 A 468 (1907) [refueal to hear application for review! Akbar khan t Muhammad Ah Khan, 31 A 610 (1909). Ramdoyal t Upendra Nath, 17 C. W N (1912) [Specific Rehef Act, refusal to grant relief to plaintiff found to be in possession within six months], Lartic ! Gorachand, 17 C L J 593 (1912) [omitting to deal with merits of an appeal]

(I) Shiva Authaji t Jonia Mashinath, 7 B at p 352 (1883) [the section now extends to refusal of jurisdiction by a Court through a misconception of its authority]

(2) Panchu Mandal : Sheikh Isaf, 17 C W N 667 (1913)

(3) Maharaja of Burds in r Apurba, 14
 C. L J .0 (1911)

Illegality -The first part of the section down to the words "so icsted" deals with jurisdiction. The remainder assumes the existence of jurisdiction. but deals with the mode in which such jurisdiction is exercised. A question may arise whether a Court in the exercise of the jurisdiction it possesses has acted according to law. Such a question relates not to the existence of jurisdiction, but to the exercise of it in either an illegal or irregular manner (1) This distinction has not always been preserved, it being in some earlier cases considered erroncously that the Privy Council had decided (2) that only questions relating to the jurisdiction of the Court can he entertuned under this section (3) This opinion, however, is not tenable, since it practically treats the additional words added to the section in 1879 ns superfluous or unnecessarily introduced (4) All that the Privy Council case really decides is that this section does not give a right of appeal on questions of law or fact, and that where the Subordinate Court has jurisdiction, the High Court can only interfere where that Court has acted illegally and with material irregularity in the exercise of such jurisdiction (5)

A Court cannot interfere under this section simply upon the ground that there has been an erroneous decision upon a question of law or fact (6) A Court that has decided a suit over which it had jurisdiction cannot, only on the ground that it has arrived at a wrong decision, be said to have exercised its jurisdiction illegally or with material irregulanty (7) Any other view would impose on the

(1) Soo Sukh Lal v Tara Chand, 2 C L. J 211, 245 (1905)

(2) In 1mir Hassan v Sheo Baksh, 11 C 6 (1884)

(3) Magni Ram v Jiwa Lall, 7 A. 336, at 338 (1885), F B , Badami Kuar : Dina Rai, 8 A. 11, at p 113, per Petheram, C.J. "the questions to which a. 622 applies, are questions of jurisdiction only," Narayana samı v Natesa, 16 M. 424, at p 428 (1892) ["the error of procedure must be such as to have led to the assumption of a jurisdiction. etc. ' per M. Aiyar, J], Manisha Eradi v Sıyalı Koya, 11 M. 220, at pp 229, 230 (1887), per M. Aiyar J, "the words 'set illegally," etc , apply to those cases only in which there is an error in the procedure by reason of which the Subordinate Court concludes that it has, or has not, jurisdiction. This dictum was, however, subsequently withdrawn by the learned judge in Kristnamma Naidu t Chaja Naidu, 17 M. 410, at p 414 (1893)

(4) Aristnamma Naidu v Chapa Naidu, 17 V 110, 414 (1893), and case a post Valhunt Bhagwau v khetter Vom, 1 C W N 617 (1896), at p. 625, Linit Mondul v Baloram Dey, 3 C W N at p. 555 (1899)

(5) Sow Bux : Shib Chunder, 13 C. (1886), at p 230. and see Wohunt Bhagwan: Khet ter Moni, 1 C. W. > 617 (1896), at p 624. (6) It has, however, recently been held by the Madras High Court that when an Appellate Court erroneously (that is, hy an error of Law) decided that the Court of the first instance had or had not jurisdiction to entertain a suit, the High Court could set aside the order under this section on the double ground of exercise of jurisdiction and illegality Vuppulum v bectaramachandra.

24 M. L J 112 (1912) [Aiyar, J, dissenting] (7) Amir Hassan t Sheo Baksh, 11 L A. 237, a c, 11 C 6 (1884), dist in Port Canning Improvement Co. Ltd. v Roson 4h, 17 C W N 160 (1912), Magni Ram v Jrwa Lal, 7 A 336 (1885) Sunder Das v Mansa Ram 7 A 407 (1884), Chattar pal Singh : Raja Ram, 7 A 661 (1885), Badama Kuar v Dina Rai, S A 111 (1886) . Muhammad Husam v Ajudhia Prasad, 10 A 467, 471 (1888) Hari Bhikaji v Naro Vishvanath, 9 B 432 (1885), Jivraji t Pragu 10 M. 51 (1886), Venkubai v Lakshman Venkuba, 12 B 617 (1887), hrishna Mohini v Acdarnath Chuckerbutty. 15 C 446 (1888) Narayanasami v Natesa, 16 M. 424, 426 (1892), Enat Mondul : Baloram Dej, 3 C. W N 581, 583, 585 (1899). Corporation of Calcutta : Bhupati Roy, 26 C. 74 (1893), Mathura Nath : Umes Chandra, 1 C. W N 626 (1837), Count the duties of a Count of Appeal Mero errors of law and fact can only be corrected by appeal Such is a wrong decision on a question of res judicata (1) or limitation, (2) or a inerely erroneous construction of the provisions of an Act (3) or a decision as to the inidimissibility of a document in evidence, (4) or the mis construction of a document, (3) or a decision that a person was not a legal representative within the meaning of sect 17, ante (6) Where a Judge having both Small Canse and ordinary jurisdiction transferred to his file as ordinary Judge a suit filed in his Court as a Small Cause Court suit, it was held that there was not a material irregularity, and that as his decree decided a question of title to immoveable property, the High Court could not interfere under its extraordinary jurisdiction, for since this decise could not have been passed in a Small Cause Court, it was not fiual (7)

The mero fact of a Court having come to a wrong decision oven on a point of havis not sufficient to constitute an illegility or irregularity, (8) that is, in orroneous decision is not by uself any ground for revision. The Privy Council have thus excluded one class of cases, but it is still left open to consider in what

Raghu Nath v Rai Chatraput, 1 C. W N 633 (1897), Sotish Chunder Lahiry : Nil comul Lahiry, 11 C 45 (1884), Gopi Kocri v Gopi Lal, 21 C (99 (1894), Corporation of Calcutta v Cohen, 6 C W N 480 (1901). Cooke : Equitable Coal Co. S C W N 631. 624 (1904) , Ross Alston : Pitamhar Das, 25 A 500, 525 (1903), per Banerjee, J , Parasu rama Ayyar v Seshier, 27 M 504 (1903), Kalı Charan v Sarat Chunder, 30 C 397 (1903), s c, 7 C W N 545, Ram Lal : Ratan Lal, 26 A 572 (1904), Joseph v Salt Company, 17 M. 371 (1892) Imistako concern ing principles of valuation], Quare whether following cases did not raise points of law only Kirparam t Modia, 19 B 135 (1894), Court of Wards t Darmalingu, 8 M. 2 (1884), Pitumbar Das v Jambusar Munici pahty, 17 B 510 (1892), Ross Alston : Pitambar, 25 \ 509 (1903), Patel Kilabhar v Hargovan Mansukh, 13 B 133 (1894), Maulyi Muhammad v Syed Husain 3 A 203 (1880), Ram Lal : Ratan Lal, 26 A. 572 (1904) forder rejecting application for roviowl, dist , Willis v Jawad Husain, 29 A 468 (1907), Ram Singh t Salig Ram, 28 A 84 (1905)

Hari Bhikaji v Naro Vishvanath, 9 B
 132 (1885), Amritrav Krishna v Balkrishna
 Ganesh, 11 B. 488, 492 (1887)

(2) Sundar Singh t Doru Shankar, 20 A. 78 (1894). Amritras Arishna t Balkirishna Ganesh, 11 B 1883 2 (1887). Anunda Lall t Debendri Lall, 2 C V cccasari (1854). Rampopal t Joharmall Ju.C. 173

(1912), but see Kadash : Bissonath, l C. W N 67 (1896), Har Prasad v Jafar Ah, 7 A 345 (1885), Pitambar Das i Jambusar Municipality, 17 B 510 (1892)

(3) Rabbaba khanum v Noorjehan Begun, 13 C 90 (1880), but where it was held that the case did not fall within a section at all it was held that was held that was held that the Occur had dechared jurisheron in consequence of a misconstruction Collector of Yingapatam v Abdul Kharim, 21 V 113 (1897), and see Rama t Lunj, 9 M 375 (1880), and as to construction of decree, Maultra Muhammad v Syed Hussin, 3 A 293 (1880).

(4) Madhayrav Ganeshpant : Gulabbhai Lallubha, 23 B 177 (1898), but see Fatteh chand Harchand u. hisan, 13 B 614 (1893), where there was revision of an order oxcluding a document for want of strump, and Gurmant Shrimuvas v Chenbasappa, 18 B 745 (1894), admitting a document though unrigisterd But see Benod v Ram Sarup, 10 O W N 1015 (1912)

(5) Dasruth Ran : Sheodin Ran, 16 1 35 (1893)

(6) Ganga Charan Bhuttacharjeo i Soshi Bhushan Roy, 32 (572 (1905)

(7) Harr Balu Gaekawad r Gantafrao Lakhururao Gaekawad, 38 B 150 (1913)

(8) Kristnamma Naidu i Chapa Naidu 17 M (1893), at p. 11.; Shith Narain Mookerjee v Bailuntha Nath Isar, 11 C. W N 8-7 (1997), Narajan a Nagindas, 30 H 113, 115 (1995). See I nat Vondul r Dailoram N. 1 C W N 681 (18-J)

other cases the clause may be applicable (1) This is a question of difficulty, upon which there has been considerable conflict of opinion. There may be a decision which is erroneous, but not illegal or materially irregular (2) It is not always easy to draw a clear hine between an illegal exercise of jurisdiction and a mistake of law (3). A distinction has been drawn between an irregular act and an erroneous decision (1) but the distinction is, ordinarily at least, of little use, as the illegal or irregular act is generally preceded by, and based upon, an erroneous decision

It is not difficult to give examples of extreme cases. The difficulty exists as to those falling within these limits. Thus, a wrong decision hased upon an erroneous construction of sect 11 that a surt is not barred by res judicate is no ground for revision, (5) hut a Jindge would not illegally who, while admitting that a case fell within the section, held that as the former decision was erroneous, he would no this ground determine the point again, (6) or if he directed, contrary to the provisions of sect 60, that in execution of a decree the tools of a judgment delitor he sold (7). So it has been held that this part of the section contemplates a perverse decision on a question of law or procedure—that is a decision involving a conscious departure from some rules of law or procedure (8)

The Calcutta High Court has gone further, and held that while acting with "material irregularity" implies only the committing of an error of procedure, acting "illegally" does not mean the saine thing for Courts may commit gross and palpable errors other than those of procedure which would justify it being said that they had acted "illegally," and that this part of the section was intended to authorize the High Courts to interfere and correct gross and palpable errors of Subordinate Courts, so as to provent gross injustice in non-appealable cases, and that it was advisedly expressed in indefinite language from the difficulty of defining exactly the classes of cases which may stand in need of such extraordinary interference. In this view, the question whether any case comes under the clause has to be determined with reference to the grossiess and palpablences of the error complained of, and to the gravity of the injustice resulting from it (9).

Coming to the particular application of the section, the following cases have been expressly held, or may perhaps be considered to have been held, to come under the heading of acting "illegally"—the rule of adjudication being that a Judge was held

- (1) Kristnamus Naidu v Chapa Naidu, at p 418, and see Mohunt Bhagwan t Khetter Moni, 1 C. W N 617 (1896), at p 626
- (2) Har Prasad v Jafar Ali, 7 1 345 (1885), at p 351
- (3) Sew Bux v Shib Chunder, 13 C. at 230 (1886), Debo Das v Mohunt Ram, 2 C. W N 474 (1893), at p 477
- (4) Enat Mondul v Baloram Dey, 3 C W N 581 (1899), at p 585, per Bancrice, J
- (5) Vide anie, p 474 (6) Har Prasad t Jafar Ab. 7 A
- (6) Har Prasad t Jafar Mr, 7 A 345 (1885), at p 351 1 nde post, and see Rabbaba Khanum t Noorjchan Begum, 13 C 90, at p 23 (1886), where it was said that if the Subordinate Judge had held that a 32 had no application to interplauler suits.

- there would have been a failure to exercise lurisdiction, but what he in fact did was to
- 1 ut an erroneous construction on that section.
 (7) Badami Luar t Dinu Rai, 8 A. 111
- (1886), at p. 115, tide post (8) Kristnamina Naidu t. Chapa Naidu, 17 M. 410 (1893), F. B., hut see as to this case,
- M. 410 (1893), F. B., but see as to this case, Mohunt Bhagwant Ahetter Moni, I.C. W. N. 617 (1896), at p. 625 (9) Mohunt Bhagwant Khetter Moni, I.
- (9) Mohunt Bhagwan t Khetter Mons, I C W A 617 (1890) st p 626 (Bannerjee and Gordon, JJ), Mathura Nath v Umes Chandra, I C W N 626 (1897), per Bancrjee, J, Raghu Nathe Rat Chartaput, I C W, N 633 (1897), per Bancrjee, J, contra, per Mackan, CJ, in Lant Mondul Baloram Der, 3 C W N 531 (1899), at p. 533

to have acted illegally in raising a question of the execution of an instrument when execution was admitted, (1) the appointment of arbitrators against consent of one of the parties, the order of reference to them, their award, and the decree passed thereon, (2) entertaining an application to set aside an ex parte decree after the time allowed by the law of limitation, (3) or setting aside an ex parte decree without notice to the plaintiff, (4) admitting that a matter was higated under the circumstances described in sect 11, ante, but holding that the former decision was erroneous, and on this ground determining it again, (5) admitting that a claim could have been made part of a suit formerly tried, but holding that the circumstances were such as rendered it inequitable to apply the provisions of O II r 2, post, and allowing a plaintiff to sue, (6) a Judge, professing to act under sect 206 of the last Code, saying that "dismissed" means "decreed," and thus altering the whole nature of the decree under the colour of amending it, (7) a Judge reviewing, in disregard of the provisions of sect 624 of the same Code, a judgment of his predecessor, (8) a Judge, before whom witnesses are produced, dismissing the claim without hearing them, on the ground that the plaintiff's story is obviously untrue, (9) Judge refusing to give effect by amending decree to his predecessor's decretal order, (10) refusing summonses, (11) passing a decree where there is no evidence at all or admission to support it, (12) the Judge addressing himself to matters entirely foreign to the inquiry he had to make, (13) erroneously bolding that a particular Act or section of it is applicable to the case, and that by reason of that Act or section the suit does not at all he, (14) not permitting a plaintiff in a suit brought upon two hundis to adduce evidence of payment otherwise than by the hundis, (15) excluding from evidence a docu ment because not stamped, (16) admitting a document in evidence though unregistered, (17) allowing a tenant to dispute his landlord's title, (18)

- Gorakh Babaji v Vithal Narayan, 11 B
 435 (1887)
- (2) Pugardin v Moidin 6 M. 114 (1882), held also to constitute a case of material irregularity
- (3) Har Prasad v Jafar Ali, 7 A 345 (1885) feed qu whether in this case there was not merely an error of law in construing art 164 of the Limitation Act, and whether same criticism does not apply to Davies, J, judgment in Kristnamma Naidu v Chapa Naidu, 17 M. at p 421 (1893)]
- (4) Subbiah v Dilawar Khan, 24 M L J 482 (1913)
- (5) Har Prasad t Jafar Ah, 7 A 345 (1885), at p 351, 1cr Mahmood, J, who held it, as well as the next four cases, to be cases both of illegality and material irregularity
- (6) Ib (7) Ib, at 1 302 [the case referred to is Surta: Ganga, 7 A. 411 (1885)]
 - (8) Ib (9) 1b
- (10) Balmakund v Jatan Lall 6 A 125,219 (1882), held also to be material irregularity
- (11) kaji thinad t Kaji Mahamad, 9 B 308 (1884)

- (12) Shields v Wilkinson, O A 398, 409, per Broadhurst, J , Edge, C J , considered the case to be one of absence of jurasdiction, and see Mamsha Eradi v Siyah Koya, 11 M. at p 232 (1887) , Bissessur Das v Johann Smidt,
- 10 C W N 14 (1905) (13) Debo Das a Mohunt Ram, 2 C W N 474, 478, 479 (1898), foll, Copal Chandra a Bagoo Mistry, 8 C W N 70 (1903) [pauper application]
- (14) Jugobundhu Pattuck v Jadu Chose 15 C 47, 50 (1887), held also to be material irregulanty, foll in Shri Vishvambhar v Shri Vasudev, 16 B 708 (1892), in which conversely the Judge enoneously held him self bound to make the order complained of
- (15) Chenbasapa ι I akshman Ramchan
 ra, 18 Β 369, 372 (1893)
 (16) Katchehand Harchand ι Kısan, 18 Β
- (16) Fatchehand Harchand t Kisan, 18 B 614 (1893), sed qu , see p 474, n (4), ande
- (17) Gurunath Shriniyas t Chenbasapist,

not mercly a mistake of law

18 B 745 (1893), sed qu, see last note (18) Patel Kilabhar , Hargovan Mansul ii 19 B 133 (1891), sed qu, whether this was directing, contrary to the provisions of sect 266 of the last Code, that in execution of a decree the tools of a judgment debtor be sold, (1) making an order without hearing the party's pleader, (2) A suing B for some property and the Court giving a decree to C, who was not a party to the suit, (3) the adoption of a procedure different from that provided by law, and such as to cause material injury to the suiter, the application of a section of the Code to a ease to which it does not apply, (4) holding wrongly, and contrary to authority, that there is a cause of action, (5) refusing to make a person a party to a proceeding, (6) a Judge or assessor hearing a case who has an interest in it . (7) Appellate Court questioning, contrary to the express provisions of the Statute, the admissibility of document improperly stamped, but admitted in evidence by Court of first instance , (8) attaching under a personal decree trust property , (9) non suiting a plaintiff, such a procedure not being permitted by the Code . (10) decree in pauper suit omitting to order plaintiff to pay Court fees when suit dismissed (11) omitting to state a case under sect 69 of the Presidency Small Court Act, (12) a District Judge revoking a sanction granted by a Subordinato Court on the ground that 'a sanction could not be granted to a third party "(13)

Irregularity,-Just as in the reported cases, questions of illegality are mixed up with those of jurischetion, so it is not easy always to distinguish " illequitty" from "material erregularity . In fact as will have been seen from the notes to the last paragraph, the Courts have often spoken of the same act as being both an illegabty and irregularity. A distruction has been drawn between cases in which a Judge omits to do something which a Statute quacts shall be done, and cases in which a Judge does something which a Statuto says shall not be done. In the former case, the omission may not amount to more than an irregularity in procedure. In the latter, the doing of the prohibited thing is ultra tires and illegal and without jurisdiction (14) using the latter term in its broadest sense. It has been said also that material "trequlardy" implies only the committing of an error of procedure, whilst acting "ellegally" means something more (15) One thing is clear, namely, that an irregularity is something less than an illegality, and before the Court will interfere

- (1) Badami Auar t Dinu Ras, S.A. 111 (1881) at p. 115, per Straight, J., and per Malimood J in Dhan Singh t Basant Singh 8 1 519 (1880) at p. "23, and per Trevelyan, J. m Sew Bux + Shib Chunder, 13 C 225 (1886) at p 231 [the word costs should lm tocla]
- (2) Chakrapana : Varal alamma 15 M. 227 (1811)
- (3) Sen Bux : Shib Chun hr 13 (225. _30 (155c)
- (4) Ib., considered also apparently to be a material irregularity
- (5) Rosa Uston e Pitambar Das, 25 L 411, 121 (1313), and que, whether as held by Haintpee, J., contra, there was not merely an error of law
- (t) Micitratueni Dani r Shiama Churn. 21 (S) (184), Jell and It le material

- arregularity. followed in Sr. Prosad Narum : Dulhm Ginda, 18 C 1. J 612 (1913). but see Rabbaba Abanum : \norphan Begum 13 (50 (1886)
- (7) Kashinath Khasaivala i Collector of Poona 9 B 553 (1554), Swamiran i Collector of Dharwar 17 B 299 (1842)
- (b) Shidat to + Irasa 18 B "37 (15.0)
 - (J) In re Shard 28 (574 (1 81)
- (10) Yasudeya r (hinnasami 7 V 554 at p. 500 (1851).
- (II) Collector of hanara r Rambhat, 18 B
- 454 (15.0) (رام 15) بالشارك الشريسة هما المناطقة المناطقة الشار (12) المناطقة المناطقة المناطقة المناطقة المناطقة المناطقة
- (13) Ram Frank! Mails (1811), 27C.13 (1.95) (14) Rameshur Singh r Sheedin Singh, 12 L 510 (1804), P R
- (1°) Medicat Blagwan r Abetter Mom. 1 CIF 1 (17 (1x +) ride aw. p. 15%.

it must be shown to be material-that is, an irregularity which has prejudicially affected the merits of the case

Certain cases of what has been held to be material irregularity will be found noted in the commentary on "acting illegally" Other reported eases are determining an issue which does not really arise in the case, and basing the decision on such determination, (1) omissions or errors of procedure in the investigation of a matter, such as the omission to comply with the procedure prescribed by sect 3 of Act XIX of 1811, relative to curators. (2) entertaining and granting an application under sect 108 of the last Code, without notice to the other side, in contravention of the directions of sect 109 of the same Code , (3) determining a suit upon an issue which was not one on which the dispute between the parties could be properly adjudicated upon . (4) treating delivery of summons hy post to n person who was not shown to have been the defendant as good service . (5) Judge and Assessors sitting to determine amount of compensation to be awarded under Land Acquisition Act, and refusing to take into consideration may of the matters prescribed by sect 24 of that Act, or improperly taking into consideration may of the matters prohibited by sect 25 thereof, (6) Appellate Court disposing of n suit on a point taken by itself in appeal without affording the parties an opportunity of proving what was nocessary to meet that point, or deciding the suit without hearing the parties at all, (7) where evidence has been improperly taken, (8) appointment of a ourator under Act XIX of 1841 w thout bolding inquiry under sect 3 of that Act , (9) grant of leave under sect 18 of the Religious Endowments Act on an unverified petition not presented in Couct, (10) in contravention of sect 629, now O XLVII r 7, entertaining an appeal from an order admitting a review, (11) going into a fresh point on a new trial the materials necessary for its decision not being before the Court, (12) wrongly bolding as regards service, and there upon passing ex parte decree, (13) refusing to draw up a prehminary decree in

⁽¹⁾ Venkubai i Venkaji Anaji 12 B 617 (1887)

⁽²⁾ Papatnina v Collector of Godavari 12

M 341, 344, 347 (1889) (3) Badamı Kuar v Dinu Rai, S A 111 (1886), at p 115, per Straight, J , and per Mahmood, J, m Dhan Singh & Basant

Singh, 8 A 519, at p 529 (1886) (4) Rudrappa v Narsingrao, 29 B 213

⁽¹⁹⁰⁴⁾

⁽⁵⁾ Jagannath Bral hbhau 1 Sassoon, 18 B 606 (1893)

⁽⁶⁾ Joseph v Salt Company, 371 (1892), but as to a mistake concerning the principles of valuation, ib

⁽⁷⁾ Kristnamma Naidu e Chapa Naidu, 17 M 410 (1893), at p. 421, per Davus, J [the rest of the Bench, however, agreed m dismissing the petition], as to the last point, see Chakra Pani : Varahalamma, 18 M. 227 (1894), where the Court interfered, an order having been passed without hearing the

party s pleader So also where a party has not been permitted to adduce ovidence Chenbasappa v Lakshman Ramchandra, 18

B 369 at p 372 (1893) (8) Shiva Nathan : Joma Kashinath, 7 B

^{341 (1883),} at p 357 (9) Krishnasami Pannikondar i Muthu

¹ rishna Pennil ondar 24 M 364 (1900), per Shephard J, Arnold White CJ, holding that the Judge acted without jurisdiction or with material irregularity

⁽¹⁰⁾ Amdoo Mujan v Muhammad Davud, 24 M 685 (1901)

⁽¹¹⁾ Abdul Sadıq : Abdul Azız, 21 A 152, 154 (1893), as however, it was held that the District Ju lge had no power to set aside the order, qu whether the question was not one of

mrisdiction (12) Ralli e Parmanan I Jowraj, 13 B (12 (1883)

⁽¹³⁾ Abraham Pillu . Donal I Smith, 29 M. 321 (1900)

accordance with the findings , (1) ordering the amount deposited to be returned to the transferce of a non transferable occupancy holding, (2) failing to decide an issue which became necessary by the reversal of the decision of other issues by the first Court, (3) an order for consolidation of suits which is erroacous in principle and will lead to irremediable imschief, (1) allowing withdrawal of suit under O XXIII r 1, with leave to file a fresh suit on the same cause of action after the defendant had obtained a decree in his favour; (5) interference by a Collector, under sect 23 of the Mamlatdar's Court Act, with the findings on fact of a Mumlatdar which are on then face legal and regular,(6) It has been held that failure of a lower Appellate Court to frame and try the requisite issue under O XLI r 25 may, under certam circumstauces, he a material irregularity (7) But the mere fact that a lower Court erroneously refused to allow amendment of a plaint is not ground for interference (8)

"May pass such order."-The words employed radicate very wide powers, and the Court may do or direct anything to be done which it considers called for under the circumstances The actual order will, however, he controlled by these latter (9) Where the decision of a Court of first instance, or of both such Court and the Appellate Court, are without jurisdiction, the Court has set aside both decisions and returned the plaint for presentation in the proper Court (10) In such a case there has been no trial, and the High Court will not undertake the functions of a Court before which the cass should have, but has never, gone Where wast of musdiction is alleged as regards the Appellate Court only, if the latter Court exceeds its jurisdiction, the High Court may set aside that pertion of the order which was in excess of jurisdiction, and if the Appellate Court had not jurisdiction at all, it may set aside the decision altogether, and may refer the appeal to the Court which had jurisdiction, even if it were too late to prefer a fresh appeal to that Court (11) But if the original order was non appealable, the Court, in setting aside the decision on appeal of a Court not possessed of jurisdiction, will not enter into the question of the merits in order to deternine if the first order was correct or not (12) It has been held that the Court may at least pass any order which it might be authorized to pass on second appeal (13) The question, however, whether the High Court, is dealing with a case under this section, can examine the evidence and itself investigate the facts is the object of conflict. In some cases it has done so ,(14) is others not (15)

- (1) Sidhanath v Ganesh, 14 Bom, L R 916 (1912) . 37 B 60
 - (2) Nalaniz Fulmani, 15 C L J 388 (1912) (3) Sibu Saut v Nitai, 15 C L J 114(1911)
- (4) Kalı Charan z Surja Kumar, 17 C W N 526 (1912)
 - (5) Eknath : Ranon, 35 B 261 (1911)
 - (6) Kashiram v Rajiram, 35 B 487 (1911) (7) Ramias t India General Navigation
- Railway Co . 16 C W Y 424 (1911) (8) Venkatasubbiah : Seshachellum, 22
- VL L. J 136 (1911)
- (9) See Sarnam Tewari z Sakina Bibi, 3 A 417 (1881), at p. 420
 - (10) Ib

- (11) In re Subjan Ostagar, B L R (F B) 351 (1866)
- (12) In re Docown Lazi, B L R (F B) 517 (1866)
- (13) Waulyi Muhammad t Sved Husain, 3 A. 203 (1880), F B , Har Prasad v Jafar Alı, 7 A. 345 (1885), at p. 349
- (14) Kailash Chandra v Bissonath Paramame, 1 C W N 67 (1896), Shields t. Walkinson, 9 1 398 (1887), and see Maulyi Muhammad t Syed Husain, 3 A 203 (1880). at p 204, per Stuart, CJ , Sarnam Tewari t Sakma Bibi, 3 A 417 (1881), at p 419,
- per Stuart, C.J. (15) Ramrao : Babaji, 20 B 630, at p 632

it must be shown to be material—that is, an irregularity which has prejudicially affected the merits of the case

Certain cases of what has been held to be material irregularity will be found noted in the commentary on "acting illegally" Other reported eases are determining an issue which does not really arise in the case, and hasing the decision on such determination, (1) omissions or errors of procedure in the investigation of a matter, such as the omission to comply with the procedure prescribed by sect 3 of Act XIX of 1841, relative to curators, (2) entertaining and granting an application under sect 108 of the last Code, without notice to the other side, in contravention of the directions of sect 109 of the same Code, (3) determining a suit upon an issue which was not one on which the dispute between the parties could be properly adjudicated upon, (4) treating delivery of summons by post to a person who was not shown to have been the defendant as good service. (5) Judge and Assessors sitting to determine amount of compensation to be awarded under Land Acquisition Act, and refusing to take into consideration any of the matters prescribed by seet 24 of that Act, or improperly taking into consideration any of the matters prohibited by sect 25 thereof, (6) Appellate Court disposing of a suit on a point taken by itself in appeal without affording the parties an opportunity of proving what was nocessary to meet that point, or deciding the suit without hearing the parties at all . (7) where evidence has been improperly taken , (8) appointment of a ourator under Act XIX of 1841 without holding inquiry under sect 3 of that Act, (9) grant of leave under sect 18 of the Religious Endowments Act on an unverified petition not presented in Court, (10) in contravention of sect 629, now O XLVII r 7, entertaining an appeal from an order admitting a review, (11) going into a fresh point on a new trial, the materials necessary for its decision not being before the Court , (12) wrongly holding as regards service, and there upon passing ex parte decree (13) refusing to draw up a preliminary decree in

⁽¹⁾ Venkubai v Venkaji Anaji 12 B 617 (1887)

⁽²⁾ Papamma v Collector of Codavari 12 M 341, 344, 347 (1889)

⁽³⁾ Badami Kuar v Dinu Rai, 8 A 111 (1886), vt p 115, per Straight, J, and per Walmood, J, in Dhan Singh : Basant Singh, 8 A 519 at p 529 (1886)

⁽⁴⁾ Rudrappa v Narsingrao, 29 B 213 (1904)

⁽⁵⁾ Jagannath Brakhbhau t Sassoon, 18 B 606 (1893)

⁽⁶⁾ Joseph v Salt Company 371 (1892), but as to a mistake concerning the principles of valuation, ib

⁽⁷⁾ Kristnamma Naidu t Chapa Naidu, 17 M 410 (1893), at p. 421, per Davies, J [the rest of the Bench, howover, agreed in dismissing the petition], as to the last point, see Chaira Pani v Varahalumma, 18 M 227 (1894) where the Court unrefiered, an order having been passed without hearing the

party s Header So also where a party has not been permitted to adduce evidence Chenbasappa v Lahshman Rumchandra 18

B 369 at p 372 (1893) (8) Shiva Nathaji v Joma Kashinath, 7 B

⁽⁸⁾ Shiva Nathaji v 341 (1883) at p 357

⁽⁹⁾ Krishnasami Pannikondar t Muthu krishna Punnikondar, 24 M. 364 (1990), per Shephard J, Arnold White, CJ, holding that the Judge acted without jurisdiction of with material irregularity

⁽¹⁰⁾ Amdoo Mujan : Muhammad Davud,

²⁴ M. 685 (1901)

⁽¹¹⁾ Abdul Sadıq z Abdul Azız, 21 A 162, 151 (1893), as, however, it was hold that the District Judge had no power to set aside the order, qu whether the question was not one of jurisdiction

⁽¹²⁾ Ralli r Parmanan I Jowraj, 13 B 642

⁽¹³⁾ Abraham Pillat & Dinal I Smith, 29 M 324 (1907)

accordance with the findings, (1) ordering the amount deposited to he returned to the transferee of n non transferable occupancy-holding; (2) failing to decide an issue which became necessary by the reversal of the decision of other issues by the first Court , (3) an order for consolidation of suits which is erioneous in principle and will lead to premediable mischief, (4) allowing withdrawnl of suit under O XXIII r 1, with leave te file a fresh suit on the same cause of action after the defendant had obtained a decree in his favour, (5) interference hy a Collector, under sect 23 of the Mamlatdar's Court Act, with the findings on fact of a Mamlatdar which are on then face legal and regular,(6) It has been held that failure of a lower Appellate Court to frame and try the requisite issue under O XLI. r 25 may, under certam circumstauces, he a material irregularity (7) But the mere fact that a lower Court erroneously refused to allow amendment of a plaint is not ground for interference (8)

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- C. W N 526 (1912)
- (5) Eknath : Ranoji, 35 B 261 (1911) (6) Kashiram t Rajiram, 35 B 487 (1911)
- (7) Ramjas e India General Navigation Railway Co., 10 C W \ 424 (1911)
- (8) Venkatasubbiah 1 Shachillum, 23 V LJ 136 (1911)
- (3) Se Sarnam Tenares Sakina Bibe 3 & 417 (1881) at p. 420
 - (10) 1b.

- (II) Inre Subjan Ostagar, B L R (F B) 351 (1866)
- (12) In re Docouri hazi B L R (P B)
- 517 (1866) (13) Mauly: Muhammad t Syed Husain 3
- 1 203 (1880), F B Har Prasad r Jafar Ah 7 L 345 (1885) at p. 319 (14) Kailash Chandra t Besonath Para
- manie I C W \ 67 (1500), Shields i Wilkinson, 9 1 3 is (1887), and see Maulti Muhammad : Spel Husain 3 L 203 (1850), at p. 204, per Stuart, C.J , Sarnam Tewari , Salana Bale, 3 L 417 (1881), at p. 413,
- per Stuart, CJ (15) Ramrsor Balan, 2: B. 630, at p. 632

639.7

jurisdiction, or to examine witnesses, except where the Courishall have in the exercise of the power conferred by its charter authorized him so to do, or to interfere with the power of the High Court to make rules concerning advocates, vakils and attorneys

Who may address Court —This section corresponds with that in the former Codes (1)

638] 120. (1) The

Provisions not applicable to High Court in original civil or insolvent surisdiction

(1) The following provisions shall not apply to the at application of the court in the exercise of its original civil jurisdiction, namely, sections 16, 17 and 20.

(') Nothing in this Code shall extend on apply to any Judge of a High Court in the exercise of jurisdiction as an Insolvent Court

Original jurisdiction—See note to sect \$17, ante, and to Preamble—It has been held that in this section the word "ordinary—has been emitted before "original civil jurisdiction" (2)

Insolvency.—The words in the Code of 1877 were slightly different, but their meaning was the same (3) The Insolvency Court has nothing to do with the procedure to be followed in the execution of a judgment entered up under sect 86 of the Insolvent Act Tho execution itself is a proceeding of the High Court and sect 649 of the last Code applied (4)

⁽¹⁾ See In re Pleaders of the High Court, 8 B 105, at p 134 (1883) In re A Vakil s Application, 37 C 853 (1910)

⁽²⁾ In re A Vakil's Application, 37 C

^{853 (1910)}

⁽³⁾ In re Bhugwandas Hurpvan, 8 B 511, at p 520 (1884)

⁽⁴⁾ Ib

PART X.

RULES.

121 The rules in the First Schedule shall have effect as if Effect of rules in First enacted in the body of this Code until annualled schedule or altered in accordance with the provisions of this Part.

122 High Courts established under the Indian High-Gourts (et.s. Power of certain high Act, 1841, and the Chief Courts of the Punjab histo courts to make rules and Louer Burma, may, from time to time after previous publication, make rules regulating their oun procedure and the procedure of Civil Courts subject to their super-intendence, and may by such rules annul, after or add to all or any of the rules in the First Schedule

123 (1) A Commuttee, to be called the Rule Commutee, shall

Commutees in certain Madras, Bombay, Allahabad, Lahore and
Rangoon

(') Each such Committee shall consist of the following persons,

namely —

(a) three Judges of the High Court established at the town at
which such Committee is constituted, one of whom at
least has seried as a District Judge or (in the Punjab
or Burna) a Divisional Judge for three years,

(b) a barrister practising in that Court,

(c) an advocate (not being a borrister) or valid or pleader enrolled in that Court,

(d) a Judge of a Civil Court subordinate to the High Court,

(e) in the towns of Calcutta, Madras and Bombay, an attorney

(3) The members of each such Committee shall be appointed by the Chief Justice or Chief Judge, who shall also nominate one of their number to be president

Provided that, if the Clinef Justice or Chief Judge elects to be himself a member of a Committee, the number of other Judges appointed to be members shall be two, and the Chief Justice or Chief

Judge shall be the President of the Committee

(4) Each member of any such Committee shall hold office for such period as may be prescribed by the Chief Justice or Chief Judge in this behalf, and whenever any member retues, resigns, dies or ceases to reside in the province in which the Committee was constituted or becomes incapable of acting as a member of the Committee, the said Chief Justice or Chief Judge may appoint another person to be a member in his stead

(5) There shall be a Sceretary to each such Committee, who

shall be appointed by the Chief Justice receive such remuneration as may be pro-

Governor General or Council or by the

' case may be-

- 124 Every Rule Committee shall make a report to the High Count to the High Count to the High Count established at the town at which it is constituted on any proposal to annul, alter or add to the rules in the First Schedule or to male new rules, and before making any rules under section 10, the High Court shall take such report and consideration.
- 125 High Courts, other than the Courts specified in section

 Power of other High 1's, may exercise the powers conferred by that
 courts to make ides section in such manner and subject to such
 conditions as the Governoi General in Council may determine

Provided that any such High Court may, after previous publication, make a rule extending within the local limits of its jurisdiction

any rules which have been made by any other High Court

126 Rules made under the foregoing provisions shall be fallowing sanction subject to subject to the previous sanction of the following authorities, namely—

(a) if the rule is made by a High Court established under the Indian High Courts Act 1861 to the sanction of the authority prescribed by section 1, of that Act for rules made under that section,

(b) if the rule is made by any other High Court, to the sanction

of the Local Government

127. Rules so made and sanctioned shall be published in the Publication of rules.

Publication of rules. as the case may be, and shall from the date of publication or from such other date as may be specified have the same force and effect, within the local limits of the jurisdiction of the High Court which made them, as if they had been contained in the First Schedule.

128. (1) Such rules shall be not ruconsistent with the pro-Matters for which visions in the body of this Code, but, subject visions with the procedure of the procedure of Civil Courts

(2) In particular, and without prejudice to the generality of the powers conferred by sub-section (1), such rules may provide for

all or any of the following matters, namely -

 (a) the service of summonses, notices and other processes by post or in any other manner either generally or in any specified areas, and the proof of such service,

(b) the maintenance and custody, while under attachment, of live stock and other moveable property, the fees payable for such maintenance and custody, the sale of such livestock and property and the proceeds of such sale,

(c) procedure in suits by may of counter-claim, and the caluation of such suits for the purposes of jurisdiction,

(d) procedure in garnishee and charging orders either in addition to, or in substitution for the attachment and sale of debts.

 (e) procedure where the defendant claims to be entitled to con tribution or indemnity over against any person whether a party to the suit or not,

(f) summary procedure-

(1) in suits in which the plaintiff seeks only to recover a debt or liquidated demand in money payable by the defendant, with or without interest, arising—

on a contract express or implied, or

on an enactment where the sum sought to be recovered is a fixed sum of money or in the nature of a debt other than a penalty, or

on a guarantee where the claim against the principal is in respect of a debt or a liquidated demand only, or

on a trust, or

(11) in suits for the recovery of immoveable property, with or without a claim for rent or mesne profits, by a

rd a.] landlord against a tenant whose term has expired or has been duly determined by notice to quet, or has become liable to forfeiture for non-payment of rent, or against persons claiming under such tenant;

(g) procedure by way of ariginating summons;

(h) consolidation of suits, appeals and other proceedings;

(i) delegation to any Registrar Prothonotary or Master or other official of the Court of any judicial, quasi-judicial and non-judicial duties; and

(j) all forms, registers, books, entries and accounts which may be necessary or desirable for the transaction of the business of Civil Comis.

It has been held that in this section we have legislative recognition that such suits as were maintainable in respect of debts at the time of the Common Law Procedure Act, 1852, are still maintainable in this country (1)

Power of Chartered High Courts and Insulation of Court established under the Indian High Courts for make Courts Act 1861 may make such rules not inconsistent with the Letters Patent establishing it to regulate its own procedure is original civil jurisdiction as it shall think fit,

and nothing herein contained shall affect the validity of any such rules in force at the commencement of this Code.

130 A High Court not established under the Indian High Courts Ide. 1911. may with the previous sanction of the Local Government, make, to matter other than procedure any rule which any High Court so

established might, under section 15 of that .Ict make with respect to any such matter for any part of the territories under its jurisdiction which is not included within the limits of a Presidency-town.

131. Rules made in accordance with section 130 or section
130 shall be published in the Gazette of India
or in the local official Gazette, as the case
may be, and shall from the date of publication or from such other
date as may be specified have the force of law

Rules.—There sections effect the most important difference between the present and the last Code Under the law as it formerly stood High Courts

PART X

Sec. 131

had power to make takes to regulate the procedure of the original side of the Court, and High Courts and Chief Courts had power to make rules to regulate the procedure of Courts subordinate to them, but neither High Courts nor Chief Courts could make rules to regulate min matters which were dealt with by the Code of Civil Procedure, nor could they in any way affect the provisious of that Code. The power which is given to the High Court in England and other countries was denied to the High Courts in India, with the result that there could be no elasticity in matters of procedure which fell within the ambit of the Code, and that defects in the existing practice could only be remedied, when discovered, by the dilatory process of legislation.

This may have been proper at the time the Code was first cureted, but it has been rightly considered that there is no reason nowadays for denying to the ligh Courts the power to regulate these numer matters of procedure a nower which they are far more connetent to exercise than the Legislature In the present Code, therefore, the Legislature has enlarged the rule-making nowers of the High Courts and Chief Courts, and vested in them the authority to make changes in minor matters of procedure. This is done by placing the sections of the Code relating to these matters in the first Schedule, and giving to the ffish Courts and Chief Courts power to vary or amend the rules in the Schedule, or to make additional rules on inatters which are specified in the Code The result follows, that the rules in the Schedule provide a precedure for the present, but that that procedure can be altered at any time, and from time to time as seems fit to the Courts It has been thought desirable that in exercising these wider powers the Courts should have the advice of representatives of the two branches of the legal profession, and accordingly it has been provided that rules should only be made after taking the opinion of a Rule Committee composed of three Judges of the Ifigh Court, a Judge of a subordinate Civil Court, and of three other members appointed by the respective Chief Justices or Chief Judges, one representing the Bar, the other the Vakals or Pleaders, and the third the attorneys It was believed that a Standing Committee of this kind would be of great value Provision has been made for the appointment of a permanent Secretary to conduct the routine work of the Committee, and, as is hoped, to assist in drafting rules for them

The division between matters which should be dealt with in the Act and matters which should be left to rules is not easy to determine on any logical basis.

Matters which affect more than one province, and matters in which it is essential that there should be uniformity in all provinces, have been kept in the Act innor matters have been relegated to the Schedulc. But between these two classes there are many matters as to which opinions may differ whether they are proper subjects for rules or not. It is probably impossible to devise an arrangement which would disarm all entiressm, but that adopted in the Code is the best that presented itself at present. It may be said against this innovation that it will create divergence of practice between the various provinces and that this will cause confusion. The answer which has been given is that the divergence will be only in minor matters, and that even in this divergence there may be advantages. The conditions and requirements of

provinces differ greatly. A rule of procedure which may be proper in Cakutta may be cutively mappropriate in the Punjab. It is desirable that the general principles of procedure should be imiform all over India, but no harm can result from a divergence in the practice in Judges' Chambers, or in the particular form of plants or interrogatories.

It may also be objected that the plan of putting some of the provisions activing to any particular subject in the Act and others in rules will lead to confusion. This is an objection which applies to ull rules made under statutory authority: but it is one which it is hoped will have little force in this particular case as soon as practitioners have become familiar with the altered system.

The rules suggested in the Schedule to the draft will be found to depart to no very considerable extent from the last Code, though important amendments have been made. The subjects of counterclaim and garmshee orders which were included in the earlier Bill, have been omitted from the Schedule They raise questions on which there was no which the requirements of different potential theoretical three forces been thought better not to make

India, but to leave it to the Courts of each province to introduce them by rules if thought advisable. Power is given in the rule making section for these purposes. With sect 122, compare first paragraph of sect 652 of last Code, with sect 128, O. III r 6, and with sects 129-131, the second, third, and fourth paragraphs respectively of sect 652 of the last Code. New rules published since the date of the last cities are collected in the Appendix.

High Court rules.—These sections correspond with certain modifications with the second, third, and fourth paragraphs of sect 652 of the last Code. The section paragraph of that section was added by sect 63, Act VII of 1885, and the last two paragraphs by seet 2, Act XIII of 1895. Rules made and published under this section have the force of law. Hence, it was held that where an application for execution was not accompanied by a copy of the decree of which execution was sought, the application would not be treated as a step in aid of execution within the meaning of the Limitation Act (I). The rule must not, however, be ultra arrest, (2) and no rule, it was held, could add to or modify the conditions and hindations of the law Ind down in the Limitation Act (3). It has been recently said by a Full Bench of the Madras High Court that, until such new Rules are made, it is probable that the Rules made made the last Code should be considered as in force (1). As regards paragraph (1) of sect 653 and the High Courts, see sect 122, ance.

⁽¹⁾ Sadashiya i Ramchandra, 5 Bom. 1 R. 394 (1903)

⁽²⁾ Rajam Chetti i Seshayya, 18 M 236 (1893) Seo Lahtishwar Singh i Ramoshwar Singh, 31 C. 019, 024 (1997) For an instance of a High Court Rule differing from the Code, see Behram Jung Nawab a Hap

Sultan Ali Shustry, 37 B 572 (1912) (O ALI r 10 does not apply in Bombay) (3) Chumlal Jethabha i Dahyabhai Amu

lakh, 9 Bom. L. R. 1138 (1907)
(4) In re District Munsif of Licuxallur,

F B, 37 M 17 (1911)

PART XI

MISCELLANEOUS.

- 132 (1) Women who, according to the customs and is.

 Exemption of certain manuers of the country, ought not to be companied from personal appear in public shall be exempt from personal appearance in Count
- (2) Nothing herein contained shall be deemed to exempt such women from arrest in execution of civil process in any ease in which the arrest of women is not prohibited by this Code

Women —This is the only section which deals with the exemption of women (1) from personal appearance in Court —The privilege is limited to the class of persons described in the section, and eannot be claimed by all women of rank (2). It has been designed for the protection of purdanashin —The words "who according to," etc., were held not to apply to a case of a Parsi widow who alleged that according to Parsi eustoms she could not leave be house for two years after her husband's death, the custom being of a varying and uncertain character (3). But a Court, independently of the section, would always have regard to such circumstances as were put forward in that case (12 the alleged custom, age, and health of the applicant, and her desire to leave the jurisdiction) as an excuse for non attendance (4). See notes to O XVIII r. 4 and O XXVI r. 1

- 133 (1) The Local Government may, by notification in the [s. Exemption of other local official Gazette, exempt from personal appearance in Court any person whose rank, in the opinion of such Government, entitles him to the privilege of exemption
- (1) In unmarried girl of twelve years was held to be too advanced in age to allow of any of the immunities of childhood. Mainish v Mourts, 24 W. R. 375 (1875). Is to examination in house, see ih., and Suit 29 of 1903. (If C., Dhara Sundart: Suruti Bala, 28th

July 1904

(2) Davis r Middleton, S.W. R. 282 (1807) (3) Rustompi r Banochar, 14 B 584 (1889).

(4) Ib.

(2) The names and residences of the persons so exempted shall, from time to time, be forwarded to the High Court by the Local Government and a list of such persons shall be kept in such Court, and a list of such persons as reside within the local limits of the jurisdiction of each Court subordinate to the High Court shall be kept in such subordinate Court.

(3) Where any person so exempted claims the privilege of such exemption, and it is consequently necessary to examine him by commission, he shall pay the costs of that commission,

unless the party requiring his evidence pays such costs.

Exemption from appearance -Act VIII of 1859, sects 22, 23 The exemption is absolute, and not limited to cases in which the party claiming it has been summoned by the opposite party A Rajah instituted a suit under Act X of 1859 through an agent appointed in that behalf The Deputy Collector, not being satisfied with the information which the agent could give, adjourned the hearing to a subsequent day, and required the personal appearance of the Rajah The Rajah claimed to be exempted, but the Deputy Collector refused the application, and dismissed the case. It was held that the Rajah was not bound to attend, and the suit was wrongly dismissed (1)

184 The provisions of sections 35, 37 and 59 shall apply,

Arrest other than in so far as may be, to all persons arrested under this Code. execution of decree

135 (1) No Judge, Magnstrate or other judicial officer shall be hable to arrest under civil process while going to, presiding in, or returning

from, his Court

(2) Where any matter is pending before a tribunal having jurisdiction, the parties thereto, their pleaders, mukhtars, icvenue-agents and recognized agents, and their witnesses acting in obcdience to a summons, shall be exempt from arrest under civil process other than process assued by such tribunal for contempt of Court while going to or attending such tribunal for the purpose of such matter, and while returning from such tribunal.

(3) Nothing in sub section (2) shall enable a judgment debtor to claim exemption from arrest under an order to immediate execution or where such judgment debtor attends to show cause why he should not be committed to prison in execution of a decree.

Exemption from arrest.-The pivilege is not that of the person mentioned and for his personal henefit, but of the Court, and is conferred for the purpose of ensuring the due administration of justice (1) A case not governed by this section must be determined upon the principles of English law, on which this section rests (2) The validity of a commitment hy a Court of inferior jurisdiction can be inquired into, and if it be found that a person was, when committed by such Court, entitled to privilege from arrest he will be released (3) Where plaintiff, a resident of Bengal, went to Madras on the 24th October to attend a case which, however, was adjourned for seven weeks on the 27th October, and while waiting in Madras for the suit to come on was arrested on the 10th November, he was directed to he released (4) In a sust under Chapter XXXIX of the last Code (see now Order XXXVII), when the defendant is not allowed to defend without leave, a defendant appearing in Court for that purpose is privileged (5) If there is no bone fides on the part of that person that his attendance is required he has no privilege (6). The privilege being that of the Court, he cannot, when arrested for contempt, claim privilego (7) Tho privilege attaches only when going to, or attending, or returning from a tribunal Therefore, where an insolvent who was wrongly imprisoned was arrested on his release from tail, it was held that he could not claim privilego (8)

"Tribunal" is a comprehensive term intended to cover Criminal as well as Revenue and Civil Courts, (9) Insolvency Courts, (10) and arbitrators (11) The words of the section are now as under the last Code not " from arrest under the Code," but from arrest "under civil process" (12)

(1) Where an application is made that any person [s. shall be arrested or that any property shall bo Procedure where person attached under any provision of this Code not to be arrested or property relating to the execution of decrees, and such to be attached is outside district.

outside the local limits of the jurisdiction of the Court to which the application is made, the Court may, in its discretion, issue a warrant of arrest or make an order of attachment, and send

⁽¹⁾ John t Carter, 4 B L. R. O C J 90, 91 (1870) Wooma Churn e 1cd, 14 B L R App. 13 (1875), Samarapura : Parry 13 M 150, 158 (ISSJ), Ardeshiri Framu e Kalyan Das, 32 L 3 (1903)

⁽²⁾ In re Sooren Ira Nath, 5 C 106 108

⁽¹⁵⁷⁹⁾ (3) In re Omrato Lall Deg. 1 C. 75 (1575) In re Juggessur Roy, 5 C. L. R. 170 (1879)

⁽⁴⁾ In re Siva Bux, 4 M. 317 (1551)

⁽⁵⁾ In re Soorendra Nath, 5 C. 100 (1874) (b) Wooms Churn e Feil, 14 B L. R.

A) p. 13 (1875). (7) John r Carter, 4 B L. R., O C. J 10

⁽S) Samarapuri e Parry, 13 M 150 (1855) (J) R e Harakh Nath 4 L 27, 29 (1891) In re Oboy Churn Mockerpee, 2 Tayl. & Lell,

^{231 (1851)} a person was held privileged who was arrested immediately after his acquittal on a charge of modemanour

⁽¹⁰⁾ Samaraj an e Parry, 13 M. 1 .0, 155

⁽¹¹⁾ In re Juga sour hoy, 5 C L IL 170 (1579)

⁽¹²⁾ See R v. Harakh Nath, 4 A. 27 (1881).

The section was modified by a, 7, let VI. cf 1883.

party to such cause, summon to its assistance, in such manner as *it* may direct or as may be prescribed, two competent assessors, and such assessors shall attend and assist accordingly.

(2) Every such assessor shall receive such fees for his attendance, to be paid by such of the parties as the Court may direct

or as may be prescribed.

141. The procedure proceed in this Code in regard to suits

Miscellaneous proceed shall be followed, as far as it can be made applicable, in all proceedings in any Court of civil junisdiction.

Procedure for miscellaneous proceedings.—The object of this section, which corresponds with sect 38, Act XXIII of 1861, is to make applicable to proceedings other than suits and appeals, the procedure, so far as it is applicable, which is adopted in suits and appeals. An appeal, however, is a substantive right and not a mere matter of procedure. This section, therefore, does not confer any right of appeal where it does not exist under the Codo or any other law (1). The right of appeal must be given by statute conferring that right(2). If, however, a right of appeal is given by law, then the procedure in such appeal will be that laid down by the Codo (3).

Proceedings other than suits—The procedure applicable during the learing of the suit until decree is provided for by the Code, as also that applicable in execution of or appeal from the decree. This section in the last Code did not on its true construction apply to execution of the decree, and was inapplicable to potitions for execution before, and independently of, the passing of sect 4, Act VI of 1892, which amended it by expressly declaring that it was not applicable to such cases (1). Prior, however, to the Amending Act it had been held, in a number of cases, that all execution proceedings should, for the purposes of this section, be treated as miscellaneous proceedings (5).

⁽¹⁾ Hurcensth koondoo't Modhoo Soodun, 19 W R 122 (1873). Ningappa t Gangawa, 10 B 433 (1883) [foll, Jung Bahadra, Valiadeo Prosid, 31 C 297, 290 (1993)]. contra (appriently), Paresh Nath't Secretary of State, 10 C 31 (1883), sed gm., nether does it empower any Court to mucho the jurisdiction of another Court Damodara t Nittappa, 30 M 10 (1911)

⁽²⁾ Minakshi + Subramanya, 11 W. 26 (1887), 8 c, 14 I A. 160

⁽³⁾ See Iara Chand t Anund Chunder, 10 W R 450 (1868)

⁽⁴⁾ Thakur Prasad v Fakirullah, 17 A 106 (1591), 8 C, 22 I 1 44

⁽⁵⁾ In re Harshankar Prasad, I 1 178 (1870) [stay of execution], Gaya Parshad v

Bhul Singh 1 A 180 (1876) [District Court transferring to itself execution proceedings in Subordinate Court], Rajpal : Chooramun, 4 1 H C 10 (1872) [applicability of s 110 of Code of 1859], Sectul Pershad v Mahomed Aureem, 5 4 H C 164 (1873) [and of s 119 of same Code], Syud Deshan t Musst Ahodya 3 W R 64 (1867) [and of s 170 of same Code], Balan Ranchoddas : Mohanial Dalsakhram 5 B 680 (1881) [and of a 25 of Code of 1877], Sithalakahnii i lythilinga S W 543 (1554) [transfer of claim registered under s 331], Lakhmi Chanli Gaite Bat 7 A. 512 (1853) [at plicability of ss. 98 and JJ to a case where a petition asking for security for costs was struck off], Ningai pa i Gan gawa, 10 B 133 (1586) [applicability of as

All such cases, in so far as they proceed upon the ground that this section of the last Code was anulicable to execution proceedings, must be considered both as overruled by the Privy Council and superseded by the Amendment of 1892 introducing the Explanation Under the Code as it stood after the introduction of the Explanation to a 107 of the last Code this section does not apply to execution proceedings (1) The Amending Act, VI of 1892, by making this section mannheable in proceedings for the execution of decrees, deprived the Civil Courts of the power to apply by analogy to proceedings for the execution of decrees, the procedure specifically prescribed for proceedings in suits at a stage prior to decree, and hunted the procedure which could be applied under the Code in proceedings for execution to the procedure which is expressly, as in Chapter XIX of the last Code, or by implication, prescribed for proceedings for execution, or at the execution stage of a suit (2). The explanation has now been omitted, but presumably the law remains the same (3) It has recently been held by the Calcutta High Court that the explanation was only omitted because it had been rendered superfluous by the decision of the Privy Council in Thakur Prasad v Fakir ullah (1)

Chapter XIX of the last Code did not, however, contain a complete procedure for proceedings in execution (5) and where this was the case the matter might have been disposed of under the inherent power of the Court (6). Thus it was held that a Court had inherent power, if not conferred by statute, to dismiss an application for execution when the applicant fails through his own laches to put the Court in a position to proceed with his application, as also to proceed fortbuilt to decide an application for execution of a decree on the materials before it, when time has been granted to a party to perform any act necessary for the further progress of the application. and that

102 and 103 to proceeding taken under s 3III, Kefavat Ah : Ram Singh 7 \ 359 (1880) [s 374 held any heable to application for execution, but see now s 37541. Falaruddin v Official Trustee 10 C 538 (1884) [s 623 held an heable to a decision under 8 2441 Gaur Mohan v Tarachand JB L R App 17 (1869), Ramala Choora mun 4 1 H C R 10 (18,2) [applicability of s 110 of the Code of 1859 (98 of present (ode) to execution proceedings] Bissessur Bhugut v Murh Sahu, 9 C 163 (1882) [applicability of s 97, arte], Shee Prasad v Kastura Kuar, 10 A 119 (1887) [ap theability of a 103, antel, halco Kristo v Mahomed Lader, 12 W R 428 (1869) [s 119 of Code of 1859, order for rehearing]. Sarju Prasad : Sita Ram, 10 A. 71 (1887) [s 647 makes as 373, 3.4 applicable to proceedings in execution of a decree!

(1) Thakur Prasad t Fskirullab 17 A 100 (1894), s c, 22 1 A 44 Dhonkal Singh t, Phakkar Singh, 15 A 84 (1893), Bunko Behary t Nil Madhub, 18 C 635 (1891), Hayrat Akrammssa t Valudinssa 18 B 420 (1893), Rura Malt Luma 1804 P R No. 62 The case of Tukaram v Khandu, 20 B 541 (1895), is not against this riew as the decision proceeds upon the ground of the Courta' inherent power in a matter of this kind. A similar view of the section was taken in view case. In re Jodoo Monce Dosset 11 W R 494 (1894)

(2) Dhonkal Singh v Phakkar Singh, 15 A 84, at p 93 (1893), per Sir John Edge,

- CJ (3) See Asim v Raj Mohan, 13 C L J 532 (1910), the procedure laid down for suits is not applicable in its entirety to execution
- proceedings
 (4) Hari Charan Ghoso t Manmaths Nath
 Sen. 41 C 1 (1913)
- (5) Dhonka Singh : Phakkar Singh, 15 A 84 (1893), at p 94
 - (6) 1b, at p 95

either by summary process of execution of the appellate decree of reversal or by a new suit (1)

The Court has, independently of the statutory power conferred on it, an inherent (2) power in this respect. It is both its right and duty to prevent its proceedings being made the cause of injustice and therefore to order the restitution of the thing improperly taken, and generally to restore the party to the position he would have occupied but for its erroneous order since reversed. The Codes, subsequent to that of 1859, provided for restitution, and the cases under them extended the operation of the words of the Statute as defined in the present amended section. The first clause of the section has been re-cast so as to bring it into closer conformity with the existing practice, and the second clause has been added

It is immaterial whether the erroneous action of the Court was due to carrying into effect a wrong decree or whether it was due to execution proceed ings wrongly conceived for the purpose of carrying out a right decree. In either case the Court, upon the error being ascertained, is bound, so far as it can, to place the aggrieved party back in his original position, and to take means not merely to restore to him the property of which he had been wrongly deprived, but also to give him compensation for such loss as he had thereby sustained. It is competent to the Court in the course of the execution proceedings to afford the aggreeved party this remedy in full (3). Where a clummant under the former section elected to put forward his claim to meson profits in execution proceedings, and the claim was dismissed and he acquiesced in the dismissal and did not appeal, the order of dismissal was held a bar to further proceedings in respect of the same claim, so long as it remained univerversed (4).

The High Court of Calcutta has power under clause 15 of the Charter to order the Court of first instance to enforce restriction of the amount realized from the defendant in excess of the amount allowed by the Court of Appeal, and also to execute that part of the decree which awarded costs to the defendant (9)

The High Court made an order dismissing an application for leave to appeal to the Privy Council with costs—Held, that though there was no section in the Code directly applicable to the case, yet by analogy to this

⁽¹⁾ Cases cited post.

⁽²⁾ Rodger t Comptoir d Escompte, 7 Moo P C N S 314 (1871), Shama Pershad v Hurro Pershad, 10 V. I A. 203, 211, 212 (156a), Mookoond Lal t Mahomed Jaun 14 C 484, 486 (1587), Vasudev t Narayan 24 M. 341, 344 (1900) . Balvantrao : Sadruddin, 13 B 150, 188 (1587), in re Raj Lissen, B L. R . F B Rul 605, 607 (1866) . Rohm Singh t Hadding, 21 C 340, 343 (1893), Sham Sundar v Ivaisar, 29 A. 143 (1906), Dinesh v Sanlar, 2 C L. J 537 (1904), Raja Sinah : Koolden, 21 C 98J, 931 (1831) . Coflin : harbari Rawat, 22 C .01, 501 (1835), Kedir : Loya Moyce 20 W R 1J (1873) . Hami la : Bhudan _0 W R _3S (1873), Hurro Chander: Shooroodhonce 9W R 102(1868).

Dorasam t Annasami, 23 M. 306 (15.79). Lata koocet : Sobadra 2 C. L. R. 75 (1878). Venkatesh : Gorundrao, 21 B. 50 (1878). Hukum Chanda Kamrlanand, 33 C 927, 941, 942 (1900). Dinesh Prasada : Sankar Chand hury, 2 C. L. J. 537 (10.94). Shiam Sandar Lal v Kausar Zamam Begam, 29 L. 143 (1906). Beni Madha t Pran Singb, 15 C. L. J. 187 (1911)

⁽³⁾ Duljeet Gosain i Rewat Gosain 22 W R 435 (1674) Ayyar i Shastram Ayyar, 9 W 506 (1886)

⁽¹⁾ Srinath t Ram Rattan, 21 A 301, 303 (1902)

⁽s) Ic petition of Govind Koomar, B L. R., I B Rul 711 (1807).

section the proper Court to execute the order as to costs was the lower Court (1)

The section was held applicable by analogy to proceedings before Courts of Revenue (2) It has been held that the principle of this section cannot be extended to the case of a decree which has been set aside under sect 108 of the last Code (now represented by O IX r 13), for such a decree cannot be revived by any subsequent proceeding (3)

"Decree."—The former section provided for restriction to which a party was entitled under a decree passed in appeal under Chapter XLI of the last Code it was held therefore not to apply where the benefit claimed was not granted in an appeal, but in a review setting aside the decree of the Appellate Court itself (4) But in such a case the Court might, in the exercise of its inherent power, or treating the application as one for execution of the decree passed on review, order restitution (5) Nor on the same grounds did the section apply where the decree under which the benefit was sought was an order of the Privy Council, (6) though the principle embedied in it did (7). The qualifying words "passed in an appeal under this Chapter" have been now omitted. But it has been held that this section only applies to a case where a party is entitled to a benefit by way of restitution or etherwise under a decree passed in an appeal (8). The decree to be executed is the final decree whether that decree reverses, modifies, or affirms the decree of the lower Court (9).

"Varied or reversed."—As to the legal effect of such variance or reversal, see first paragraph

Money recovered under a decree or judgment cannot be recovered back whilst the decree or judgment under which it was recovered remains in force, but this rule of law rests upon this ground, that the original decree or judgment must be taken to be subsisting and valid until it has been reversed or superseded by some ulterior proceeding. If it has been so reversed or superseded the money recovered under it ought certainly to be refunded. The true question in such cases is, whether the decree or judgment under which the money was originally recovered has been reversed or suspended (10). The supersession to which their Lordships of the Privy Council were referring in this case must be a superseding by a decree of a Court which had competent juris diction to reverse the decree under which the money had been paid if it had been

Jogendra Chunder Sen e Wazidunnissa Khatun, 34 C 500 (1907), 11 C W X 856
 Masih ullah Khan t Majid un rissa, 26 A 143 (1903)

⁽³⁾ Raghu Nandan e Jagdis, 11 C. W. N. 182 (1903)

⁽¹⁾ Collector of Mourat r Kalka Prasad, 28

A 665, 667 (1306) (5) 1b.

^{(5) 10}

⁽⁰⁾ Sali I Husam + Lalta Prosad, 20 1 130, 142 (1597)

⁽⁷⁾ Bibeo Hamila e Bibeo Bhudhun 20 W R. 235 (1873), but see Gopal's Ooday, 12 W R. 411, 412 (1804), as to execution of Prox Council decree, see O ALIV r 15.

⁽⁵⁾ Girdhari Lali t Khushali Rani 31 \ 361 (1909), Pra_o Narani t Kamakhia Eingh 31 \ 551 (P.C.) (1903)

Kristo i Barrada Caunt H. M. I. V. G. Sch. Sch. 20, 1872.
 Malbonmad Vallamana
 Muhammad Var Shani H. V. 207. 273
 Chaol. Vanchand i Vethn. 19 B. 23
 Royl. Vanchand i Vethn. 19 B. 23
 Royl. And Ladman i Valla. 22 B. 500, 266
 Royl. Maran Kriman i Umrai Jan. B. M. Tro 171 (1831). Varura j Rais Lattl.
 L. 34 (1831). Michand i Ram Batan, 28 L. 402 (1832).
 V. 4. 40 (1832).

⁽¹⁰⁾ Shama Pershad r. Hurro Pershad, 19 M.I. A. 203, 211, 212, a. c., 3 W. E. P. C. 11.

(b) for the restitution of any property talen in execution of a decree, or

(c) for the payment of any money, or for the fulfilment of any condition imposed on any per on under an order of the Court in any suit or in any proceeding consequent thereon,

the decree or order may be executed against him, to the extent to which he has rendered himself per onally hable, in the manner herein provided for the execution of decrees and such per on shall for the purposes of appeal, be deemed a party within the meaning of section 4.

Provided that such notice in writing as the Court in each case thinks sufficient has been given to the surery

Execution against surety—This section core ponds with sect 204 of Act VIII of 1809, save that the portions in it thes were added by the present Code and the last clause added by sect 203 of 1ct A of 1877. By the latter 1ct the section was limited to sureties who had become liable help effect the passing of a decree in an original suit. That himitation has been removed by the present Code.

The section applies to sureties in respect of applications for arrest and attachment before judgment under sec**. 4*9 [O XXXVIII r 6] (I) It does not prevent a surety being suced on his bond but gives an additional remedy against him (2) A surety objecting to his liability being enforced under this section on the ground that he hecame liable after the decree should object under sect 278 [O XXI r 30] and not under sect 311 [O XXI r 30] (3) Under the Code of 1877 and 1882, by which the operation of this section only affected arretic who had become hable before the passing of a decree in an original art it was held that this provision did not apply to persons becoming arctics after decree (4) such as where after decree its terms were varied and provision and he for its powering that the such and for the payment of a portion of which a arctic terms that had sect 211 of Act VIII of 1839 (3) but the traditional for the performance of an sureties for the costs of appeal, (6) a. also sureties for the performance of an

second appeal was filed (1) The Calcutta II C originally held that sureties for costs of appeal came within the section (2) but subsequently that execution could not issue under this provision against surcties for costs of appeal, (3) or against surcties after decree under sect 545 [O XLI r 5], (1) or against surcties under sect 546 [O XLI r 6], (5) but it could where an expanse surcties under sect 546 [O XLI r 6], (5) but it could where an expanse decree was set used on condition the defendant found a surety for any amount subsequently decreed and another decree was passed after giving of security (6) and the huntation meant "before the decrea in the original suit" which had not been made, but which would be made if the hitigation proceeded and for the performance of which the surety hecama bable (6). The removal of these words of limitation and the inclusion of paragraph (b) now extend the operation of this clause to proceedings after decree. See also notes to last exection, 'Security for restitution'.

"For the performance of any decree"—A surety pending partition by a hond undertaking to produce certain honds in case the defendant fulled to do so or to pay the amount mentioned therein is not hable for the performance of the decree, and his hability cannot be enforced in execution (7)

"Mny be executed "—The mode of enfereing payment is it has been held, by summary process in execution and not by separate suit (8). Likewise in cases of security for costs pending appeal (9). The decree against the judgment debtor does not impose a joint hability on the judgment-debtor and surety so as to enable the decree holder to take advantage of applications for execution ogainst the judgment debtor alone to save limitation (10). Under this section the Court cannot declare a forfeiture in favour of the Government for the security money should he paid to the decree helder (11)

"Extent to which he has rendered himself personnlly liable—A surety for the performance of a decree of the Court of first instance cannot have his hability increased by the decree of the Appellate Court though it may be reduced theigh. His bability is not affected by a stay of execution heing granted (12) If he made himself bable for the repayment of the principal sum awarded in a land acquisition ease he cannot be made hable for interest and costs (13)

- 'Notice —It is immaterial whether the notice is given by the Court which passed the decree or by the Court to which it is sent for execution (14)
- (1) Hardeo Dao v Zaman 8 A 639 (1886) (2) Chunder Kant i Ram Coomar 3 C L
- (2) Chunder Kant t Ram Coomar 3 C : R 505 (1878)
- (3) Radha Pershad v Phuljum 12 C 402 (1885) Kali Charan v Balgobind 15 C 497 (1888)
- (4) Tokhan Sing t Udwant Singh 25 C 25 (1894)
- (5) Surjeo Das : Balmakund 23 C 212
- (f) Sonatun Shah : Dino Nath, 26 C 222 (1898) 3 C W N 228
- (") \arayanamma: Ramayya 22 M 268 (1898)
 - (8) Ausaji + Venayal 23 B 478 (1598)

- but see Abdul Kadır : Hurree Mehun 6 N W P H C 261 (1874) where it was held
- that the former section d d not provent a suit. And see as to execution Waman : Hart 31 B 128 (1996)
- (9) Abdul Wahed: Farcedoonnessa 16 C 323 (1889) [this decision was after the amen I ment of \$ 549 by Act VII of 1888]
 - (10) Narayan v Timmaya 31 B 50 (1906)
 (11) Basantilal v Cheddu 39 C 1048
- (11) Basantulal v Cheddu 39 C 1048 (1912) 16 C W N 664
- (12) Suleman : Shivram 12 B 71 (1887)
 - (13) Kusan r Vinayak 23 B 478 (1898)
- (14) Lalshmishankar v Roghumal 20 B 29 (1904)

Limitation -Previous applications for execution against the judgment debtor will not take an application against the surety out of limitation. Art 179 of Shed II of the Limitation Act not being applicable (1)

Appeal -An appeal, it has been held, lay from an order enforcing a claim against a surety under the former section (2)

Save as otherwise provided by this Code or by any law Proceedings by or for the time being in force, where any proceeding junst representatives may be taken or application made by or against against representatives any person, then the proceeding may be taken or the application may be made by or against any person claiming under him.

Representatives -- It ought to have been hardly necessary to enact this section But it appears to be necessary to meet cases such as that which held that because sect 108 of the last Code did not expressly refer to a legal repre sentative be could not take the benefit of that section (3)

In all suits to which any person under disability is a party any consent or agreement as to any pro-Consent or agreement ceeding shall, if given or made with the express by persons under dis leave of the Court by the next friend or guardian for the surt, have the same force and effect as if such person were under no disability and had given such consent or made such agreement

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Code, the Court may, in its discretion, Enlargement of time from time to time, enlarge such period, even though the period originally fixed or granted may have expired

Enlargement of time -In examining the provisions of the Bill, the attention of the Select Committee was directed to a number of clauses in which power was given to the Court to fix a period or to give or allow time for the performance of any act by a party On the strength of the facts underlying reported decisions, the clauses were expanded to make it clear, in some cases that the period or time may be extended, and in others that this power of extension may be exercised even though the original period of time has expired The Committee were of opinion that uniformity in this matter was of importance, because it might not impossibly be argued that the express conferment of these powers in certain eases negatives them by necessary implication in others This difficulty has been sought to be removed by the general enactment contained in

⁽¹⁾ Narayan Ganpathhat : Timmiy: 8 Bom L. R 807 (1J06), 31 B 50

⁽²⁾ Ghorce Lal Jha t Sheo Naram, SW R 24 (1867), Akhoot Ramanah : Ahmed I us offec, 15 W R *38 (1871), 7 B L R

^{81 ,} Suleman v Shivram, 12 B 71 (1887) (3) Janks Prasad t Sukhrans, 21 A 271

^{(1899),} des from in Ganada Prasad Roy t Shib Naram Mukerice ... 9 C. 33 (1 101)

the present section The principle embodied in this section was acted upon under the last Code in several cases, as under sect 549 of that Code (1) (now O XLI r 10) and under sect 54 where leave was obtained to amend plaint within a certain time (2) This section is the legislative recognition of the rule laid down in those cases (3) It cannot be taken to give a Court power to interfere with or modify its decree after an appeal has been filed against it (4) This section applies to cases in which the time fixed by the Code for doing some act is extended, but not to the extension of the time fixed by a mortgage decree for the payment of a prior mortgage (5) Under it the Court can extend the time for making an award, although the time has already expired (6) It has been recently held that this section does not entitle the Court to extend the time for payment of purchase money in pre emption cases and that an order under it is not a decree under sect 2 nor appealable under sect 104 (7) But in another recent case in the Allahabad High Court where an application to set aside a decree had been granted on the condition of payment of a sum of money as damages by a certain date, and this condition had not been fulfilled, and tho Court had then held that it had no jurisdiction to extend the time for such payment and had therefore proceeded to disallow the application to set asido the decree, it was held on appeal that an appeal lay from this order, and that the lower Court had such jurisdiction (8)

149. Where the whole or any part of any fee prescribed for Power to make up any document by the law for the time being in deficiency of court fees force relating to court fees has not been paid, the Court may, in its discretion, at any stage, allow the person, by whom such fee is payable, to pay the whole or part, as the case may be, of such count-fee; and upon such payment the document, in respect of which such fee is payable, shall have the same force and effect as if such fee had been paid in the first instance

Court fee -Sect 5824 of the former Code which this section replaces, was added by Act VI of 1892, settling a matter in respect of which the case law was in conflict (9) It was applied in the last mentioned case which was held to come either under sect 5 of the Limitation Act or this section (10)

⁽¹⁾ Jumnahar e Vissan las 21 B 5"6, 57J (1837), Bulin Naram t Shee Kour I" 1 A

^{1, 3, 4,} a c, 17 C. 512, 514 (1853)

⁽²⁾ Bhagunt Das Bugla e Hap Ahred,

¹⁶ B 263, 266 (1531) (3) Amir Hossain v Babu Nanal, 14

C, W N 882 (1910) (4) Parmanan I r Kripasindhu, 37 (545

^() Het \nsh + 1ska Ram 74 1 788 (1.012)

⁽t) Milki shi a r Satish, 25 C, 522 (1911) (7) Suranjan Sirgh : Rain Lahal Lah, 23

^{1 &#}x27;53 (1913), distrigualing Rahima e

Nepal Rat, 14 A. 520 (1892)

⁽b) Jagarnath Sahi t karuta Prasad Upadhya 36 L 77 (1913), datingualang Suranjan Singh v Rain Bahal I.al (1313)

⁽⁹⁾ See Durga Charan r Dokhuram, 26 C. 925 (1519), Laklu Naram v Kartikas, 18

C. L. J 133 (1913) (10) And see as to insufacently stamps 1

memorandum of appeal, Chemappa e Riag hunatha 15 M . J (1831), I ars hotain Lal r Lachman Das, J L 2-2 (1880). \a_arut Ahr Mahomed Kanco, 11 W R. 341 (15,2)

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same or under any other enactment hereby repealed shall, so far as they are consistent with this Code, have the same force and effect as if they had been respectively published, made, appointed, filed, prescribed, framed and conferred under this Code and by the authority empowered thereby in such behalf (1)

158. In every

Civil Procedure and other repealed enact-

In every enactment of notification passed or issued to Code of before the commencement of this Code in which left enact is made to or to any Chapter of section of Aet VIII. of 1859 or any Code of Civil Procedure or any Act amending the same

or any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to ats corresponding Part, Order, section or rule.

Repeal—The ordinary rule of construction of Statutes gives them a future operation only, unless the legislative intent appears clear from their terms that they are to have a ictiospective operation. This presumption against ictio spective operation does not, however, exist in the case of enactments relating to procedure, including pleadings, practice, and evidence. In fact, the general principle is that alterations in procedure are always retrospective in effect and apply to pending proceedings unless there be a declared intention to the contrary or good reason against it. When the effect of an enactment is to take away a right, then it does not prima facie apply to existing rights, but when it deals with procedure only, prima facie, it applies to all actions pending as well as future (2). There is, however, a distinction between "relief" and the mode or procedure for obtaining such relief. The "rehef" remains unaffected by a change of procedure (3). The intention to take away a vested right (including a right of suit) is not to be imputed to the Legislature unless it is expressed in unequivocal terms (4).

⁽¹⁾ It was pointed out in District Munsif of Truvallur (in re) (F B), 37 M. 17 (1914), that this is an enabling (and not a repealing)

sction
(2) In to Bhugwandas Hurpvan, S B 511, 518, 623 (1834), Haprat Akramussa, 1 Valulmussa, 18 B 123 (1830), Gungaram * Punamelrund, 21 B 822 (1890), Vedavallt Nasarah * Mangamma, 2 7 M. 538 (1904), C, 11 M. L J 310, Bliobo Sundar * Rakhal Chunder, 12 C 53 (1850) Hie rulo was contastly stated by Holloway, J, in Morris * Sunbamurthi, 6 M H. C R 126 (1871) as follows Replaced a result of the second shall not be affected by the retreattion of a new liw Rules as to procedure are as execution. It claw as to the acquisition of a fixed to the acquisition of the second shall not be affected by the retreattion of a new liw Rules as to procedure are as execution. It claw as to the acquisition of

But, as there jointed out the practical difficulty lies in the application of the principle and in distinguishing between material and processual laws—See also Hulm Chand, if (3) Per Freyelyan, J., in Bhobo Sundari

t Rakhal Chunder, 12 C vs3 (1880)
(4) Gogeswar Pal v Jiban Chan Irachan Ir
5 B, LJ C L J 519 (1214), follow 1.5 Com
massoner of Public Works v Logan, 1 C
355 (1993), dustinguish ng Lala Som Rante
k nituy 1 d, 10 1 V 71 (1212), 75 A --7
and Varifoort Bible v Akel Vilinind 47
C L J J 16 (1914)

THE SCHEDULES

THE FIRST SCHEDULE

ORDER L

Parties to Saits.

- 1. All persons may be joined in one suit as plaintiffs in [
 whom any right to rehef in respect of or arising plaintiffs.

 out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.
- 2. Where it appears to the Court that any joinder of plaintiffs

 Power of Court to may embarrass or delay the trial of the suit,
 order separate trials the Court may put the plaintiffs to their election
 or order separate trials or make such other order as may be
 expedient.
- 3. All persons may be joined as defendants against whom is who may be joined as any light to rehef in respect of or arising out of detendants.

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Scope of the English and Indian rules —Sects 26-32 of the last Code were first incorporated in Act X of 1877 from the various rules of Order XVI, framed under the Supreme Court of Judicature Act, 1873 Sect 26 was substantially the same with Rule 1 of the Order, as it stood at the time of the onactment of the Code, with the exception that that rule did not contain the words "in respect of the same cause of action". The rule was construed very broadly in the eather cases, and held to justify a joinder of plaintiffs having distinct

causes of action,(1) and seeking wholly distinct rehefs, and not to import any limitation on the power of joinder (2). It was gradually narrowed in its application, and in Hannay v Smurthwaite,(3). Lord Bowen observed that it was not "the intention of this rule to allow writs to be issued under which any number of plaintiffs might join any number of causes of action or that a writ should be like an omnibus travelling on a certain route into which any number of persons may get as passengers for the journey 'It was thus first restructed to cases in which rehef was claimed in respect of the same subject matter, "as Order XVI dealing with parties, assumes an ascertained subject matter," (4) a principle recognized here in Haramoni Dassi v Har Churn Chowdhry (5). In accordance with this view, it was held in a number of cases that where the causes of action were separate and distinct they could not be joined in one action (6)

The English rule (7) was then altered in October, 1896, the alteration restricting it to eases in which the right to relief, alleged to exist, was "in respect of or arising out of the same transaction or series of transactions," and where, if the persons joined brought separate actions, "any common question of law or fact would arise". Power also was expressly given in it to the Courts to "order soparate trials, or make such other order as may be expedient," if upon the upplication of any defendant it shall appear that such joined may embairs of delay the trial of the action."

The present English rule was therefore in widely different terms from sect 26 of the last Code A limited liberty of joining plaintiffs with

sect 26 of the last Code A limited liberty of joining plaintiffs with soparate causes of action is given. The nature of the limitation is plain upon the face of the rule. It was not thereby intended to allow any number of

list case was decided after the amendment,

⁽¹⁾ Booth t Briscoe 2 Q B D 496, Hukm Chand, C. P C 369

⁽²⁾ Gort v Rouney, 17 Q. B D 633, per Laher, M.R

^{(3) 2} Q B 422 (1833)

⁽¹⁾ Smith t Richardson 4 C P D 113 (5) 22 C 833 (1835), Hukm Chand C P C

^{169, 370} (b) Smurthwaite v Hannay, A. C 434 (1831) [sixteen persons, nine shippers, and seven consignees under various bills of lading, sucd shapewards for short delivery], Carter v Righty, 2 Q B 113 (1896) [fifty persons, relatives of as many mmers drowned by flooding of a mine, brought action for nt blgence], P & O S N Co : Isune Lymn, A C 661 (1595) [sixty two persons, or groups of persons, sued for damages by reason of collision between two ships], Poddio i Kyle, 2 I R _65 (1900) [libel in same words and in same document, but of different persons] In these cases the suits were held not maintainable under O 16, r l, as it stood | nor to its amendment

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same terms as the old English rule (7) Is in the following terms - Ill persons may be joined in one action as plain tills in whom any right to relief in respect of, or arising out of, the same transaction or series of transactions, is alleged to exist whether jointly, soverally, or in the alterna tive, where if such persons brought separate actions any common question of law or fact would arise, provided that if upon the appli cation of any defendant it shall appear that such join ler may delay or embarrass the trial of the action, the Court or a Judge may order separate trials or make such other order as may be expedient, and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to reliel, for such relief as ho or they may be entitle I to, with out any amendment But the defendant though unsuccessful, shall be entitled to his costs occasioned by so joining any person who shall not be found entitle I to relief unless the Court or a Julise in dispous of the costs shall otherwise direct.

different plaintiffs to join in one action any number of separate and different causes of action, but it was intended merely to effect a modification of the old rule by which a limited linety of joining plaintiffs with separate causes of action should be conferred. The conditions are, firstly, that the right to reher alleged to east in each plaintiff should be in respect of, or arise out of, the same transaction, and secondly, that there should be a common question of fact or law (1). Where, however, there were in effect the plaintiffs and two causes of action not arising out of the same transaction, the case was held not to be within the present rule (2).

From the foregoing it will appear that the English rule was wider than that laid down in sect 26 of the Code of 1882, which might generally be said to have represented the views commenly entertained by the English Courts in the middle period between the first promulgation of the rule and its amendment in 1896. While it is sufficient under the English rule that the right to relief should arise out of the "anie transaction, the Court hour, given a control over the exercise of such right, the right of joinder given by that section was only in respect of the same cause of action a right which was still further limited by certain decisions owing to the interpretation placed upon the terms "cause of action" as to which, see post The use of the term "cause of action" in the last Code gave rise to difficulty (tide post) , the phrase therefore has been omitted and r 1 has been made to correspond with the present English rule as regards plaintiffs. It is in substantially the sime terms as O AVI r I down to the words 'would arise" The portion in the English rule from 'provided that' to "expedient" has been substantially embodied in r 2 and in O II r & post, and the pertion as to judgment being given is embodied in O I r 1 The second paragraph of sect 26 of the last Code has not been re enacted, as to which see notes to O I r 1 Rulo 3 dealing with defendants corresponding with sect 28 of the last Code has been modified to bring it in conformity with r 1 The result is an extension of the right of joinder in conformity with the English law, the decisions under which will be applicable to this rule. The Select Committee said, "It is heped that the multiplicity of suits will be further curtailed by the new provisions we have inserted to remeve limitations which no regard is needless on the comprehensiveness of a suit, and by the wider powers of amendment vested in the Courts An adequate check (see 1 2) is provided by the power of a Court to interfere where embirras ment is likely to result

"Persons"—This and the following rules deal only with the joinder of parties, and have no reference to the joinder of cauces of action Sect 31 of the last Code, which provided that nothing in the section should be deemed

decided before the rule was altered must now be considered with reference to the alteration. The rule has been held to have untouched the practice in Admiralty of allowing joinder of parties in collision, salvage, and wages actions. The Marcchal Suchet, 18,50, P. 233, [2] Stroud r. Lawson, L. R. J. Q. B. 14 (18,5).

⁽¹⁾ Universities of Oxford and Cambridge (2) Gill L. R. (18.9) Ch. D. 55, as pp. 53, 60 The Editors of the Annual Practice, 1905, in their notes to this rule consider that the cases cited at p. 4.5 p. n. I, though not within the old rule, would be held probably to be within the new rule, subject to the control of the Court Other cases cited in the L. P.

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(1) Booth & Briscoe, 2 Q B D 496, Hukm Chand, C P C 369

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(4) Smith v Richardson, 4 C P D 113 (5) 22 C 833 (1835), Hukin Chand C P C

369, 370

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to enable pluntifis to join in respect of distinct causes of action, has been omitted, all reference to cause of action being omitted from this section, and O II deals with the joinder of causes of action

Generally, as to parties, whether plaintiffs or defendants, every person cun sue and he hable to he sued, and may thus he a party. The Code, which presupposes this rule, does not contain any provisions as to who may be parties. The portions of the Code which contain special provisions enacted on grounds of general interest, public convenience or policy, and, in the case of the incompetent, for their protection, refer generally only to the mode of suing or being sued in such cases. Every person who has a primary right or interest which has been violated in such a manner as to give him a secondary right to relief, may bring a suit as plaintiff against any person as defendant against whom an older for enforcement of that right is asked (1)

Subject to a few exceptions, the Common Law Courts were rigidly tied down to disposing of claims arising between exactly the same parties upon each side and in the same rights They could give a judgment for A sgainst C or against C, D, and E but they could not give relief of one sort against C and of another sort against D and E Nor could they give relief of one kind to A and of another kind to B, or of one kind to A and B jointly and another to A separately All the plaintiffs, if more than one, had to be jointly entitled and all the defendants jointly hable, with respect to every single matter upon which the Court was asked to adjudicate In Chancery, on the other hand, the course was to deal with the controversy or transaction forming the subject matter of the action as a whole, and endcavour to do complete justice to it and for that object the Court insisted on all the parties interested in the subject matter being brought before it (2) The Chancery Ruls has now been adopted as a general one hy both English and Indian Courts See r 10, olause (2) post The same person cannot however, he both plaintiff and defendant in a suit unless he appears upon the record in different capacities (3)

In order to enable a person to sue, the right must he a real and existing one (4) The legal interest must be existing at the date of the institution of the suit, (5) which must be brought by the person who at the date of the suit represents, so far as its subject matter is concerned the person with whom the original transaction took place (6) While the interest may be future it must be a present and existing one at the time of the suit Merely "an expectation of the possibility of a future event which, if it occurs, may give birth to an interest," is not such an interest as will give a right of

See Hukm Chand, C P C 350 et seq, where the subject is more fully discussed.
 Wilson s Judicature Acts 2nd ed.

⁽²⁾ Wilson's Judicature Acts 2nd c

⁽³⁾ So it has been held that a suit in the name of a lirm can be maintained by or against one of its members in a caracity different to that of partner Premy Ludha;

Dossa Doongersey 10 B 358, 361 (1886)
(4) Bibee l'amaconnissa v Woojjulmonco

Dossee, 20 W R 72 (1873)

⁽⁵⁾ Iyyappa v Rama Lakshmamma, 13 M 549 (1890)

⁽⁶⁾ Gossam Gunga : Dabee Dass, 25 W R 118 (1876)

suit (1) The right must have come into exi tence before the date of the suit, and therefore a real owner's disclaimer, made in his deposition in a suit, has been held not sufficient to give a plaintiff a right to maintain a suit (2) The plaintiff must have a subsisting cause of action at the time of the institution of the suit, and he cannot take advantage of events that have happened sub equently (3) I suit by a person in respect of an act by which he may never be injuriously affected at all is premature (f) Leaving such general considerations, it may be stated that the question as to whether there is a right to relief in any case, and as to the person in whom that right is vested, and against whom it may be claimed and the nature of the relief, are questions of substantive law, and not part of the law of procedure, which may restrict or even extinguish such a right, but cannot create or extend it (5) This matter therefore does not come within the scope of this Commentary, and will not be dealt with by it (6) The rules relating to parties laid down by the Code refer not so much to the persons who may be parties as to their joinder Is to defendants, tide post

"May be joined"—This section, under the Code of 1882, was beld to be on enabling one, ellowing a number of plantiffs with the same right to relief to join in one suit instead of brioging separate suits. It did not say that ell persons must be joined as plantiffs when they bid the same cause of action against the defendant (7). The present section is equally enabling. There is a distinction between a joint right and a right enjoyed in common with others. In the first case it may be necessary for ell persons jointly interested to be joined as parties, and if they are not joined the suit may be bad for misjoinder (8). Where a person sues under a power of attorney, the principal's name should oppear as plantiff (9). It was keld that Act X of 1859 allowed suits to be instituted by zemindars in their own names by their authorized agents, but the ogent has no right to institute the suit in his own name. The zemindar's name should oppear on the record as the plantiff (10). It has been held the managing members of a Mittalshare joint family aen sue authout making the other members

⁽¹⁾ Davis v Angel, 4 D F & J 531

⁽²⁾ Harı Gobind Adhikarı : Akhoy humar Mozumdar, 16 C. 364 (1889)

⁽³⁾ Budh Singh v Niradbaran Roy, 2 C L. J 431, 438 (1905)

⁽⁴⁾ Bhikdaree Singh t Kishen Prosad, 15 W R 106 (1871)

⁽⁵⁾ Hukm Chand, C P C 3.3

⁽³⁾ Humm Chand, P V 5.33.

(6) Ib, at pp 5.3-507 the following subjects are discussed — p 5.35 Right to relat of worshippers, p 355 Right of suit of person for slander of his relations, p 337 Right of suit in respect of property basiled or leased, p 3.85 Suit by assignee of does in action, p 338 Right of suit by transfero of property not in transferor a possession, p 361 When agent may suo on behalf of principal, p 363 Suits by Coslarers A number of Cases on these and other points.

will also be found in the notes to s 26 of O hincally s Civ Pr Code to which reference may be made

⁽⁷⁾ Baqu Lal Parisata v Bulak Lal Pathul 24 C 389 388 (1897) As a general rule however all the parties interested in the subject matter of a suit should be joined in it whether as plannish or defendants Rapendronath Dutt v Shaik Mahomed Lal 8 I A at p 112 (1881)

⁽⁸⁾ Bayu Lal t Bulak Lal, svyra, at p 399, thus difference between common and loint interest is the basis of the distinction between necessary and proper parties Sco Hukm Chand, C. P. C. 367, 368

⁽⁹⁾ Choonee Sookul t Hur Pershad, 1 1 H C R 277 (1869)

⁽¹⁰⁾ Ladleo Pershad : Gunga P rshad, 1 4. H C R 59 (1872).

of the joint family co plaintiffs (1) Where the plaintiff has assigned his rights during the pendiney of the suit it is irregular to substitute for his name that of the purchaser, but it is an irregularity which can be cured by the consent of the defendant (2) In a suit by or against unincorporated partnerships, the names of all the partners had to be given. This is the rule of the old Common Law, according to which a partnership is not a distinct legal entity entitled to suce or he sued in the firm name as a corporation. In India, the only departure from it recognized was in regard to corporations or incorporated companies authorized to sue or he sued in the name of some officer thereof, under sect 435 of the last Code. See now O XXIX r 1 (3) A firm thus could not sue or be sued without the names of all the members of the firm heing given in the plaint (4) See now O XXX

The question whether and in what circumstances a benimidar is competent to maintain a suit in his own name and without the beneficial owner heing a party to the suit (5) has been discussed in a number of rulings in the various High Courts, and in regard to it a considerable conflict of authority prevails. In those cases, which approve (6) the right of the benanidar of

(1) Kishen Pershad t Har Narain, 38 I. A. 45 (1911)

(2) Beer Chunder : Shaikh Tumeczood
 deen 12 W R 87 (1869) s c, 3 B L R 211
 (3) S 435 of last Code See Cannan ε

Aylash, 25 W R 117 (1876)
(4) Pulm Beharit Watson, B L R I B
904 906 (1868), Gunga Dutt t Dabee Das
25 W R 118 (1876) See now O AXX.

(5) If the real owner be co plaintiff there is, of course, no objection In Kally Prosonne v Dmonath 11B L R 56 64 (1873) it was held that the real owner should have been co plaintiff In bits Nath v Nobin Chunder, 5 C L R 102 (1879), it was said that the Court ought to direct that the beneficial owner be made a party and ought not to dismiss the summary.

(6) Doe d Tilluck : Hurry Dey, Mort 249 (suit on bond) [see Copeckristo Gosain v Gungapersad Gosam, 6 M I A 63 72 (1854), the Supreme Court distinguishing between legal and equitable title allowed the benamidar, that is the party in whose name the title deed was, to sue See Mohendra Nath t | Kali Proshad, 30 C at p 272 (1902)]. Bhaishankar v Harivallabh, 1 B H C R 20 (1863) [possessory suit for land, held good if consent of owner could be shown], Pro sunno Coomar v Gooroo Churn, 3 W R 159 (186a) [suit for declaration of right to land, real owner should sue, but benamidar may sue as trustee if no objection], Scenath Vag v Chundernath, 17 W R 192 (1872) [suit for possession after foreclosure, de

fendant held estopped], Ram Bhurosco t Bissessur, 18 W R 454 (1872) [benamidar can sue for fand, defendant could not rat c

authority to sue res judicala foll, Shangara Lrishnan, 15 V 267 (1891)], hand Aishore v Ahmad Ata 15 A 60 (1895) (henamidar may suo for land, consent pro sumed, adverso decision res judicata]. Bhola Pershad v Ram Lali, 24 C 34, 36 (1896) (suit to enforce mortgage, cannot be held that a suit by a benamidar can so extend to property instituted, though it may be partially defective, assignees of owner were added under s 32, after institution of suit), Sachitanauda v Baloram, 24 C 644 (1897) [suit for foreclosure and possession of land may be brought by benamidar, suit should not be dismissed because beneficial owner not added as a party-estoppel], followed in Chowdhury Kirtibas Das v Gopal Jn, 19 C L J 193 (1913). Ravji t Mahadov, 22 B 6,2 (1897) [a benami certified purchaser cau sue in his own name even when the true owners name is disclosed, fer Ranade, J.J., Bijjamma i Venkataramayja 21 M 30(1891)[benamidar, payee, or holder of note may sue], Dagdu v Balvant, 22 B 820 (1897) [suit for redemption, benamidar may maintain suit in his own name], Ya I Ram : Umrao, 21 1 380 (1899) [benamidar mortgagee may sue, previous cases reviewe I]

to sue, the right has been based partly on the first that he is the transferce named in the registered instrument constituting the transfer, and on the principle that a contract can be enforced by the parties who have entered into it north on the ground that the defendant is estouned from raising the question, and partly on the view that the benamidar must be presumed to be suing on behalf of the beneficial owner, or to mut the same idea into other words, that the suit is really brought by the beneficial owner through, and in the name of the henoundar. On the other hand, those rulings which are adverse (1) to the right of the benumidar to sue are mainly based on the ground that a suit cannot be maintained by any person who fails to prove if his title is challenged, that he has a teal interest of his own in the subjectmatter of the suit (2) In some cases it seems to have been held that there is a distinction between suits on bonds and the like and suits for unmoveable property in that in the former case a benamidar may, and in the latter may not, suc (3) But even in this the cases are not uniform (1) As to benamidar defendants, see not, and as to adding a benamidar as a party, r 10, post. O XXXI contains provisions relating to suits concerning property vested in trustees. The question has arisen in this country generally with reference

(1) Meheroonissa i Hur Churn Bose, 10 W 11 220 (1868) [suit for declaration of title to land . held, a benamidar has no right to maintain a suit in a Civil Court for property in which he has no beneficial interest], Fuzeelun Bibeo : Omdah Bibee, 11 B L. R. 60, n. (1568) [suit for possession by benamidar dismissed], Kally Prosonno i Dinonath Mullick, 11 B L. R 56, 64 (1873) [sust to has o salo set asido], Bibeo Tamaconnissa t Woonulmonce, 20 W R 72 (1873) [suit should he brought he real and not colourable owner). Bhoobunessar t Juggessurce, 22 W R. 413 (1874) (suit for money on bond not maintain ablel, Judov Nath t Girija Bhoosun, 23 W R 446 (1875) faut on bond, if plaintiff not real holder suit must be dismissed], Sita Noth t Nobin Chunder, 5 C L. R 102 (1879) fauit for a ossession of land secured by mort Lago. Court was not prepared to say that benamidar could suo in lus own namel. Hari Gobind t Akhoy Kumar 16 C 364 (1889) fant for land . held, plaintiff as benamidar could not sue an I that neither the disclarmer of the real owner nor the fact that he was a party to the suit made any differencel Timmalayappa t Swams Naskar, 18 M 469 (1894), Issur Chandra t Gopal Chandra, 25 C 98 (1897) [a mere benamidar cannot main tain a suit for electment, he having neither title to nor possession of the property]. Baroda Sundarı t Dino Bandhu 25 C. 874 (1898), s c, 3 C W N 12 (s lenamidar

has no right to suo for recovery ol possession of immoveable property] Mohandra Nath whall Problad 30 C.25 (1002) (the same), Chinnan * Ramachandra, 15 M. 54 (1891) (the Court pointed out that when the execution of a document is proved, further evidence is not required to show that the transferse has taken the interest which the document purports to convey, it is not necessary to prove as against a third person that the consideration passed, but dis missed the appeal on its appearing that the plantiff had no interest?

(2) Yad Ram t Umroo Singh, 21 A 380, 381 (1882) As to ahieration by beramidar, consent of true owner, equitable rights of purchaser see Sarju Parahad t Bir Bha Idar, 20 I A 193 (1890), and as to bond fide transfer without notice that transforor was benamidar Mir Mahomed t haihori Mohun, 22 I A 193 (1895) s e 22 C 909

(3) Mohendra Nath v Kah Proshad 30 C 265, at p 27 (1902), Hart Gobind t Ackhoy Kumar 10 C 304 (1889), Bupanma t Venkatavamayya, 21 M 30 (1897), Sarat Chunder i Acdar Nath, 2 C W N 286 (1898) [a benamdar can sue on a promissory note]

(4) Bhoobunessar v Juggessure, 22 W R 413 (1874), Judoo Nath t Girija Bhoosun, 23 W R 446 (1876) in both of which cases the suity were held not to be maintainable. to suits by a benamidar, who, as already stated, in some cases has been held not to occupy the position of a more name lender, but a position analogous to that of a trustee holding the legal estate

This rule itself is not obligatory It does not enact that any persons must join as parties It does not even say that all persons who may be interested in the result of an action must necessarily be parties, (1) or that all persons must join as plaintiffs when they have the same cause of action against the defen dant (2) Nor is it lind down anywhere else in the Code as to who must be joined as plaintiffs as distinct from these who may be so joined, and though some idea may be formed from the provisious of rule 10, yet they cannot furnish any general rule, as the first clause of the rule is restricted to the case of a bona fide mistake, and the discretion of the Court under the second clause is regulated by considerations different from those which must regulate the action of the plaintiffs themselves The exact character of the right is immaterial (3) there being no distinction between legal and equitable rights, so far as relief in a particular Court is concerned

R 1 was introduced to prevent a misearriage of justice from want of parties and to enable persons aggreeved by the same act, or having the same right to relief, to join in one suit instead of bringing separate suits (4) The former section was not exhaustive in words, and did not say that only persons referred to in it might be joined as parties. The contrary might, no doubt, have been contended for, on the authority of the maxim, expressio unius personæ est exclusio alterius. On the other hand, it was held that there were clearly cases not falling within sects 26 and 28 of the former Code in which plaintiffs and defendants were and must be allowed to tom in a suit. Thus persons having a successive interest were allowed to join as plaintiffs, (5) and in the case cited, in a suit by a daughter to set aside her mother's alienation of the property she held as a widow, the daughter's son was allowed to join as a co plaintiff, though he could not acquire the property in his mother's lifetime And in some cases, persons were allowed to join merely ex abundants cautela. Thus a receiver of an insolvent's estate may, after the insolvent's death, sue for everything due to his estate, but for greater security his executrix may be joined as a plaintiff (6) It is somewhat on a similar principle that, as a general rule, unless the policy of insurance has been legally assigned, and the assignment recognized by the insurance company or unless there has been an equitable assignment, and it can be shown that the holder of the policy has given value for it, the company is entitled to insist upon the legal representative of the assured being made a party to the suit for the amount due under the policy (7) Where however, there was mis joinder of plaintiffs and causes of action it was held that there was nothing to necessitate the dismissal of the suit, but that the party should be put to election and the plaint amended (8)

⁽¹⁾ Gobind Prasad v Chandar Sekhar, 9

A 486 491 (1887) per Edge, CJ (2) Baiju Lal : Bulak Lal, 25 C 385 (1897)

⁽³⁾ Hukm Chand C P C 372, 373 (4) See Banu Jal v Bulak Lal, 21 C 385

^{(&}quot;) Narayana + Chergalamma 10 M 1

⁽¹⁸⁸⁶⁾ (6) Bachubai v Shamji, 9 B 536 517

⁽¹⁸⁸⁵⁾ (7) Rajnaram v Universal Life Assurance

Co, 10 C I R 561 (1882) (8) Aldra be a Barrow, 31 C 602 (1 10)

See notes to O II r 3 post

1 ۵ r 7 o nı ex th for 101 aS mo son ere allowed to in iiio mer of an in-olvent's estate aus estate, but for the insulable different re-creation of the furnish having and observed that a first of the furnish having and the form that the furnish having on the furnish to see that the furnish having on the furnish to see that the furnish having on the furnish to see that the furnish having on the furnish to see that the furnish had a furnish to see that the furnish the furnish the furnish that the furnish the fur join merely e_ to wildow her Oldfield, J. Observed the forested in the property is the research of their possession after we have been at the property in the possession after wildow with the possession after wildow to oldfield, J. Observed the forested in the property is the possession after wildow wildow to the property is the possession after wildow the property is the possession after the possess widow were beld on the description of the property do that in limiting the bound of the street the original acts of obstruction of the street the distribution of the street the distribution of the street the s or but and acts of abstruction of the decembers to the but and acts of abstruction of the price project and acts of abstruction of the project and acts of abstruction at many he started the fit for a first and acts of abstruction of abstruction of abstruction of abstruction of abstruction of abstruction of acts of abstruction of abstruction of abstruction of acts The probably therefore it may be for the term " from the sew of the sew of the se 1) 22 C 533 (1593) foil in bundar JI 475

its extreme brockers specially with reference to the decision in Both r Briscoe (4) in which right persons were allowed to join in an action of libel, though to joint injury was slown. The section was held not to authorize the join let of several plaintake in respect of separate estaces of action (5) Under the last Code the exact effect of this rule, as depending on the identity of the "crue of action," had in the onl to depend on the sense in which that expression was understood as wed in this section. It is in its I midest senso taken to denote the con littone of the maintenance of an action, which generally consists of a right and its liteach. Thus ever cause of action presuppo es the existence of a right, but it may be observed that an actual breach is not always necessary to constitute a cause of action. In some cases even an actual dental or refusal of the right is not necessary, and a suit may be brought sumply on the basis of a right. Thus may person entitled to any legal character, or to any right as to any property, may institute a sun not only against any susponder was not allowed to pressurers one interested in denving his longment of the Court, and "The cause of acties considerable to both Miz pir ittack on their residence, the time when the injury complyined of was ne amitted, is one and the same, and the parties who committed the injury are il'so the same in both cases No Court is ousted of its prisdiction by the form of this action, and the irregularity, if any there be does not inpure the refendants, but is in their favour, masmuch as they have to defend one stead of two actions, and justice can be done in the form in which the suit has been brought. The cause, the time the place and the parties charged, heing the same in both instances, the fact that plaintiffs have not a joint interest in the whole of the property plundered by the defendants is insufficient to put them out of Court " (6) Cause of action is essentially different from subject matter, and the cause

"In respect of, or arlsing out of, the same act or transaction."-The words "in respect of the en weaver of action were added in the section of the last Code, as taken from the corresponding English rule, on account of

of action mentioned in sect 26 in the last Code could not in any case be identical with the subject-matter, the identity of which was generally held to be the

(4) Varajlal v Ramdat, 26 B 259 (1901)

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Alı Scrang : Beadon, Il C 524 (1885)

⁽²⁾ Hukm Chand, C P C. 379

⁽⁵⁾ Aldridge : Barrow, 34 C 662 (1907) (3) Ramanuja v Devanayka, 8 M 361 (6) Jugobundhoo Dutt: Mascyk, 1864, W. (1885)R 81 See Hukm Chand, C P C 379

test of the application of the corresponding early rule of the English Supreme Court The rule enacted in that section was narrower or broader according as the cause of action was understood in the broad or restricted sense above mentioned (1) Thus in the case (2) to which reference has already heen made, Innes, J. observed that if some such words as "in respect to a particular subject matter" stood in place of "in respect of the same cause of action," the suit might not have been had for misjoinder, but that "looking to the language of sect 26, and that of the latter part of sect 54 (of the former Code), as they jointly stand, it appears to us that the Code does not authorize the joining of plaintiffs in a suit in respect of distinct causes of action, in which they are not interested, and their interests are not merely conflicting but antagonistic " On the other hand, Tyrrell, J , in pointing out (3) the distinction between the cruso of action and the subject matter, observed that "the plaintiffs had distinct and separate subject matters of action, to wit, their separate shares in the estate possessed for her life by the widow in alienating the property to N , to the jeopardy of the future rights of the plaintiffs as her reversionary successors to two thirds of the estate," and that "the plaintiffs therefore, though unconnected and separate in respect to the subject matters of the suit, were conveniently and rightly joined in vindicating the one interest common to them all, centreing in the main issue in the case, which was simply the nature and extent of the widow's dominen over the estate she admittedly pessessed"

With a view to meet these various difficulties the Legislature has now omitted all reference to cause of action, and breadened the rule of joinder in accordance with the procedure of English Courts as to which vide ante

"Jointly "-Thus where a person sued his brothers for his share of them deceased father's estate but was transported for hie, his sons were made co plaintiffs, on the ground that they would be co owners with their father in the ancestral estate, the High Court observing that "it is true they would be in law sufficiently represented by their father, but in fact they might not be represented effectually "(4)

"Severally."-In the Court of Chancery there were many eases in which co plaintiffs might severally he entitled to the same rehef and might, before the Judicature Act, have been properly joined although their claim was neither joint nor alternative (5)

"In the alternative "-These words apply to cases in which there is a doubt as to who is the person entitled to sue upon the cause of action, as in the case of a sale to an agent, in which it may be doubtful whether the principal or agent should sue, or to cases where parties have different and con flicting interests in the same subject matter, and an act is committed which gives the same cause of action to either party, according to the eventual determination of the Court as to which of the two is entitled to recover

⁽¹⁾ Hukm Chand, C P C 379 (2) Lingaminal t Venkatammal, 6 M. 239

⁽³⁾ Seo Ram Sewak Singh v Nakel ed

Singh 4 A 261 (1892)

⁽⁴⁾ Narakka t Narayana, 6 M 331 (1883) (5) Smurthwarto : Hannay, 1 C. 501

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as in a case in which the plaintiffs were respectively a Receiver appointed to take possession of and manage a culhery business and other persons who were executors of the will nf an equitable mortgagee of the colliery. They sued for damages for a wrongful levy of execution against the colliery, which was a trespass giving rise to a right of action in which the plaintiffs were severally or, at all events alternatively interested (1) In a subsequent decision, in which this passage was cited, the Churt said, with reference to the view taken in the earlier case at to the meaning of the term "cause of action". "We feel, no doubt, that the cases here suggested are among those to which the words 'in the alternative' are intended in apply, but what we feel some difficulty in understanding is as in him the principal and agent in the one ease, and the parties having different and conflicting interests in the other, can be said to have the same cause of action, if that expression be taken to include the facts which constitute the right and its infringement, when the facts which constitute their rights must be different" (2) A plaint was held not to he bad because it prayed for a decree in favour of all the plaintiffs in certain allegations, or in the alternative, in favour of one of them, if other allegations should be proved (3)

Rule 2. Separate trials - See notes to O II r 6

Rule 3 Joinder of defendants -The third rule (4) (which [modified to meet the amendments made in r 1] corresponds with seet 28 of the last Code) is now substantially the same as r 4 of O XVI of the Rules under the Supreme Court of Judicature Act, 1873 The former section differed from it in that the Indian Legislature bad introduced the words "in respect of the same matter" The English rule has been construed to embrace eases in which the cause of action is not the same (5) but not those in which the actions are based on entirely disconnected acts (6) The terms of the English rule were held to he wider and more general than the terms of the former section (7) specially as its application was subject to as 41, 45 of the former Code, dealing with the joinder of distinct causes of action. It was said with reference to the former Code that the Indian Legislature had in several ways shown that it did not intend to introduce here the wide latitude as to the joinder of parties allowed in English Courts (8) It thus altogether omitted to enact any provisions corresponding to rr 48-55 of the Order dealing with the third party procedure, and to rr 5 and 7 of the Order the former of which provides that "it shall not be necessary that every defendant

⁽¹⁾ Lingarimal v. Venkatammal, v M. 239, 243, 244 (1882) (2) Haramoni Dassi v. Hari Churn Chou

⁽²⁾ Haramoni Dassi t Hari Churn Chow dhry, 22 C at p 840 (1895)

⁽³⁾ Lakshmakka : Vagi Reddi 28 M. 500 (1904)

⁽⁴⁾ See Hukin Chand, C. P. C. 408 (5) Child: Stenning 5 Ch. D 693.

⁽⁵⁾ Child : Stenning 5 Ch. D 695. (0) See Muthsppa Chetty : Muthu Palam,

²⁷ M. 80 (1903), citing Burstall t Beyfus, 26 Ch D 35, Saddler r Great Western Railway

Co (1896), 1 C. 450, Gower : Couldridge (1897) 1 Q B 318

⁽⁷⁾ Wathappa Chetty r Watha Palani, 27 U. So (1903) But in Knoouri Basser v Tallaparagada, 35 M. 39 (1910), it was hold that the test whether sect. 28 of the last Code applied was not whether the causes of action were the same, but whether the relief was sought in the same matter.

⁽a) See Marsingh Das r Mangal Dubey, 5 L at p. 170 (1552).

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⁽I) Hukm Chand C P C 379 (2) Lingammal : Venkatammal 6 VL 239

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5 A at p 170 (1882)

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⁽⁸⁾ See Narsingh Das v Mangal Dubey.

shall be interested as to all the reliefs prayed for, or as to every cause of action included in any proceeding against him" English r 7 provides that "where the plaintiff is in doubt as to the person from whom he is entitled to redress, he may join two or more defendants, to the intent that the question as to which, if any, of the defendants is liable, and to what extent, may be determined as between all parties" These observations are no longer applicable The limiting words "in respect of the same matter" bave been omitted, the English rr 5 and 7 bave been incorporated in the present Code as rr 5 and 7 of the present Order, and power has been given to promulgate further rules The question of the joinder of defendants must now be dealt with on principles substantially the same as those which govern the English Courts in the same matter

Persons -See notes, p 513, ante In the under-mentioned case,(1) it was held that the rules by which the Poora Cantonment Committee was created did by implication, though not by express words, create the committee a corpora tion for the purposes of the conservancy of the cantonment It could therefore sue, and bs sued, in its own name, on contracts entered into in its corporate character

"May be joined."—It was held that the provisions (2) of sect 28 also, like those of sect 26 of the last Code, were neither imperative (3) and obligatory, nor exhaustive The third rule is in the same terms as sect 28 of the Code of 1882, except as to the omission (which is of importance) of the words " in respect of the same matter," and the introduction of words which bring it into conformity with r 1 Additional power to make certain persons defen dants is given expressly by r 6 and there are several other cases in which persons may, and in fact must, be joined as co defendants, though "ony right to relief" is not alleged and cannot be alleged, to exist against them Reference may be made to the case of co sharers and others who ought to join as co plaintiffs and in their refusal to join as such, must be joined as co defendants There are, besides, persons against whom no right to relief exists, or 15 alleged to exist, and against whom no relief is or can be claimed, but who must be joined as co defendants for an effective and final determina tion of the suit or "uhose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit," and whom the Court may on that account, implead under r 10, and therefore it must be permissible for the plaintiff to implead as defendants in a suit. In the case noted (4) the minor brother of a person who had entered into a contract was held to be rightly joined as a defendant, even though no decree for specific performance, such as was asked against the party to the contract, could be asked against him, the

⁽¹⁸⁸¹⁾ (1) Cantonment Committee, Poons v Butorit, 14 B 286 (1889)

⁽⁴⁾ Magappa : Swaramasundara, 1) M 211 (1594) (2) Hukm Chand C P C 109

⁽³⁾ Loda: Mollah : Kolly Dass S C 245

whether the contract is of such a nature as in be hinding on him" A leading instance of this necessity of minder is found in the case of suits on mortgages, in which, on the grounds of equity and good conscience, it has long heen considered a general rule in England as well as in India, that all the persons having an interest in the mortgaged property must be impleaded as parties (1) Unlike the right of joint contractees, when two mr more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one of such joint primisors to perform the whole of the promise (2) And in suits on joint torts the tortfeasors may be saed jointly or separately at the option of the plaintiff, as their responsibility has been held to ho not only joint, but several also (3) The distinction between this rule and r 10 is this the former refers to the action of a plaintiff at the time of presentation of the plaint in joining in the same suit as defendants, parties against whom the right to any rehef is alleged to exist, while the latter refers to the action of the Court at a stage subsequent to the presentation of the plaint in adding a party either as plaintift or defendant, whose presence in the opinion of the Court is neces sary (4)

The Code does not contain any express provision as to who should he considered necessary parties and what would he the effect of the omission of a plaintiff to hring on the record all necessary parties R 13, however hy implication shows that an objection for want of parties is a valid objection to a sut or proceeding, and this section and r 10 hy implication show whn are to he deemed necessary parties. Reading this and r 10 together it has been held that in order that a party may be considered a necessary party defendant, two conditions must be satisfied—first that there must be a right to some relied against him in respect of the matter involved in the suit, and second, that his presence should be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit (5)

In a recent case in the Allahahad High Court where mortgagees suing for recovery of the whole of the mortgage money by sale of the mortgaged property, ountted by an oversight to implied persons who owned a share in the property distinct from the shares owned by the other defendants it was held that only so much of the claim should be decreed as related to the latter shares (6)

It is necessary, however to coneur in the language of Judge Story in which he states the impossibility of laying down any rules which shall be of universal application in the joinder of parties in equity observing that "whether the counton formulary be adopted that all persons materially

⁽¹⁾ Hukm Chand C P C 403 This rule has been enacted in a So of the Transfer of Property let 1852 Under this rule the plaintiff may, but under a So of the Code as O XAAIV r 1) he must make persons of O XAAIV r 1) he must make persons of two untersite he has notice, parties to the suit No Lala Surja Prosad r Golab Chand 27 C. 7.1 at pr. 73 (1903), subless an Prosad c Dharantt Naran, 13 C. L. J. 437 (1914).

Ganesh Lal v Charan Singh, 35 A. 247 (1913).

⁽²⁾ Contract 1ct s. 43

⁽³⁾ See cases cited in Hukm Chand, C. P. C. 413.

⁽a) Dur₀a Charan Sarkar r Joundra Mohun Tagore 27 C 493, at 1 497 (1899) (b) Gancahi Lalir Charan Sin₀h, 39 A 247

^{(1913), 17} C W / CCLXXXVIL

interested in the suit, or in the subject of the suit, ought to be made parties, or that all persons materially interested in the object of the suit ought to be made parties, we express but a general truth in the application of the doctrine which is useful and valuable, indeed, as a practical guide, but is still open to exceptious and qualifications and limitations, the nature and extent and application of which are not, and cannot independently of judicial decision be always clearly defined "(1)

In a suit for declaration of right against a proprietor of an estate it is necessary that the proprietor himself be made a party to the suit, not his kaindah only. A decree against the latter does not bind the former. The kaindah may, of course, be retained as a party if it is intended to make a personal claim against him (2). As regards benamidar plaintiffs, see aide. A plaintiff is entitled to a decree against a benamidar defendant who has covenanted with him for the quiet enjoyment of property (3). In a suit for reit, defendant pleaded non liability on the ground that he was a benamidar and that the jote belonged to A. It was held that the Court was not competent to introduce A into the suit, against whom no rehef had been sought by the plaintiff (4). Darputnidar and Seputnidar are proper, though not necessary, parties (5). In a suit for pre emption the vender is not a necessary party (6).

"Any right to relief."—It is not necessary that the relief to which the right is alleged to exist should be the same (7) Whicher there is a right to relief in any case depends on the principles of the substantive law applicable, and reference is made to a few typical cases in the text book cited (8) In the under mentioned case, (9) the absent decree holders were held not to be merely parties against whom the auction purchaser defendants were entitled to claim some indemnity, but persons against whom a right to relief existed in the plaintiff if the suit was well founded

"In respect of or arising out of the same act or transaction"— See notes, ante in particular note under some table and the next paragraph but one, post

"Jointly, severally, or in the alternative '-The right to rehef may exist jointly, severally, or in the alternative (10) These latter words refer

Sinthu Meera, 31 W _52 (1908)

^{(1) 1} Story, Eq P G 76 (e)

⁽²⁾ Madho Rao : Fhakur Pershad, 4 Agra

<sup>127 (1868)
(3)</sup> Somasundaram 1 Fischer, 19 W 60

⁽³⁾ Somasundaram i Fischer, 19 u (1895)

⁽⁴⁾ Moharanco Surno Moyce & Bykunt Chunder, 25 W R 17 (1876) [defendant dead when plaint filed Court cannot hear or receive written statement from person not a larty] (5) Upendra & Sheikh Sobhan 15 C I J

⁽⁵⁾ Opendra i Sneigh Southair 15 C (1911)

⁽⁶⁾ Harbans t Fota Sahu 32 1 14 (1909) (7) Magapa t Swaramasandara 19 M

^{-11, -10, 216 (1831)} tide a fe p o-1

⁽⁸⁾ Hulm Chand C P G 115-118, where also will be found discussed the question as to how far public officers and Government

may be made defendants
(9) Durga Charun Sarlar & Joundra
Mohan Tagore 27 C 493, 496, 499 (1899)

⁽¹⁰⁾ For illustrations see notes to annual Practice, 1914 Ord XM r s and Hukm Chrind, C P C 118, 419 In the recent case of Muthappa Chetty: Muthu Palani _7 M 80 (1993) the plantiff was hell not entited to sue jointly or in the alternative But the case has not been followed in hyathurai t

primarily to eases like those of principal debtor and surety in which both are hable, but the creditor may, at his option enforce his right against either, though not against both. They are not restricted, however to the e eases, and find application also where the plaintiff has no option and the hability depends on the facts as they may be found (1) Thus, in suits on contracts entered into by an agent and repudiated by the principal, both the principal and the agent may be joined as defendants with a climi for relicf against them in the alternative (2) Where the claim was to have a molurrars patta enforced as against the co sharer granting it and the other co sharers who repudiated it, and in the alternative to have the salams paid for the patta returned, it was held that the suit was in substance to enforce n contract to place the plain tiff in pos ession of the land under the patts and to declare his rights to it as against all the defendants, and to ask for compen ation as against the defendant granting it and that such alternative claums might be allowed against one or more of the defendants (3) In n suit by a purchaser of land for arrears of rent against the tenant and the vendor, to whom the tenant alleged having paid the same, the two defendants were held to be properly joined. and a decree against the vendor was sustained on appeal (4) The plaintuit in a suit to recover money from certain persons alleged to have borrowed money from his agent, is entitled, when the olleged debtors deny the loan to make his agent a co defendant and pray for a decree in the alternative against such agent (5)

Omission of the words "in respect of the same matter '-It was a subject of doubt under the Code of 1882 whether the use of the two expressions 'cause of action" and ' same matter" in sects 26 and 28 respectively of that Code, was intended to convey any distinction. As already pointed out, r 1 now omits all reference to cause of action. The subject will be found further discussed in the notes to O II r 3 dealing with the question whether that rule is a provise to this. Whether the terms be synonymous or the latter more comprehensive than the former it was held that if there were but one cause of action the jounder of defendants was justified (6) On the other hand where there were separate causes of action against separate sets of defendants it was held that the trial could not proceed (7) The difficulty arose in cases where, though there may be strictly different causes of action the joinder was sought to be justified on the ground that there was yet 'the same matter' as to which see O II r 3, post This raised the question whether assuming that the latter term was more comprehensive than "cause of action seet 28 of the last Code (corresponding with rule 3 of this order) was not controlled by the section corresponding with O II r 3 post. (8) and that was the basis of the decision in

⁽¹⁾ Hukm Chand, op caf

⁽²⁾ Buddree Doss v Hoare 8 C. 1"0 (1882)

⁽³⁾ Rajdhur v Lahkristna 8 C 963 (1882) (4) Madan Mohun Lal v Holloway, 12 C 555 (1886)

⁽⁵⁾ Meyapi a Chetti t Perrannun Chetta,

^{...)} M. 50 (190a)

⁽⁶⁾ Loke Nath v Keshab Ram, 13 C 147. 152 (1886) Ishan Chandra v Rameshwar, 21 C 831 (1897)

⁽⁷⁾ Ram Prosad v Sachi Dassi, GC W N 585 (1902)

⁽⁸⁾ Hukm Chand C P C 422

a case (1) in which the Punjah Chief Court held that a suit hy a person to set aside the attachinents, made on different dates at the instance of different defendants, of various sums to which the plaintiff was entitled, was had for mis joinder of causes of action, as also that an order merely for the distribu tion of assets among several persons under sect 295 of the former Code did not give a cause of action to a person considering hunself entitled to the assets, and that a suit against those persons was not tenable, though it may be that where several decree holders combine in getting an order of distribution passed to the prejudice of another decree holder who is solely entitled to the money in the hands of the Court, the latter is entitled to have the question decided in a single joint suit against the former, as well as to recover the monies severally realized by them under the order, as was the case in No 90, P R, 1892, and in Gowii Prosad v Ram Ratan (2) In Gangabai i Bal, (3) 148 persons were joined as defendants, and there was held to be no misjoinder, as the order which the plaintiff sought to have reversed or modified was common to all the defendants, and the plaintiff's claim to relief, in so far as that order was concerned, existed against all the defendants jointly. In the under mentioned suit (1) the matter was held not to be the same, the matter in the one case being an alleged breach of contract by an agent of the firm, and in the other being the right of one partner in the firm as against the other partner to have accounts taken and the partnership wound up Where a number of persons join fraudulently in combination do some act which leads to plaintiff's ouster from the full eujoyment of his proprietary right, they may all be joined in one suit (5) So, also in a suit for damages for assault against several persons, they may all be joined together, if it was simultaneously "made by parties proceeding together and acting in conjunction as to time, place, and assault," as the assault is in such a case only a single act (6) Where a suit was against two defendants uniting two causes of action, one of which was stated to have arisen out of a joint account of the defendants, and the other out of a transaction in which defendant No 1 alone was concerned, it was held that the right to rehef against the defendants quoad the second branch of the claim could not he said to exist, whether jointly, severally, or in the alternative, in respect of the same matter, so as to justify the joinder in the one suit under the former section (7) A suit (8) against one defendant was for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon that land, and Sargent, CJ, held that the relief claimed against the two defendants could not be said to he in respect of the same matter, the right to relief against one defendant hemg in respect of the non fulfilment of the contract, and that against the other defendant in respect of a threatened disturbance of his possession Where, on the other hand, both sets of

⁽i) Jhaman Lal : Sunt Lal (1897), P R No 43, Hukm Chand, C P C 422

^{(2) 13} C 159 (1886) (3) (1898), B P J 198.

⁽¹⁾ Muthappa Chetty : Muthu Palam, 27

M 80 (1J0J)

⁽a) Gujadhur Pershad : Saheb Roy, 13

W R 203 (1872)

⁽⁶⁾ Ramessur Bhuttacharjeo t Naram, 14 W R 419, Varajlal : Ramdat J Bom. L. P 878 (1901)

⁽⁷⁾ Sama Mal t Bag Husain (1888), P R No 189

⁽⁸⁾ Lukumsey e Fazulla, 5 B 177 (1880)

ereditors attached goods which the plantiff claimed as his and the plaintiff had to establish his ownership as against both, it was held that the right to relief against all the attaching creditors was in respect of the same matter (1) The fermer cection was held not to permit a tenant to bring a suit to have it determined which of two defendants, both of whom claimed rent from him, is his landlord . (2) the High Court observing in the case cited, that "the plaintiffs had no cause of action against the second defendant beyond that he demanded rent from them and obtained a decree for that rent," and "their ordy cause of action against the first defendant was that he had, on some other occasion, demanded and received rent from them," and "that cannot be con sidered the 'same matter within the meaning of the section" In a recent case decided under the last Code it was broadly held that the general principle governing the joinder of defendants was, that there must be a cause of action in which all the defendants are more or less interested, although the relief against them may vary, but that separate causes of action against separate defendants quite unconnected net involving any common question of law or fact could not safely be joined in one action (3) In a recent case under the present Code it has been held that the first condition to be fulfilled before joining several persons as co-defeudants is that the right to relief must arise against them all from the same act or transaction (or the same series of acts or transactions) and the second condition is that some common question of law or fact would arise against them if separate suits were brought (4)

The Legislature recognizing that the words under discussion have given rise to great difficulty have followed the wording of the English rule and omitted

them I ide ante and notes to O II r 3

4. Judgment may be given without any amendment-

Court may give judg ment for or against one or more of joint parties (a) for such one or more of the planniffs as may be found to be entitled to relief, for such relief as he of they may be entitled to,

(b) against such one or more of the defendants as may be found to be hable, according to their respective habilities

"Judgment may be given," etc.—Visjonder of plaintiffs is only to plea in abstement and rither to the form than the substance of the action. It ought not therefore, if possible, to defeat the action altogether unless the defendant has been prejudired. The provision here referred to is obviously based on the principle that the misjonner of a party is plaintiff to whom the relief claimed could not be awarded whilst there are others to whom it might

Mookerjee, 4 C. W. N. 590 (1900) (3) Mowji Monji t. Kuverji Kanaji, 31 B. 516 (1907)

⁽¹⁾ Raghunath v Sarosh, 23 B 266 (1898)
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^{(2) 13} C IoJ (1886) (3) (1898), B P J 198

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to the join ler of the jurchaser of a tenure
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be awarded, is a mere defect of form which is not fatal to the action (1) Where a person and the widowed daughter in law of his deceased father sued for pre emption as joint co sharers, and the widow was found to be entitled only to maintenance and therefore not to be a co sharer, it was held that a decree could not be given to the other plaintiff without an amendment of the plaint, and as it was too late to amend the plaint, the suit was altogether dismissed (2)

"Respective liabilities"-The liabilities of all the defendants need not he the same, and there will be no misjoinder if some of the defendants are found not to he liable Thus, if in a suit against six persons for possession of a certain share of land and in the alternative for its rent, the fact that only one of the defendants is found to be in possession and that a portion of the claim for rent is not sustainable against another defendant, is not a ground for dismissing the suit altogether for misjoinder of defendants (3) An insolvent and his trustees have been sued together, though their habilities were not the same (4) It was held there was no misjoinder in a suit against two agents one of whom was hable to account for twenty years and the other jointly hable with the former for the last two years of this period (5) The suit, however, has been held to be bad where the plaintiff has united different causes of action in one suit against different defendants who were not jointly liable in respect of each and all of such causes of action (6) Where the defendants combined to keep the plaintiff out of his property it was held they were properly joined (7) In the under mentioned case the right to relief, so far as regards the first and second sets of defendants, was a right to relief against them severally but the cause of action arose out of the single subject matter, which formed the subject of the plaintiff's original mortgage (8) Where there is no misjoinder of causes, a plaintiff is permitted to hring a single suit against a number of persons, even though some of them may not be in terested in the entire subject matter of the suit (9) The general principle

⁽¹⁾ Ramanuja v Devanayaka, 8 M. 361 365 (1885), as to misjoinder of plaintiffs and causes of action see Varajlal t Ramdat 16

B 259 (1901) (2) Karan Singh v Nuhammad Ismail 7

A 860 (1885) (3) Janokinath : Ramrunjun 4 C 949

⁽⁴⁾ Audha Nath v Anant Das, 3 A "09

⁽¹⁸⁸¹⁾ (v) Degamber Mozumdar v Kallynath

Roy, 7 C 654, 657, 658 (1881)

⁽⁶⁾ Narsingh Das v Mangul Dubey, 5 A 1 9 (1883), foll in Bhagwati v Bindeshri, 6 A 106, 108 (1883) in which it was pointed out that joint interest in the main questions raised by the litigation was a condition prece dent to the join ler of several causes of action against several defendants, expl1 in Indar huar t Cur Pra ad 11 \ 33 (1883)

⁽⁷⁾ Omur Alı v Woylayet Alı 4 C I R

same conspiracy In Hira Lal Vozumdar v Prosunno Chundor 12 C L R 5a6 (ISS3) the defendants were held to have but one defence In Sudhendhu v Durga Dasi 14 C 435 439 (1887) and Ram Narsin Dutt 1 Annoda Prosad 14 C 681 (1887) it was held that the defendants had not combined and so there was no community of interest In Ram Nara n Dutt v Annoda I rosad 11 C 631 (1837) it was held there was misjoni ler of causes of action.

⁽⁸⁾ Bungsee Singh & Soodist Lall 7 C 739 745 (1889)

⁽⁹⁾ Wuhammad Balsh : Ram lat (1890), PR No 5

that the difference of the extent of the defendant's liabilities does not prevent a joinder of them in a suit is specially applicable in cases in which several properties comprised in an estate are alienated to different persons and all such aliences are allowed to be joined in one suit (1) An unsuccessful defendant may be ordered to pay the costs of the successful

Costs -The second paragraph of sect 26 of the last Codo dealt with the question of costs The words "entitled to his costs," etc. in that section. referred to the joining of persons as plaintiffs, as mentioned in the first sentence of the section The words in the corresponding English rule were held to refer to "the persons who bring the action, who act by one solicitor. and who speak of themselves as the plaintiffs, though they allogo that each of them has a separate right" (3) If one or some of the plaintiffs are successful, and the other or others unsuccessful, the successful were held hable to pay to the defendant the costs of the unsuccessful plaintiff.(4) and to recover from the defendant the whole of his general costs of the action . (5) Esher, MR . observing in the case cited, that the last sentence of the section as to costs applies "as between a plaintiff who has succeeded in the action and a defendant who has failed " And it is a settled rule of English practice that the costs occasioned to the defendant by the joining of the uu successful plaintiff may be deducted from those payable by the defendant to the successful plaintiff (6) The Select Committee in their report stated that they understood that in practice the provisions of sect 26 of the last Code relating to costs was not operative in the Mofuseil, and that part of the section has therefore not been reproduced

5. It shall not be necessary that every defendant shall be interested as to all the relief claimed in any Defendant need not be suit against him interested in all the relief claimed

"As to all the relief"-This rule, which is new, is taken from the first portion of O XVf r 5 of the English rules. The words ' or as to

(1) Hukm Chand, C P C 427 See Sami Chetti : Ammani, 7 M. II C. R. 260 (1873), Vasudeva : huleadi, ib , 200 (1873). Mahomed t Arishnan, 11 M. 100 (1886) . Abdul c Ayaga, 12 M. 234 (1889), Chuhar Mall : Bakhtwadi (1890), P R No 149, Shoroon Chunder : Mothoor Mohun, 4 W R 103 (1865), Arishna Gopal e Hurry Nath Dutt. 25 W R. 60 (1876), Haranund v Prosunno Chunder J C. 763 (1883) So in Ishan Chan Ira : Rameswar, _ 1 C. 831 (1837) (approved in Umabas t Vithal, 33 B 233 (1 a)s)), it was feld that the reversionary heirs of a llin lu can, in a suit to set asale the separate abenations of several parcels of the husband s land, made by the wilew 1 m the several ahences. Though see Ganeshi Lal t Khairati Singh 16 A 2"J (1891). hachar Bhoi v Bai Rathore, 7 B asJ (1883) in which there was held to be interprinder cach alienation being treated as a separate cause of action. The latter case has been distinguished in Umabar (Vithal 33 B 233 (1 105)

- (2) Chill r Steams 11 Ch. D 52.
- (3) D Hurmu. see : Gicy, 10 Q. B. D 13
- (4) lb.
- (a) Gort v Rouney, 17 Q B. D 625. (e) Umfreville r Johnson, 10 Ch. App.
- 580 . Hukm Cland, C. P. C. 380

29.1

every cause of action included" which appear in the English rule have been omutted

6. The plaintiff may, at his option, join as parties to the Joinder of parties liable same suit all or any of the persons severally, or jointly and severally, hable on any one contract, including parties to bills of exchange, hundrs and promissory notes.

Joinder of parties in same contract. This rule, which corresponds with sect 29 of the last Code, is the same as r 6 of O 16 of the English rules, except that the word "hundis" has been added. It is a modification of the general principle which required that wherever more than one person was liable to contribution to the plaintiff's demands, they should all be made parties to the suit (1) The word "contract" is, however, to be construed strictly, and a hability to account under a will is not a liability under a contract (2) In Baldeo Prasad v Grish Chundar, (3) the endorsee of a cheque sucd the endorser for a duplicate or the amount of the cheque said to have been lost and the High Court ordered the plaint to be returned so that the drawer night he joined as a defendant, but this was on the ground that a duplicate chequo could not be given by the endorser without the co operation of the drawer. The rule is merely an enabling one, and does not prevent the joinder in any case in which it would otherwise be proper Thus it has been held that the drawer and the acceptor of a bill of exchange may be joined as co defendants in a suit brought by the holder (4) When two out of three defendants hable for a joint debt had promised to pay separately it was held that the suit could proceed against them only (5)

7. Where the plaintiff is in doubt as to the person from whom the interpretation of the person from whom he is entitled to obtain redress, he may join two forces is to be sought on more defendants in order that the question as to which of the defendants is hable, and to which of the defendants in lable, and the lable in lable in lable in lable in lable.

"Is in doubt"—This rule which is new, is taken from O 16, r 7 of the English rules with some slight verbal modifications. It has been held under that rule that while alternative relief of different kinds may be given against alternative defendants, (6) it does not enable a plaintiff to bring separate causes

^{(1) (1905),} Ann Prac 157

⁽²⁾ Smith: Allen, 2 Ch 349 (1891) As to the offset of this section, and a 13 of the Contract Act, see Muhammad lakari a Radhe Ram 22 A 307, 316 (1900)

^{(4) 2} A, 754 (1880)

⁽⁴⁾ Pestonjee : Mirza Mahomed, 3 C 541

⁽⁵⁾ Bhugabuth Thakur : Vladhub Kristo Sett, 23 C 553 (1896)

⁽⁶⁾ Honduras etc., Co v Lefeve, 2 1x D 307, Massey t Hoynes, 21 Q B D 334

of action against different persons in one action (1) The costs of a successful defendant sucd in the alternative may be ordered to be paid by the unsuccessful co defendant (2)

8. (1) Where there are numerous persons having the same one person may sue or detend on behalf of all in same interest. One or may defend, in such suct, one or be sued, or may defend, in such suct, on behalf of or for the benefit of all persons so interested. But the Court shall in such case give, at the plaintiff's expense, notice of the institution of the suit to all such persons or any other cause such service or, where from the number of persons or any other cause such service is not reasonably practicable, by public advertisement, as the Court in each case may direct

(2) Any person on whose behalf or for whose benefit a suit is instituted or defended under sub rule (1) may apply to the

Court to be made a party to such suit.

Scope of Indian and English rule—It is a general rule that ill persons interested ought to be made parties to a suit however minimerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigations may be prevented, also that a person who ought to be, but is not, a party to a proceeding is not ordinarily bound by any decree or order passed therein. This rule yields to the exigences of particular cases, and there are well established qualifications to it, such as the power of the Court under this rule to make a representance order (3)

This rule, which corresponds with sect 30 and a portion of sect 32 of the last Code,(4) is the same as the English r 9 of 0 16, except that in the present rule the word "suit is substituted for 'cause of matter and it is here necessary to obtain permission of the Court for suing also, while under the English rule the permission is required only for defending a suit on behalf of others. The second sentence also has been added (5). The effect of the statutory rule is merely to give Legislative sanction to the practice which long prevailed in the Equity Courts of England. The great risk from abatement, and the mean remember on the expense involved in a great number of persons being parties, led those Courts to recognize the representative system as it was not inconsistent with general principles that certain judicial proceedings taken by or against,

⁽¹⁾ Thompson t London City Co 1 Q B 884 (1899), Frankenburg t Great Horseless Car Co, 1 Q B 512 (1900)

⁽²⁾ Sanderson (Blyth etc. 2 k B 533 C. L (1903)

⁽³⁾ Chudasama Sursangii : Partapsang Ishengarii 25 R. 209 (1903) , 8 c. 5 B L. R. 337 See also Rira Lal r Bharon 5 A at

p t07 (1883) which states one of the grounds on which the section is based.

⁽⁴⁾ Bukm Chand, C P (431

⁽a) See as to these amendments of the Enlish rule, observations of Norris, J., in Oriental Bank Corporation: Cobind Lall Scal, JC 605, 607 [1883]

a select number as representing a large class might, if fairly and honestly con ducted, bind or henefit the whole class (1)

In the first place, the rule does not constitute but presupposes the existence of a right to sue, without which it can find no application (2) The rule deals with procedure only, and does not affect substantive rights (3) In the under mentioned case, (1) Shephard, J, referring to the case of Jan Ali v Ram Nath, (5) observed that "it seems to have been considered that the granting of leave under the section would have made up for the insufficiency of interest dis closed in the plaint," hut added that "with great deference, that view appears to be incorrect "

Nextly, assuming that a right of suit exists under the substantive law, the rule is merely au enalihug one, allowing a suit to be instituted under certain circumstances hy some of the persons interested on behalf of all (6) Beverley, J, observed, in the case first cited, that "there are no words in the section to the effect that where persons have the same interest in a suit they are debarred from sumg either jointly or severally unless they obtain the permission of the Court to suo on behalf of all the persons similarly interested," and "the section does not forlid them from suing in their own right, it merely says that if they desire to sue on behalf of others, they must obtain the permission of the Court" Amoer Ah, J, after observing that "that section is an enabling section, and must be read in conjunction with Explanation V to sect 13' (corresponding with sect 11), said "The effect of sect 30, therefore to my mind is that unless such permission is obtained by the person suing cr defending the suit, his action has no binding effect upon the persons whom he chooses to represent Where there is a joint right it may be necessary for all persons jointly interested to be joined as parties, and if they are not joined the suit may be bad for misjoinder. In order to prevent the record from being unnecessarily encumbered hy many names, sect 30 allows one or more persons having a joint interest to suo or defend with the authorization or permission of the Court on hehalf of all Tho section, in fact, embodies a ruls of convemence based on reason and good policy but in my opinion it was not intended to take away, nor does it take away any light. It seems to me that sect 30 does not give any warrant for the contention that because a person has a right in common with others he may not maintain an action for the establishment or enforcement of his own right There is no obbgation on him to sue or defend on hehalf of others, and if he does not seek any rehef on behalf of those who have an interest in common with him or to bind them by his action, there is nothing in the section or in any other law to dehar him from maintaining the action Even if he were to bring a suit on behalf of himself and the others he may choose to go on with the action on his own behalf, and would be entitled

⁽¹⁾ Jenkins : Robertson, I H L Sc 117 (2) Anundrav Bhikap t Shankar Dap, 7

B 323 (1683) (3) Sriniva*a Chariar : Raghava Chariar,

^{~3} M at p 31 (1897)

⁽i) 1b 7 M I J R 281 23 M at p 32 (15J7)

^{(5) 8} C 32, at p 41

⁽⁶⁾ Bayu Lal i Bulak Lal, 24 C 385, 389 (1897) The Rule is permissive and not prohibitive Srimvasa Chariar i Raghava Chariar, 23 W 28, 31 (1897), Gulba t

Kishan 32 A 281 (1310)

to do so if he mides the necessary amendments. The English calls on the point are collected in Daniell's Chancers Practice (I) and tend to show that the plaintiff of he has a right in himself to bring an action, or the defendant. if he has a right in himself to defend an action, is entitled to sue or to defend in any way he chooses without making any person a party to the action or to the defence so long as the effect remains confined to hunself "(2). As to execution see the case ested below . (3) and as to nubbe charity suits (1) notes to secta (1) and 93 auta

"Numerous."-There is no absolute rule as to what number will be considered sufficient, though in the case mentioned (5) twenty persons were not considered sufficiently numerous. A question as to the applicability, however, of the rule has ansen where the parties are numerous. This rule, as already observed, deals with procedure only and does not confer substantive rights of suit. Under the ordinary rule of the substantive law no action is maintainable by a private judividual for an infrincement of the rights of the gineral public, unless he has suffered special damage (6) As this rule presupposes a right to suo it gives none where there is otherwise none. This rule does not therefore allow one or more persons to sue on behalf of the ceneral public (7) In the case therefore of an infringement of a right of the public at large no suit will be under this section, or at all, unless on proof of special damage, in which case either one person sucs in respect of his individual right, and the rule does not apply, or if he should suc on behalf of others similarly specially injured. he sues on their hehalf and not on behalf of the general public (8) In the case cited(9) it was held that a suit could not be brought on behalf of a portion (10) of the ceneral public, such as the Hindu community, as the entire Hindu community was meabable of ascertainment, and that the words "numerous parties" (in the former section) meant parties capable of heing ascertained, as "seems clear from a reference to the provisions for service of notice upon all such parties" (11) No doubt the rule is often applied where the parties though numerous can be definitely ascertained as in the case of

⁽¹⁾ P 215, 5th ed.

⁽²⁾ The same view was taken by Shephard, J. in Srinivasa Chariar i Raghava Chariar, 23 M. 28, 32 (1897), where it was pointed out that there was an individual right to sue, and that if the course prescribed by this Rule was not followed in a case such as that dealt with, the only consequence was that the judgment did not bind the persons whose names were not on the record. In Kalidas v Gor Parjaram, 15 B 309, 319 (1890), and Tanudin v Pandu, 18 B 699 (1893), the corresponding section was held to be in applicable, as the plaintiffs sued for them selves, and it was not a case of persons suing on behalf of a class

⁽³⁾ Sadagopacharı t Krishnamacharı, 12 M 356 (1889)

⁽⁴⁾ Budreo Das Muhim v Chooni Lal

Johurry, 33 C 789 (1906) (5) Harrison : Stewardson 2 Hs 530, and ude post, notes on 'Permission.

⁽⁶⁾ Adamson t Arumugam, 9 M 463, 466 (1886). London Association of Shipowners : London and India Docks, 3 Ch D (1892), at pp 257, 270, and next note

⁽⁷⁾ Monmotho Nath Das: Harish Chandra

Das, 33 C 905, s c, IO C W N 867 (1906) (8 Ih

⁽⁹⁾ Sajedur Raja v Baidyanath Deb. 20 C 397 (1892)

⁽¹⁰⁾ See Monmothe Nath Das : Harish Chandra Das, 33 C 905, s c, 10 C W N 867 (1906)

⁽II) Sajedur Raja t Baidyanath Deb, вирга

creditors,(1) legatees,(2) members of a samaham,(3) dehenture holders, bond holders, club, and the like (4) The rule, however, is not limited to such cases The decision of the Madras High Court, (5) which was cited in the Calcutta case,(6) is not an authority for the principle hald down by the latter. The Hindu community, (7) no more than the Mahomedan community, (8) is not tho general public but only a particular portion, though it may be a large one of the population of this country, which consists of various races and creeds (9) Nextly, the observation of the Madras High Court that the section is "rather designed to allow one or more persons to represent a class having special interests," seems to show that the decision in the Calcutta case is incorrect even according to the Madras decision which it approved (10) Further, the provisions of the rule as to advertisement appear to have been overlooked and, lastly, other decisions are not consistent with it One or more persons have been allowed to represent classes of the general public having special interests, though they cannot sue on behalf of the whole general public So suits have been allowed by one or more persons on behalf of others of a sect,(11) caste,(12) worshippers at a mosque,(13) parishioners of a church,(14) fellow villagers, (15) or class of villagers (16) All these cases are suits on behalf of a defined class, though that class is composed of a more or less "indefinite number of persons "(17) Thus in one of the cases cited (18) two Brahmins were per mitted to sue to enforce a trust for the benefit of Brahmins generally, of whatever kind or sect or place In many if not in all of these cases if the matter is looked at strictly, it cannot be said that all the parties are capable of being ascertained so that's notice might if required, be served on each and all of them An inquiry made for such a purpose would have no abiding result While it was being made, and after it had been made its subject matter would

⁽¹⁾ Oruntal Bank : Gobind Lall Seal 9 C 604 (1883), set Manickavelu v Arbuthnot

¹ ML 208 (1882) (2) Geerceballa Dabee t Chunder kant,

¹¹ C 213 (1885)

⁽³⁾ Chennu v Krishnan, 25 M. 399 (1901) (4) Ann Pr 1906, notes to Ord XVI r 9

⁽⁵⁾ Adamson : Arumugan 9 W 463

⁽¹⁸⁸⁶⁾ (6) Saicdur Raja t Baidyanath Deb. 20 C 397 (1892)

⁽⁷⁾ Monmotho Nath Das z Harish Chandra Das, 33 C 905, s c, 10 C W N 567 (1906)

⁽⁸⁾ Jawahra : Akbar Husain, 7 A at p 182 , Ram Chandra t Ali Muhammad, 35 A 197 (1913)

⁽⁹⁾ Monmotho Nath Dasa Harish Chandra Das, 10 C W N 867 (1906), s c, 33 C 905

⁽¹⁰⁾ Canaipati Iyer's Hindu and Mahom medan Endowments, celaxxii.

⁽¹¹⁾ Srinivasa Chariar i Raghava Chariar, -1 M -8 (1897), Dhungut Singh e Puesh

Nath, 21 C 180 (1893) Maharaj Bahadur t Paresh Nath, 31 C 839, 845 (1904), Rs. hava : Rajaratnam, 11 M. 57 (1890), Baldeo

Bharthi v Bir Gor, 22 A 269 (1900) (12) Ganapati Ayyan t Savithri Ammal, 21 M 10 (1897) Monmotha Nath Das t

Harish Chandra Das 10 C W N 867 (1906) (13) Jan Aliv Ram Nath Mundal 8 C. 32

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⁽¹⁴⁾ Fernandez : Rodriguez, 21 B 784 (1897)

⁽¹⁵⁾ Haradhono Dass : Ramdoyal Rat 21 C 181 n (1890), Kalu Kabir : Jan Meali 29 C 100 (1901), Thanakat : Muniappa 8

VL 496 499 (1885) (16) Ahmedbhoy Habibhoy i Balkrishna Mukund 19 B 391 (1891), Bhundal Panda

t Pandal Pos 12 B 221 (1887) (17) To use the language of the Court in Srimivasa Chariar : Ragliava Chariar, 23 V

^{28, 30 (1837)}

⁽¹⁸⁾ Canapati Ayyan i Swithii Main I, 21 M 10 (1897)

constantly he hable to change, owing to deaths and hirths, new arrivals and departures of the members of the class on whose behalf the suit was sought to be instituted. The limitation of this rule, therefore, to cases where the parties can he ascertained has been dissented from in a case in which it was held that the Satchari caste of Chatra was a defined class of the general public and that the suit had been properly instituted under the former section, whether all the members of such caste were or were not capable of being so accurately ascertained as that notices could, if required, he served on each and all of them (1)

To sum up, no suit ean he brought on hehalf of the general public a suit may lie on hehalf of a class of the general public having special interests, though that class may consist of a more or less indefinite number of persons, as also on hehalf of numerous parties who can, in the strict sense, he accurately ascertained, as in the case of a suit by a legatee on hehalf of all other legatees

" Persons "-" Parties" was the word used originally in the corresponding rulo of the English law, but it has since been altered to "persons" In Oriental Bonk Corporation v Gobind Lall Seal,(2) it was contended, without success, that the word "parties" did not mean persons in the position of creditors, but "only porties necessary to the suit without whose presence on the record the suit would be defective," and Norris J, observed that the word "parties" meant persons, and "that the provisions would be unintelligible unless the word received that meaning" In occordence with this decision the word "persons" has been substituted for the word "parties" in the former Code as being the more appropriate expression. As a result of the representative system enacted in this rule, the parties represented by another, though interested, will not he parties to the suit, (3) but they can apply to he made parties, and if any person thinks that he is not properly represented by the plaintiff, os holding different views from his, he should apply to he inade a party personally (1) It has been held that it is undesirable that individual creditors should be added as parties in an administration suit, unless they can show strong reason to think that the person who has filed the suit on their hehalf is not conducting it properly (5) Though the effect of an order under this rule is that the parties, who have obtained permission to sue as representatives, have the conduct of the suit on hehalf of all those they purport to represent, yet if any person is dissatisfied with the conduct of the suit or deems that he is not properly represented, it is open to him to make an application to secure his views heing properly represented and if necessary to take the conduct of the suit out of the hands of those who by the permission of the Court represent him (6)

⁽¹⁾ Monmotho Nath Das : Harish Chandra Das, 10 C. W. N. 807 (1906), s. c., 33 C. 905.

^{(2) 9} C. 601, 600 (1883)

⁽³⁾ Leathley + Mc Indrew Fng (1570),
W A 20)

⁽⁴⁾ Watson t Cave, 17 Ch D 19, Fraser t Cooper, 21 Ch. D 718.

⁽⁵⁾ lassonj: r Esmailbhai, 34 B 420 (1909).

⁽⁶⁾ Dhuncooverbhai : Idvocate General, I Bom. L. R. 743 (1839)

A represented purson should not be made a party simply for the security of the defendant's costs, as the Court may order security for them etherwise (1)

"Same interest."-The word "interest" in the corresponding English rule was formerly held to deneto "beneficial preprietary interest," (2) But it has been more recently held that the rule is not confined to such cases, and that, given a common interest and a common grievance, a representative suit is in order if the relicl sought is in its nature beneficial to all whem the plaintiff proposed to represent (3) In the first of the cases last cited, it was held that the plaintiffs had a common right, which was invaded by a common entmy, and that they were entitled to join in attacking the common enemy in respect of the common right, although inter se they might have different rights The identity of interest in a suit dopends directly on the identity of the relief sought and only inducetly on the right on the hasis of which the relief is sought. The rule is therefore independent of the joint, cemmon, or several character of the right sought to be enforced, except so far as that character may determine the nature of the relief sought Whether a right 18 "leint," er "oemmen" or "eeveral," the rule is equally applicable or not applicable according as the rebef sought is, or ie net, the same in any of those cases (4) Where there is a joint right all interested must eue, er some one or mere may sue on behalf of the rest Where the right is common or several, a complete option is given Separate ouits may be presecuted by each of the persons interested, or if numerous parties pessess the same interest, seme one or more may suo on behalf of the rest under the terms of this rule The matter has been well summarised by Shephard, J (5) who said, "The rule of the Court of Chancery, to which the section owes its origin, appears to have been made applicable in two classes of cases There are the cases in which the number of persons claiming concurrent interest in the subject matter and therefore, according to strict rule, necessary (6) parties te the suit, is so large that they cannot all be conveniently joined with any chance of bringing the suit to a conclusion And there are the cases in which numerous persons have distinct but similar rights which might be prosecuted in distinct suits For instance there is the case of numerous creditors of the

De Hart ι Stevenson, I Q B D 313
 Temperton ι Russell, I Q B 435

<sup>(1893)
(3)</sup> Duke of Bedford : Elits, A C I (1901), at p 8, see lower Court, I Ch 494 (1899), and cf Taff Valo Ry Co v Amalgamated Society, etc. A C 426, 443 (1901)

⁽⁴⁾ Hukm Chand, C P C 131, 435 (5) Srimvasa Chariar i Raghava Chariar,

⁽⁵⁾ Srimivasa Chariar i Raghava Chariar 21 M. 28, 31 (1897), s c, 7 M. L J R 286

⁽⁶⁾ Jawahra t Abbar Husam, 7 A at p 182 (1881) The passage at p 580, 17 C (1889), Moham Mohun Das t Bunga Bud dan, was not meant to limit the rule to case of joint rights strictly so called "Joint interests was there used in the non-technical school of some interests," As to joint rights,

see Nitjanund Ghose t Mohendro Kristo 21 C 181 n (1889), Chuni Lall v Ram Kishen 15 C 465 (1888), Lutifunnissa t Nazirun, 11 C 33 (1884), and see Jan Ah : Ram Nath, 8 C 32 (1581), where the right was treated as a joint one [It has, however, since been held, following Zafaryab t Bakhtawar, 5 A 497 (1883), Javahra Albar Husam 7 A 178 (1884), that the right of worship of each worshipper is an in le pendent right wholly prespective of the right of the other worshippers, and that matter the joinder of other worshipers nor leave under this section is necessary Mohin I hat Sayaluddan, -0 C 810, 810 (1603) and see as to individual rights, Kalidas Jivram t Gor Pariarani, 15 B 3 9 (1 90)]

same person, or that of many persons claiming a right of common or right of fishing in respect of the same property '(1) As already stated, the rule is an enabling one, and therefore a person whose individual several right has been infringed may sue alone. But he may also sue on behalf of himself and others, whose individual rights have been infringed, if they have the same interest with him within the meaning of the rule (2) Co sharers in joint property have, however, not necessarily the same interest in a suit relating to that property In Ihra Lal t Bhairon (3) the suit was hy one co sharer against three other co sharers to prevent them from usurping exclusive possession of the joint land, and it was held that the suit would lie, and that the corresponding section to this rule did not apply to it, as though tho remaining co sharers would in such a case has o co parcenary or joint interest with the plaintiff in the subject-matter of the suit, they would not have the same interest in the suit, and would not be so "interested" in like manner as be was, as it might he "indifferent to them whether the defendants usurped exclusive rights in the shamilat, or it may be inconvenient to them at this moment to assert their own rights" And this decision was cited with approval in Dhunput Singh t Pareshnath Singh (4) in which it was held that the other persons of the Saumbary seet were similarly interested in suing, though the Digambary Jains were not similarly interested. It was held by a 1 ull Bench of the High Court in Vasudevan & Sankaran (5) that sect 30 (corresponding to this rule) has no application to suits to which a harnaran is a party in n representative capacity, Shephard, J, pointing out that the interest of the Karnatan "with his right of management and possession and his obligation to maintain the junior members, is surely not identical with the interest of n junior member who has a claim for maintenance only " It has been held that n suit is maintainable under this rule where a right to a village pathway is the subject matter of litigation, even in the absence of special damage (6) Where a party to a suit represents others under this rule, the decree is binding on those ho represents, but when such a party disobeys an injunction (which is personal in its nature) and is proceeded against in execution for that disobedience, an order in such proceedings will not be binding on those whom he was allowed to represent (7)

Permission —The Calcutta High Court has held that the requirement as to the permission is imperative, so that where it is not obtained the suit

In Ahmedbhoy t Balkrishna, 19 B
 181 (1895), Bhundul v Pandal Pos, 12 B
 1821 (1888), Haradhone Dass t Ramdoyal
 Rai, 21 C. 181 n (1890), Kalu Khabir t

Jan Meah, 29 C. 100 (1901)

(2) In Javahra t Akbar Husam, 7 A 178

(1881), at p 183, Mahmood, J, said, that the rule only applied where no individual right was interfered with but what was meant was necessarily applied. There was in this case a p invalue individual right, and at was

therefore held that the plaintiff could sue alone and need not have recourse to this rule or

^{88 92, 93,} ante. (3) 5 A 602 (1883)

^{(4) 21} C. 189 (1894)

^{(5) 7} M. L. J R. 102, cited in Hukm Chand. C P C 436

⁽⁶⁾ Kah Charan 1 Ram Kumar, 17 C W N 73 (1912)

⁽⁷⁾ Srimvasa : Arayar Srimvasa, 33 M. 483 (1910)

must be dismissed,(I) and that the permission must have been obtained pror to the institution of the suit, and cannot be given at the hearing nunc protune (?) A Full Bench of the Bombay High Court, however, has held that per mussion may, as under the old Chancery practice in England, be given at any time, as it does not involve a question of jurisdiction, and is analogous to that of adding parties, and where a suit is defective as to parties the requisite parties can be added after the suit is filed (3) The decision has been followed hy the Allahabad High Court (4) and the Madras High Court (5) the latter also holding that where leave had been given after the commencement of the suit it was immaterial that an application to sue had been previously refused The permission need not be in express words (6) In the case cited, Petheram, C J , and Ghose, J , observed \H that if permission can be well gathered from the proceedings of the Court in which the suit was instituted, the Appellate Court ought to hold that such permission was really granted" The Court should exercise a judicial discretion in granting the permission to some definite person or persons, (7) and permission should be given only if the number of persons suing or defending is so large as will fairly and honestly try the legal right in dispute, (8) and every right adverse to the opposite party would be represented (9)

"On behalf"-The first part of the rule implies that the plaintiff therein contomplated wishes to sue on hehalf of other persons similarly interested in suing, they also wishing the same (10) In a recent case the Court referring to this observation, though not deciding the point, observed that as the plaintiff suod on behalf of the sect of Digambary Jams, this section prima facie applied but that there was nothing to indicate that the other members of the sect wished to hrmg the sunt (II) The present section includes also the words "or for the henefit of " "On behalf" will only ho so far as the "same interest" is concerned Thus, an order appointing a person to represent a class such as the next of hin does not affect one of the next of kin who has a distinct and independent right, (12) nor will it affect the class except as regards the property which he can legally

⁽¹⁾ Gecreeballa v Chunder Kant, 11 C 213 (1885), Nityanand Ghose v Mohendro Kristo Ghose, 21 C 181 n (1889)

⁽²⁾ Oriental Bank Corporation v Gobind Lall, 9 C 604 (1883), per Norris, J

⁽³⁾ Fernandez v Rodrigues, 21 B 784

⁽¹⁸⁹⁷⁾ (4) Baldco Bharthi v Bir Gir, 22 A 269 (1900)

⁽⁵⁾ Chennu Menon t Krishnan, 25 M. 399 (1901) In Srinivasa Chariar v Raghava Chariar, 23 M 28 (1897), it was also held that the granting of leave was not a condition

⁽⁶⁾ Dhunput Singh : Parcshnath, 21 C 180 (1833) [followed in Kalu Khalar : Jan Meah 23 (100 (1901)], dissenting from dictum of Stuart CJ, in Hira Lal 1

Bhairon, 5 A 602, 604 (1883), on which the decision in the case did not turn, and which was not approved by the other Judges Ragava v Rajaratnam, 14 M 57 (1891), 18 not against this viow, as it was simply held that the order in question did not intend to guo permission, Dasondhay v Muhammad, 33 A. 660 (1911)

⁽⁷⁾ Kah Kanta v Gouri Prosad, 17 C 906 910 (1890)

⁽⁸⁾ Adam v New River Co 11 Ves. 429

⁽⁹⁾ Cramer : Bird, L R 6 1 q 143 (10) Hira Lal : Bhairon, 5 1 602 (1253),

per Straight and Lyrrell, JJ (11) Waharaja Bahadur Smah : Paresh Nath Singh, 31 C. 83), 815 (1904)

⁽¹²⁾ In re Last Wilkinson v Bla 1 s, 2 Ch 733 (1836)

represent (1) It has been held that persons conducting a suit on behalf of them selves and others with the leave of the Gourt under sect 30 of the last Code (now represented by this rule) have authority to enter into a compromise, so as to bind those whom they represent. In such a suit all the members of the class represented are in effect parties, and any one of them is entitled to bring himself on the record as an actual party. There is no difference between the powers of the representatives in the original litigation and in appeal (2)

Notice—The notice must include the names of the persons who have been permitted to represent others, so that the persons interested may have an opportunity of knowing who have been selected to represent them (3) It is the duty of the Court to cause service of the notices or advertisements to be published under this rule. If a plaintiff omits to loove the Court for that purpose, his suit should unb be dismissed on account of the failure of the Court to perform this duty (1)

9 No suit shall be defeated by reason of the misjoinder is misjoinder and non or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so fai as regards the rights and interests of the parties actually before it

English and Indian rules compared —This rule reproduces seet 19 of the Common Law Procedure Act 1860, and is now substantially the same with the first sentence of O XVI r 11, as it appeared after the revision of the rules in 1883 Following the English rule the rule has now been amended to include the case of non joinder also. The rest of Order XVI r 11 corresponds with portions of the following rule

Misjoinder—Misjoinder is of several kinds (5) (a) Of plaintiffs This is dealt with by this rule, which deals with misjoinder of parties only There is no misjoinder where a plaintiff is entitled to recover all the estate sued for, and the name of another person is added merely as a matter of caution (b) Of defindants. This is also covered by the present rule. (c) Of causes of action, or subjects of suit. This class of misjoinder is dealt with by O. II ir 3-7, post. (d) Of plaintiffs and causes of action. This was impliedly forbidden by the second paragraph of this section in the last Code read with sect 26 of that Code (7). But see now post, "Distinct causes of action" (c) Of defendants

⁽¹⁾ Sahib Thambi Marakayar t Hamid Marakayar, 36 M 414 (1911) (2) Krishnamachariar t Chimnamal 24

M. L. J. 192 (1913)

(3) Kali Kanta Surma r. Gours Procad, 17

^{(910 (1890)}

⁽⁴⁾ Mukh Lal e Jag leo Tewart 35 C. 1021 (1 105)

⁽a) O Amcaly a Cav Pr Code, 8 31

⁽⁶⁾ Bachubat t Shamp, 9 B 536 (1885) (7) See Moluma Chandra r Mul Chandra,

²⁴ C. 540, 543 (1897), in which the frame of the suit was held to be bad there being a majorider of two plaintiffs with two distinct causes of action, and see your

and causes of action, or multifatiousness strictly so called, that is, when one of the defendants is not interested in the whole of the relief sought to O II, post

Where a plaintiff alleging himself to be entitled on the death of a Hinda widow to the possession of certain immoveable property, upon the death of such widow brought a joint suit against three sets of defendants, being persons to whom the widow in her lifetime had by separate alienations transferred separate portions of the property claimed Held, that such suit was had for misjoinder of both parties and causes of action, and that sect 578 of the former Code could not be applied to cure the defect. But the plaintiff was allowed on terms to withdraw his suit as against two out of three sets of defendants with liberty to hring a fresh suit on the same cause of action (1) But see now sect 99, which is amended to include misjoinder

Nonjoinder -- Even before the revision of the rules in 1883, the Court notwithstanding the absence of these words, treated the English rule as com prehending cases of "non joinder" as well as "misjoinder" (2) It was said that it could not be legitimately inferred from the provision as to misjoinder that the surt "shall be defeated by reason of non joinder of plaintiffs who ought to sue, '(3) and that a similar construction to that put upon the English rulo should he followed here, the power given by the last clause of the first paragraph of this section in the old Code being held to amount to a direction to the Court not to dismiss a suit on the ground either of misjoinder or of non joinder (4) The amendment of the section now makes this point clear The English rule, which corresponds with this and the next rule was intended to do away with pleas in abatement and demurrers for want of parties (5) The present remedy is to apply for the joinder of the party The rule as to parties is for the purposes of justice, and the Court has ample powers under rule 10 to add parties whenever they ought to have been joined, or whenever without them the Court cannot deal with the matter in contro versy so far as regards the rights and interests of the parties actually before it (6) So far as the initial stage of the suit is concerned, there can be no question If an objection is taken by the defendant to the non-joinder of a necessary party, the Court will not dismiss the suit if an application be made to it by the plaintiff to add that party, but will add the party and proceed with the suit (7) There is, however, this distinction between the two cases, that misjoinder of plaintiffs can never subsequently be fatal to a

⁽¹⁾ Ganeshi Lal i Khairati Singh, 16 A 278 (1894)

⁽²⁾ Werderman v Sociéto Genérale d Elec triente, 19 Ch D 216, 251, ented in Maha bilat Kunhanna 21 M 373, at p 383 (1898) (3) Kale Khan t Sera Rum P R No 153

^{(1889),} p. 534, per Plowden, J. (1) Mahabala t. Kunhanna, 21 M. 373, at p. 383 (1899)

⁽⁵⁾ Ib Kondall v Hamilton 4 Alp Cas. 504, per Carris, L.C., Robinson v Gersel

² Q B 685 (1891)
(6) Vahabala v Kunhanna, supra

⁽⁷⁾ Ramsebuk v Hamlall Loondoo, 6 6-815 (1881), at p 823, though a question maj arise whither the suit is not barred under the provisions of s 22 of the Limitation Act

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suit, though non joinder of a plaintiff in certain cases may (1) An objection may be taken to misjoinder and no notice may be taken of it. If there has in fact been a misjoinder, the suit will be dismissed as regards the party misjoined and the Court will deal with the rights of the other parties (2) Where, however, it is the right of the defendant if he takes the objection in proper time to insist upon all of certain persons being joined as plaintiffs; and if after the objection has been raised the plaintiff proceeds with the suit without taking steps to add the person or persons whose non joinder has been objected to and the Court finds that the objection is well founded, the suit must be dismissed (3) A suit may be dismissed for non joinder of persons against whom the plaintiff is entitled to relief in respect of the matter involved in the suit and whose presence is necessary in order to enable the Court to adjudicate upon all the questions involved in the suit (4) Apart from cases where joinder of parties is required under the Common Law, the effect of non joinder must also be considered with reference to any special stotutory requirements which may exist on the subject. Thus, sect 85 of the Transfer of Property Act required that all persons having an interest in the mortgaged property should be joined, provided that the plaintiff has notice of such interest. This section is now incorporated as r 1 of O XXXIV. As to the effect of nen joinder of persons interested in mortgaged property, see the eases undermentioned (5)

The principle of this section should be applied, so far as may be, by Appellato Courts also (6) In the case cited, the suit was for possession of a small corner of gorah land, which had been awarded to the plaintiff on a partition of the whole culturable land of the village. Only eleven of tho proprietors were made defendants by the plaintiff, but the Original Court impleaded the entire proprietary body as co-defendants On oppeal, the

(8) Ah Mir v Gulab Din, 1892, P R. No 5. cated in Hukm Chand C P C 442

⁽¹⁾ Ramsebuk v Ramlall Koon loo, 6 C. 815 (1881), at p 825

⁽²⁾ Ib

⁽³⁾ Ib. at p 823 Rajendronath Dutt v Shaikh Mahomed, S C 42 (1881), where a suit by three out of four shebaits was dismissed for non joinder of the fourth. In Ramayya v Venkataratnam 17 M. 122 (1893), the objection of non-joinder was held not to be fatal, there having been an application to add party which was refused, and the plaint showing that the plaintiff sucd in a representative capacity In Mahabala v kunhanna, 21 M. 373 (1898), it was held that there was no non joinder as one tenant in common could sue in tort without joining others. In Chief of Lunds v Secretary of State, 14 B 299, at p 305 (1889), the Court in remanding the case said that the lower Court would consider whether certain persons should be torned after the fuller statement of the plaintiff s

claim (4) Durga Charan Sarkar v Jotindra Mohan Tagore, 27 C 493 (1900)

⁽⁵⁾ Janks Prasad v Lishen Dat, 16 A, 478. F B (1894), Bhawam Prasad : Kallu, 17 A 537, F B (1895), Ghulam hadir v Mus takun, 18 A 109 (1895) [non joinder is fatal unless cured by action of Court under s 29; where non joinder Court will dismiss suit Sri Gopal v Prithi Singh, 20 A 110 (1897), Mehrbano v Nader Ali, 22 A 212 (1900), Baldeo Singh v Jaggu Ram, 23 A, 1 (1900) . Audrat Ullah : Aubra Begam, 23 A 25 (1900), Krishnan v Chadayan, 17 M. 17 (1892), Ramasamayyan t Virasami Ayyar, 21 M. 222 (1898) , Palani v Rangayya, 22 M 207 (1898), Sorabji v Rattonji, 22 B 701 (1898), Lala Suraj Prosad v Golab Chand, 27 C. 724 (1900), S dheswarı Prosad v Dha rampt Naram, 19 C L. J 437 (1914)

plaintiff again impleaded only eleven, contending that he could obtain fall relief from them The lower Appellate Court dismissed the appeal for the nou joinder of the other proprietors The Chief Court held the dismissal to be wrong and observed that the lower Appellate Court should either have decided "the appeal as between the parties before it, leaving with the plaintiff the n k of not having the other defendants before the Court," or, under O XLI r 20 unde them respondents. In a recent appeal under sect 15 of the Letters Patent where in a suit instituted under the last Code, a co sharer had omitted to join parties who were apparently his co-sharers, it was held by the Calcutta High Court that the suit was bad for misjoinder since it was not under this rule hut under sect 31 of the last Code, which did not contain a saving clause in favour of non-joinder (1)

"Defeated "-If there is such a misjoinder as to cause inconvenience and expense to the defendant, the suit should not be tried, but the proper courso will not be to dismiss the suit, but to reject the plaint (2) Where there is no misjoinder of parties, but misjoinder of causes of action again t the same defendant the causes not trable conveniently should be tred separately or excluded under O II r 6(3) Where, however, there was misjoinder both of parties and causes of action, it was held that the suit should be dismissed (4)

Distinct causes of action -The second paragraph of this section under the last Code ran "Nothing in this section sholl be deemed to enable plantiffs to goin in respect of distinct causes of action" It was not to he read as if it ran "Nothing shall be deemed to enable a plaintiff to join distinct causes of action This was clear from the provisions of sect 45 of that Code, and O II r 3 of this which distinctly enable a plaintiff to join in the same suit several causes

Mahomedan ou the allegation that he had by two separate sale deeds of different dates purchased the property from two of the heirs of the deceased, and that the said property was withheld from him by another of the heirs of the decea ed who was in possession of some of it, and by certain transferces of other portions from the said heir Both the remaining heir and the transferees from him were made defendants Held that there was no misjoinder of parties or the quises of action in such a suit (6)

The second paragraph was held not to apply where plaintiffs joined in respect of the same cause of action, as, for instance where a widow and the son adopted by her to her deceased husband sued to have the deceased's property declared theirs, the widow admitting the adoption and there being no antagonism

⁽¹⁾ Sheikh Fazu v Sheikh Doman, 13 (L, J 455 (1914)

⁽²⁾ Sudhendu Mohun Roy : Durga Dasi, 14 (435 (1887)

⁽³⁾ Janok nath r Ramrunjun 6 C 949

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Prosad Lal, 19 C L. J 316 (1914)

⁽¹⁾ Ram Naram Dutt : Annola Presal

Joshi 11 C 681 (1897) (5) Mazhar Mi Khan i Sana i H san

Khan _4 \ 3 8 (1 802)

⁽t) lb

between the clams of the two (1) 1 Mahomedan widow and her daughter instituted a suit against her husband's heirs for their shares in the husband's property, the widow alleging that a certain conveyance and a release which she was induced to execute under a false representation were invalid, and the daughter relying on this and on the further allegation that the widow had no power in any case to execute the release so far as the daughter's share was concerned For defendants it was contended that the suit was bad for mis somder and multifariousness, but it was held that neither of these contentions was good The plaintiffs sought their share of the family property and claimed that their shares had been improperly dealt with It was true that the defendants set up different claims to the property, but they were all based on the validity or otherwise of the release (2)

This paragraph no longer appears in the present rule, doubtless because of the amendments made in O I r 1 Probably the position now is that where two or more plaintiffs base their claims to relief on a common ground within the meaning of that rule claims may be united in the same suit

(1) Where a suit has been instituted in the name of the Suit in name of Wrong person as plaintiff or where it is doubtful whother it has been the compared in the name of the of the right plantiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or idded as plaintiff upon such terms as the Court thinks just

(2) The Court may at any stage of the proceedings either upon or without the application of either Court may strike out party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit, be added

(3) No person shall be added as a plaintiff suring without a next friend or as the next friend of a plantiff under any disability

without his consent

J. R. TON, 710 (1,43).

(f) Where a defendant is added, the plaint shall, indees, the Court otherwise directs be amended in defendant added, plaint to be amended. such manner as may be necessary, and amended comes of the summons and of the plaint shall

⁽¹⁾ Fakirapa r Rudrapa 16 H (2) Amerlabar Abbal Land, 3 born, la R. (1811), fell in Ningawa r Ramaj pa, 5 Be n.

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be served on the new defendant and, if the Court thinks fit, on

the original defendants (5) Subject to the provisions of the Indian Limitation Act, 1877, section 22, the proceedings as against any person added as

defendant shall be deemed to have begun only on the service of the summons

Sub Rule (1) English rule and Indian rule compared -This rule is an amalgamation of sects 27, 32 and 33 of the last Code, and the first subrule corresponds with sect 27 of the old Code (1) The latter, as originally enacted, was the same as r 2 of O XVI of the Supreme Court of Judicature Act, with the exception that the terms in which the substitution or the addition of the plaintiff could be ordered were not required to be "just" but such as 'the Court might think just" Act XII of 1888 inserted further in this section the words 'at any stage of the suit," and "with his or them the former evidently to word the construction placed on the section by Pontifes, J (2) and the latter with reference to the construction placed on the English r 2 in which a person was not allowed to be joined as a plaintiff without his consent (3) This is now provided for by the third sub rule Sir Arthur Wilson in explaining the effect of the first sub rule It has often bappened that actions have been inadvertently brought by the wrong person-as by cestur que trust, instead of trustee, by mortgagor instead of mortgagec Often the same mistale has been made where it was a matter of real difficulty to say which of two persons ought to suc-as in the case of contracts made by agents, as to which it is often a question of much meets to determine who ought to sue Though the Common Ian Courts had the largest powers of adding parties or amending misdescriptions of parties, they had no power to substitute one plaintiff for another such as this rule confers (5) The same difficulty was experienced in British India as the Courts had no power here also to substitute any person's name for the plaintiff s (6) The rule, however, does not give a Court unlimited power to remodel the proceedings (7) It has been held that the power given under this rule is not excluded in cases where the person originally suing has no right to institute the suit (8)

"Suit"—In the undermentioned case (9) Banerjee J held that this word did not include an appeal, sect 582 of the former Code (corresponding with sect 107 of this) not making all the provisions applicable to suits applicable also to appeals Maclean CJ, expressed a grave doubt whether this word

⁽¹⁾ See Hukm Chand C P C 381

⁽²⁾ Chunder Coomar Roy : Gocool Chun der, 6 C 376 (1879)

⁽³⁾ Pryon t National Provident Institu tı n 16 Q B D 678

⁽⁴⁾ Wils Prac 173 See Goral Dass Agrawallah i Budree Das Sureka 33 C. 6.7 (1 101) s c 10 C W \ 662

^{(&}quot;) De Gendre + Bogard is L. R 7 C P

⁽⁶⁾ Ju looputteo : Chun ler hart JW R

^{309 (1868)} (7) Furquand: learon, 4 Q B D -50

⁽⁸⁾ Krishna Boi : Collector lai jore 30

M 419 (1907) (3) Dwarka Nath Biswas t Debendro

[\]ath Tagore, 4 C. W \ 7 8 (1893)

and "plantiff" could be read as including an "appeal" and "appellant". This doubts were, bowever, based on the wording of sect 582. The drafting has now been altered, the first portion of sect 582 standing by itself as sect 107, and the latter portion being represented by O XXII r 13. In an early case, (1) the High Court, in a special appeal, allowed the name of the real persons to be substituted for that of the receiver, who had by mistake brought the suit on their behalf in his name. And in Seshamma v Chennappa (2) the original Court dismissed the suit on the ground that the will relied upon was not genuine, and the lower Appellate Court on the ground that the suit was wrongly brought in the name of the plaintiffs as executors. The High Court on second appeal, allowed an amendment by substituting the minor son as plaintiff with one of the original plaintiffs as next friend. In the converse case where a plaintiff such one of the original plaintiffs as next friend. In the converse case where a plaintiff rule was made (3)

The principle of the section has been moreover, held to be of general application, and to apply analogically to a miscellaneous application also (4). In the case cited, an application to raise the attachment of a property was made by the Official Assignce of Bombay as an attorney of the Official Assignce of Madras, and be was, instead of the latter, wrongly described as the applicant, and Straebey, J, beld that as the affidavit annexed to the application showed the real fact, the application was not to be dismissed but aniended by the substitution of the correct name, and that the analogy of a plaint would, under this rule, support the amendment

"Doubtful"—So where it was doubtful whether a road contractor or the vestry ought to sue a trainway company which had injured the road the vestry mas therefore added as a co plaintiff in a suit by the road contractor (c). In the under mentioned case the suit was filed by a benanidar. Parsons J, said that he would hesitate before deeding that the suit was wrongly filed, but any defect there may have been was cured by the lower Court acting under this section (6)

"The right plaintiff"—The question as to who is the right plaintiff will depend on the circumstancts of the case in which the question should arise, and on the substantive law applicable. I rom a general point of view it has been explained already who may be a plaintiff. Every per on will be a right plaintiff in a suit if he could join as a plaintiff. Every per on will be a right plaintiff in a suit if he could join as a plaintiff in that suit (7). If however, there has been a bond fide mistake the Court will rectify it be where a suit was brought by one \(\times\) as the authorized manager of \(\times\) a mandalment was made by striking out \(\times\) and instituting \(\times\) his employers as plaintiffs in the case (8). \(\times\) case of misdescription mu to be distinguished from that of

⁽¹⁾ Jugs manth Per lale II 24 12 W

^{(2) 20} VL 467 (1537)

^{(3) 6} pal Dass Agrawallah , Bulice Das Surcka 33 (657 (1 %)).

⁽⁴⁾ Nardarrial v Aranzaval 21 R 205 (15 K)

^() Valide Travers Asphalte Co. e London Tramusas to 48 L. J. C. P. 312.

⁽c) Ranger Mahader _2 R 672 (1837), t") Hukm Chand (P C 352, release, it old

⁽⁵⁾ Subolim Dels r Ganoda haut Boy, 14 C 4 a) [1857].

non joinder (1) The rule has been said to be applicable where it is found that a plaintiff cannot get the full relief which he seeks without joining some other persons as co-plaintiff (2). It may, however, be a question whether in some cases, at any rate, such a joinder should not be made under sub-clause (2). Under this sub-rule there may be substitution, with which the second sub-ruledos not deal, (3) or addition. In the case of the first sub-rule, the original plaintiff may be either a wrong plaintiff or a doubtful plaintiff. The second sub-rule deals with the case of a person who is a right plaintiff in the sense that he is a person who should sue though he may be a person who is unable to obtain relief unless others are joined as co-plaintiffs with him. The matter, however is not one of practical importance unless it be correct, as has been held, (4) that a change of parties as plaintiffs under this sub-rule does not give rise to such a question of limitation as arries under the second sub-rule

"May"—The Court is not bound to add any person. In a case() apparently under the section corresponding to the second sub rule, the Court over ruled the defendant's objection as to the non joinder of certain co shares of the plaintiff, but the lower Appellate Court decided it against the plaintiff. It was contended, on second appeal before the High Court, that that Court was bound to do justice by adding them as parties. The High Court observed however, that "if the plaintiff has insisted upon his right to bring an action in the absence of his co sharers, he must abide by the result, and that it is too late, at this stage of the case, for him to ask to be allowed an indulgence of which he did not avail himself when it was available."

"Mistake"—The mistake may be either of law or fact (6) Irj, J.(1) considered that the corresponding rule of the English law did not apply where the plaintiff did not admit his mistake and misisted on his rights, but that while the Court could not substitute one plaintiff for another, except by the first plaintiff's consent, and where he admits that he has commanced his action improperly, yet in a proper case the Court will add a plaintiff under the second sub-rule. Where a son sued for his share in the family inheritance to which his father, then alive, was entitled alleging that the father was insane, it was held that in the absence of anything to show that the father authorized the suit, the Court could not regard its being brought in his son's name and not in his own as a bona fide instale such as could be corrected under

⁽I) Kasturchand & Sagarmal, 17 B 113 (1892) In Mandardhar Aitch & Sceretary of State, 6 C W N 218 (1901), it was held

of State, 6 C W N 218 (1901), it was held that there was no misdescription (2) Ayscough v Bullar, 41 Ch. D 341, and

see Vaddal v Shah Khushal, 27 B 157 (1902)

⁽³⁾ Hemiger v Droz, 25 B at p 463 (1900)

⁽⁴⁾ Subodim Debit Ganoda Kant Roy, 14 6. 100 (1887) See, howaver, s 22 of the I initiation let, which is not repealed by ss al-32 of the Code, and pp 7-34, 756, 757, Mitra s I initiation let, tilled The dictum

in this case does not appear to be correct, for if the substituted or added planniff is a new planniff, then a 22 of the Lumiation tet will equally apply in the case of the first as of the second sub rule. First dictum has be treemely doubted in Blulo Roy t. Int.

Bahadur, 19 G L J 5 (1913)

(5) Obhoy Gobind : Harychura, 8 C 277

<sup>(1882)
(6)</sup> Gopal Dass Agrawallah t Budres Das Sureka, 33 C 657 (1998), Duckett t Gover, 6 Ch D 82

⁽⁷⁾ Fm km : Cart , 17 Ch D 16J, 173

this rule (1) An action through a bon i fide mittake was communed in the name of the wrong person as plaintiff and the eves on a point of law was decaded in that have the control plaintiff that moved to substitute another as plaintiff, which was done (2). There can be no bon i fide mistake when the person asking to be ab tituted or added as quited his right to be a plaintiff since the institution of the suit and had no locus stands at the time of the institution (3). The mistake must be as to the distinction be rectified only under the second sub-rule (1).

"Necessary for the determination'—Under this rule it is essential that the order for substitution or addition should be necessary for the determination of the real matter in dispute (6). It contemplates, it has been said, only cases in which the necessity is of the joinder of a person as a plaintiff, and there can be no determination of the matter in dispute until such joinder—a case which chiefly irises in suits for the enforcement of or relating to joint rights by persons jointly entrusted as co-contractors joint owners and co-sharers of property, or as members of joint families or partners in business (6). The question who should be joined is part of the substitutive law applicable to the case and is not therefore here considered (7).

"Substituted or added.—There is no difference in principle whether a plaintiff is added or substituted (8). In the following cives plaintiffs have been substituted (9) or added,(10) under this rule or the section corresponding to

- (1) Muhammad Kalu Ahan : Saifella Ahan (1887) I R No 91
- (2) Hughes : Pump House, etc., Co 2 I. B 180 C \ (1.02)
- (3) House Property Co : Horse Vail Co, 29 Ch. D 130
- (4) See Challinor : Roder 1 fimes Rep 027, see Gauendra t Surja kant 17 C W V 462 (1912) [alleged mistake as to de
- fendants]
 (a) Seo Hemger : Droz 25 B 433 464
 (1900), in which the section was held to be
- mappheable (6) Hukm Chand C P C 383
- (7) Sco b 1, 383-402 where the questron is consider to under the following headings—
 p 384. One of joint lessors cannot sue for his share of rent 1 385. Separate n nt unay be claimed under special arrangement among co sharers 1 386. All co sharers are necessary parties in a suit for rehet by any co sharer in respect of his own share p 387. Suit by one of several persons en titled to equity of chempton for redemption of his own share p 388. Suits by one of several mortgages for sale or forcelosure p 389. One of the heirs of a creditor cannot

sue for his share of the debt p 390 One

- of the heirs of a promisee cannot sue for his rights p 3.32. In Figural co-contractes must be joined in a suit to enforce joint rights p 3.33. Non joinder of co-contractes not necessarily fatal in India, p 3.95. Case of persons jointly interested different from that of joint contracters
- 1 39. All joint Jessors must be Lartics it a sust for rent by one of them 1 p 306. All to os sharers must be parties in a suit relating to Joint property p 396. Even in a suit by managung os sharer p 397. Suit by a member of a joint Hudu family p 38

Variager of same cannot suo p 309
All partners must be parties in a suit by
one p 400, Suit by surviving jartners representative of deceased partner not neces
sary party p 401 Persons jointly
injured need not all be parties in a suit on tort

(8) Hughes a Pump House ate Co (190,) h B 485 t A

(9) Ih The Duke of Buccleugh P 201 C 1 (1892)

(10) Catdwell 1 Pagham Harbour etc., Co., 2 C D 221 and see Long v Crossley, 13 C D 383, Bourle 1 Davis, 44 C D 112 4s to notice, see Tildesly 1 Harper, 3 Ch. D 277

the second sub rule. It is no objection to the substitution or addition of another person that the suit will fail even if he is substituted or added, as the object of the provisions of the section is not that a party's case should be so framed as to succeed, but that it should be so framed that it can be adjudicated upon by the Court, whether in his favour or against him (1). The institution of a suit hy a wrong party cannot operate to keep alive the rights of one who by he delay has brought himself within the provisions of the Limitation Act (2). It has therefore often been held that if the period of himitation has lapsed as legards the person added, the suit must be dismissed (3). Although this rule only applies where the action has been commenced through a bond fide mistake as to the plaintiff, yet as the former section and sect. 32 of the former Code were both used together, the Court had full power under the combined rules to deal with all questions relating to the adding, striking out, or substitution of parties (4)

Gonsont—Reference to this has been struck out as it has been dealt with in the third sub rule. No person is obliged to have his or her name added as plaintiff in a suit without his or her consent. And the justice of the rule is obvious because the suit may be improperly brought; and it a party were made plaintiff without his consent, be might also he made hable to costs. If other parties should be joined as plaintiff, and they refuse to be joined, the proper course is to make them defendants, so that they are all before the Court, and it after may make what order it considers just as to costs (5)

"Upon such terms"—Amendment is an indulgence, and the applicant will generally have to bear costs. The terms usually imposed are that, if the original plaintiff is found not to be entitled to maintain the action, he must pay the costs up to the time of the joinder or substitution, and that the plaintiff joined or substituted will be entitled only to such rehef as he could have claimed if the action had commenced at the time of his joinder as plaintiff (6)

⁽¹⁾ Long v Crossley 13 C D 388, 391

⁽²⁾ Kishen Loll & Chunder Cooma Roy, W R 152 (1864)

⁽³⁾ See cases etted in Mitra s Lamitation Act, notes to s 22. Hul m Chand C P C 403. As to whether s 22 is applicable to change of plantiffs under this section, suffer anter The question cliently arises in suits on joint contracts by one or more of the promisees, or for joint rights by one or more of the coowners where the remaining promisees or co-owners do not join until after the expany of the huntation period.

⁽⁴⁾ Annual Practice 1906 See notes to O AM r 2

⁽⁵⁾ Unia Sundari Dasi i Ramji, 7 C 212 (1881), and see generally as to implicating of ridants who refuse to concur an a suit, Rustum Mily i Ameer Mily 10 W R 187 (1818) Jagadainba Dasi i Haron Chandra,

⁶ B L R 526 n (1868), Kanna Pesharod) v Narayanan, 3 M 236 (1581), Kandhi)3 Lall v Chandar, 7 A 326 (1884), Kali Chandra t Raj Kishore, 11 C. 618 (1880) Parameswaran v Shangaran, 14 M 450 (1891) Dwarka Nath t Tara Prosuma Roy, 17 C 160 (1889), Unni Nambiar 1 Nilakandan Bhattathiripad, 4 M 141 (1881), Sheshee Shekhareswar Roy : Guis Chandra 1 C W N 659 (1890), Dwarks Nath : 1at : Prosunna, 17 C 160 (1553) Jibanti Nath Khan i Gocool Chunder 19 C 760 (1981), Janua Kant t Nund Lishore 12 C L R 588 (1882), Blase swar Roy t Broj t Kant Roy, I C. W N -1 (1691)

⁽⁶⁾ tyscough t Buller, 11 Ch D 346 in less Iong t Crossley, 13 Ch D 385 Iurquantt Icaron 1 Q B D 282

Origin and scope of sub-rule 2 -1 bis clause, which as well as clauses 3 and 5 corresponds with sect 32 of the last Code, is taken from r 11, O 16, of the English rules The distruction between this clause and O I r 1, is that the latter refers to the action of the plaintiff at the time of the presentation of the plant in joining defendants, whilst this rule rufers to the action of the Court at a stage subsequent to the presentation of the plaint in adding o party either as plaintiff or defendant (1) It deals with joinder and not with substitution (2) It does not apparently opply to diverce proceedings, (3) but the provisions of sect 53 of Act I of 1894 (Land Acquisition) are sufficiently large to allow the adaptation of this section to matters before the Judge referred to bim by the Collector (4) As to Revenue Courts, (5) see note It was held under the Code of 1859 that the section should receive a very liberal construction , (6) and under the Code of 1882 that the section was wide enough to much every case of defect of parties (7) The section is not exhaustive, and it was held in the case cited below, (8) that even if it did not apply, the Court bad, in the circumstances of that case, which dealt with a public trust, an inherent power to odd new parties The effect of the amendment of the section is to bring it into greater conformity with the Euglish rule (vide rost) The last clause but two of seet 32 of the last Code is now incorporated in O I r 8 Where in a suit for the recovery of possession of property the plaintiff falsely denied the title of persons whom he had joined as defendants and asserted that an exchange by which he had trai sferred this property to the defendants had never been acted upon, but it was found that the exchange had in fact terminated bis title and had been acted upon, and he could not sue the principal defendant, it was beld that he had not made a bona fide mistake within the meaning of this

Court —Upon the question whether the powers given by this rule are excessible only by the Court of first instance, or both by it and a Court of Appeal, a distinction must be drawn between the case (A) where a person has been a party to the original suit, but is not a party to the appeal, and this may be (a) where the party to the original suit has died, or (b) has not been added a party to the appeal, and (B) where the person sought to be added has not been a party to the original suit

Case (A) (a) is provided for by seet 107 When the person alleged by the appellant to be the legal representative of a deceased respondent had been put on the record under these provisions, the Madras High Court held that the Court might add under this section another person who claims on good prima fucie grounds to he the representative of the deceased (10)

Sailajananda v Umeshananda, 4 C W N 102, 464 (1899)

⁽²⁾ Heiniger : Droz, 25 B 433, 463 (1900), but see Annual Practice, 1905, p 171

⁽³⁾ Ramsay : Boyle 30 C 489 (1903) (4) Kishan Chand : Jacannath Presad.

⁽⁴⁾ Kishan Chand t Jagannath Presad, 25 1 133 (1902)

⁽⁵⁾ Shib Gopal : Baldco, 2 1 264 (15.9)

⁽⁰⁾ No. 1 ha Ya t Mt Khan Whaw, 5 B L. R J71, 373 (1870), Vakatchand t Mro

cate General 8 B H C R at p 100 (1871)

(7) Bhola Pershad v Ram Lall, 24 C 34

⁽⁸⁾ Gyanananda Asram v Aristo Chandra,

⁸ C W A 404 (1901)

⁽⁹⁾ Ganendra : Surya Kant, 17 C. W A 463 (1912)

⁽¹⁰⁾ Atheap par Ayanna, 8 M 300 (1881), and under sumlar circumstances the Bombay

High Court, following this decision, added 4

The power conferred by this rule, which should be liberally construed is necessarily very wide. It should, however, be exercised in a reasonable manner, (1) and the Courts ought to take earo in its exercise. Thus, Markly, J., in the case cited, (2) said. "To bring persons on to the record, whose interests are not identical with either plaintiff or defendant, necessarily complicates the proceedings, and greatly impedes the progress of the suit. This disadavantage very frequently outweighs the advantages arising from finality of hitigation, which is, upon the whole, the best justification for bring ing in fresh parties. This alone ought to make the Courts of first instance very careful in the exercise of the power granted by sect 73 (now the present rule)." If embarrassment or inconvenience will be caused, the order will probably not be made (3)

It is not profitable, however, in a matter of discretion to attempt to formulate particular rules for its exercise Addition has been refused, where it would have led to a great variation in the plaint (4) Generally, but not always, the Court will in the exercise of its discretion refuse to give leave to add a plaintiff when the result would be to introduce a new cause of action and subject to the rule enacted by clause 1, where the original plaintiff has no right of action, he caunot by amendment under this rulo introduce a plaintiff in whom there is a right of action and so make an entirely new case (5) And generally, caro should be taken that the nature of the suit is not changed (6) But it was held in the under-mentioned case that at an early stage a person may be added as a party, even though the addition may load to an alteration in the nature of the proceedings. Thus in an action an personam against the owners of a vessel for damages caused by its collision the ship has been added as a defendant The vessel bad not heen impleaded originally, as at the time of the institution of the suit it was submerged in the harbour It was contended that it was not competent to engraft pro ceedings in personam upon proceedings in rem, but Farran, J, said "The later decisions afford no ground for the contention that at an early stage and in a proper case the initial proceedings cannot be amended so as to bring them into the form which they would have assumed in the first instance, but for the ship not being, or not being supposed to be amenable to the process of ths Court " (7)

⁽¹⁾ Googleo Sahoo : Premlall, 7 C 148, 149 (1881), Thakur Das : President Muni cipal Co, 1890, P R No 36, cited in Hukin Chand, C P C 445

⁽²⁾ Kaleo Pershad Singh v Joy Narain Roy, 11 W R 361, 365 (1869), and see observations of Phear, J, in Kartsek Nath v Chummun Roy, 21 W R 50, 51 (1874)

⁽³⁾ The Germann, 1896, P. 84, McCheane t Gyles No 2, I Ch 917, 918 (1992), Bower I Harthy J Q B D 652, per Medhsh, J, and James, L J as where by the addition of new parties other of the parties on the record would be projudiced or hindred of their new 1 - Valundad - Starama, 5 M

^{52, 54 (1881)}

⁽⁴⁾ Buddia Soondurco v Doorganund, 22 W R 97 (1874)

⁽⁵⁾ Annual Practice, 1905, p 168, ct ibscars. So also as to introducing a now cause of action where this would be the effect of adding defendant and would be moon ement, the Court will refuse to do so Rakigh t (osschin, 1898, 1 Ch. 81

⁽⁶⁾ See Oh Ling Ice : Aukinice, 10 W R 86 (1808), in which the Court refused to transform the suit into one for gental administration

⁽⁷⁾ Bombay and Persia 5 V Co 1 Shep lard, 12 B 237 (1887)

The exercise of discretion must, of course, he of a judicial character, but will, as in other cases, not be interfered with on appeal, nuless it is manifestly laujudicial and wrong (1). It is independent of the restrictions imposed by law on the parties. So the Court may make the Government a party, even though the notice required by the Code has not been given, the absence of the notice not affecting the power of the Court in any ease (2). An application to strike out or change the parties on the record should not he made ex parte (3). And before a person is added as a party, unless he is in Court and cogmizant of the proceedings, a notice may be issued asking him to show cause why he should not he so added, and the notice should show the grounds on which either of the parties applies to have him added (4). The defendant on record cannot object to the addition of any person as a defendant, even in a suit which has been instituted with special leave required on account of the accrual of only a part of the cause of action within the jurisdiction of the Court (5).

"At any stago,' etc -Ihe rule has been here simplified The former section drew a distinction (6) hetween orders striking out and orders adding The former could be made only on or before the first hearing the latter at any tuno before the suit had actually terminated (7) (vide post) And, further, while orders of the first kind could only he made upon the application of the party, the latter orders might have been made at any time. Both the English rule and the present section contain the words "at any stage of the proceedings" Under the last Code the words were at any time," and under the Code of 1859 "at any hearing" Under the English rule it has heen held that there is jurisdiction to allow amendment, even after final judg ment, as long as anything remains to he done in the action, though it ho only assessment of damages though whether or not the Court will exercise the juris diction will depend on the circumstances of each case (8) Under the Code of 1859 also, in Vakat Chand v Advocate General (9) parties were allowed to he added after a decree had been made whereby the suit was referred to the Commissioner's Office to have accounts taken and property sold But when the plaintiff, after his case had been gone into and some of his witnesses examined applied to have certain persons made so defendants the Court was held to have exercised its discretion properly in refusing to add them at that stage, even though "they were the parties from whom, if he got a decree, he would have to receive possession"(10) Under the Code of 1882 "though

Gyaram v Issur Chunder, 2 W R 158
 (1865)

⁽²⁾ Balmokoond Lall v Jirjudhun Roy 9

C 271 (1882)
(3) Tildesley v Harper, 3 Ch. D 277

⁽⁴⁾ Ramnarain t Moneo Bibeo 9 C 735 (1883) Seo 1876, Eng W N 23

⁽⁵⁾ Foolibai v Rampratab Samratrai 17 B 466 (1893)

⁽⁶⁾ Seo Abbasi Begam t Imdadi Jan, 18 A 53, 54 (1895)

⁽⁷⁾ Jetindra Mohan Fagore v Bejoy Chand Mahatap 32 C 483 (1904)

⁽⁸⁾ The Duke of Buccleugh (1892) P 201, C A., Annual Practice 1905 p 166, and cases there cited.

^{(9) 8} B H C R, C J 96 (1871), see cases cited in threedbhoy t Vullcebhoy, 8 B at p 330 (1884)

⁽¹⁰⁾ Poran Vundul t Sham Chand, 1 W R 228 (1864)

seet 31 limits the time during which the defendant may object as of right for want of partice, there is nothing in the Code to prevent his applying at any time to the Court to exercise its powers of adding persons who ought to have heen joined, or to prevent the Court from excreising its power upon such an application" (1) An order allowing a co-widow, who was not a party to the suit, to be joined in execution proceedings as a joint decree holder was not set aside, as the Court (2) was not prepared to say that the Subordinate Judge had not a discretionary power at any stage of the suit They observed, however that the power was restricted to the cases in which joinder might be necessary for the adjudication of questions raised in the suit, and that in that case that period had passed, and that "it is unusual and inconvenent to allow a persou, who might have applied before decree, to be joined as co plaintiff after decree even if it be lawful to do so, where no interest has devolved and no interest has been created since the institution of proceedings" In Tilam Siugh v Thakur Kishore (3) the suit was for a sale of the property under the Transfer of Property Act, and defendant's minor brother and sons, who were members of a joint Hindu family, and interested in the property within the meaning of sect 85 of the Act, were added as co defendants, on an application by the plaintiff, presented even after a decree had been made against him, and set asido under sect 108 of the former Code, corresponding with O IX r 13 of this If, however, it becomes necessary to enforce a judgment against persons who have acquired a title after it was made, this cannot be done by execution but an action must be brought for that purpose (4)

"Upon or without the application."—This is an application, if made of other party, plaintiff or defendant. Though other party may apply, the iesult of such application may vary according as it is made by either the plaintiff or the defendant. Thus, a person may sometimes be made a co defendant on plaintiff s application but not on the defendant's (5). And, as a general rule, a person whose right to join as a plaintiff is denied by the plaintiff on the record should not be made a co plaintiff, though he may he made a defendant (b). The plaintiff is not bound to make the application, even in cases in which the Court will usually sallow the addition of a person as a party. So while the Court will usually sanction the addition of assignees pendente lite, the plaintiff is not bound to implicat them (7). A person may, however, be made a party without the application of either party and on his own application, (8) the Court acting

⁽¹⁾ Kalo Khan v Siva Ram, 1889, P R No 156, p 535, per Plowden, J

 ⁽²⁾ Lingammal v Venkatammal, 6 W 227
 (1583), see also Sotish Chunder v Nil Comul,
 11 C 15, 51 (1884)

^{(3) 1898,} A. W. N. 12, s. c., 20 A. 188, and see Sotish Chundre: Ail Comml, 11 C. i., 51 (1884), in which it was suggested that a party might be added in execution proceedings. Is to this case, see Hukm Chand, C. P. C. 118 n.

⁽¹⁾ Goodall r Mussoorie Bank, 10 1 97 (1887)

⁽⁵⁾ See Horwell t London Omnibus Co 2 Ex D 365, Leroculey v Harrison, 1876,

Lng W N 39
(6) Googlee Sahoo v Premlall, 7 C 145
(1831)

⁽⁷⁾ Umamoyi Burmoneca i Tarun Prasad, 7 W R 225 (1867)

⁽⁸⁾ Oriental Bank Corporation : Charrol, 12 C 612 (1889), Rabbaba : Noorjehan, 13 C 90 (1889) See also thmedbhoy : Vulleshoy, 8 B 723 (1881), Khadar Sabab : Chottobu, 8 B 610 (1884), Vydannalysta, 5 U 52 (1881) It was sad

itself on the information of a third party. The right to make the application contemplated arises with the necessity for imaking it (1) A person may however, he added as a defendant to an interpleader suit, even if the plaintiff does not recognize any right in the party who seeks to be added to share in the thing in

respect of which the interpleader suit is brought (2)

In representative buits falling within O I r 8 of the Code, a person who is not a party on record is often made such on an application by himself, and, in fact, as O I r Satates the course to be taken by any one of the class on behalf or against which a suit is brought, who desires to intervene is by applying to be made a defendant in person (3) There is a considerable difference between the position of a person who is made a defendant on his own application, and who is so mide without any application of his. The former has to make out a primá facie case before the plaintiff can be asked to meet it . (4) but against the latter, the plaintiff has to prove his case, as against the original defendant, (5) whose position as regards the burden of proof is not altered by a person being made a co defendant on his own application (6) It was held that when the name of a person who had been made a party was struck out all the evidence produced by him ought to be excluded (7). The order giving leave to strike out a defendant should provide for his costs (8) If when a name is struck out the Court has not jurisdiction to try the case the plaint should be returned to be presented in the proper Court (9) In a suit (10) for possession of land between persons, each of whom claimed to be the lessee of it, and the lessors from whom they alleged having derived their right respectively had been made parties, it was held that that had been done unnecessarily as there was no cause of action against either of them and the Court ordered their names to ho struck out And where two persons in the same suit claim pre emption in regard to the sale, but without having any joint right the name of one of them ought to be struck out (11)

in Mohindrobhoosun v Shosheebhoosun 5 C 882 (1880) that this section did not con template any application by the person lesir ing to be added, but the learned Judge (Wilson J) subsequently stated that he did not intend to lay down that a third party could not come in and apply. In the first case cited at p 646 and the second case at p

- (1) Oriental Bank Corporation t Charmol 12 C 642 (1886)
- (2) Rabbaba t Noorp han 13 C 90 (1886) (3) See Watson t Cave 17 Ch. D 19
- Fraser t Cooper, 21 Ch. D 718 May t Yeston 34 Ch D 347, and s 30 ante. (4) Juggodanund v Hamid Russool 10 W
- R 52 (1868), Bhyrubnath : Vahesh Chun der, 13 W R 168 (1870), Balma Kundu t Adıkunda 7 C L R 560 (1880)
- (6) Konjul Sahoo v Guroo Bulsh kooer,
- (5) Ram Taruck Ghosal : Radha Bullab 15 W R 97 (1871)
- (11) Buru Wul: Radha Kishen, 1881, PR to 3, Lhawas Khan : Rasal Khan, 1594

137 (1869)

P R to 29 cited in Hukm Chand C P C 443

- 13 W R 362 (1870) Hukm Chand C P C 419, and see ib as to application ly
- foreigner and Annual Practice 1905 p 16" (7) Bucha Singh t Mashook Ali 15 W R a 2 (1871) the name was struck out by the
- Appellate Court
- (8) Wymer t Dodds 11 C D 438 See also as to costs Amos t Herne Bay Pavibon Co 54 L T 264 (9) Shridhar : Chima 10 B H C R
- 17 (1873) As to striking out se in adlition to cases already cited Sukhawat Ali : Kestro Tewars 6 \ W P 208 (18"4) Syed Hossen Ah t Abdur Rahım 7 C W N 529 531 (1903) (19) \sgur Chand: Doorga Das 11 W R

As to the exercise of powers under this section on appeal, vide ante, p 50l, " Court "

The terms will be such as the Court thinks just under the particular circum stances of the ease So the Court has imposed the term that the person added a defendant should consent to be bound by all the previous proceedings in the suit in the Court, and by any order that the Court might make as to the costs of those proceedings, (1) as without such consent the evidence already existing on the record could not be used against him (2) So also a party has been added who consented to be bound by the preliminary judgment which had already been passed, the Court directing that further proceedings were to be carried on against him in the same manner as if he had been an original defendant (3) An order has been made for adding a Bank as defendant on its undertaking, if the Court should so direct, to pay its own costs and those of the other party to the action, to enter appearance at once, to appear on motion for judgment next day, and to wrive questions of form (4) And the Court has offered on the defendant's application to add a person as a co defendant against the wish of the plaintiff, if the defendant would indemnify plaintiff against his costs (5) A Court cannot of its own motion add a Receiver as s defendant, when the leave of the Court appointing the Receiver has not been obtained (6)

Striking out.—Further, no name could be struck out by the Court suo motu without an application from a party, nor at the trial, but only on or before the first hearing Thus, where a suit was dismissed against one of the defendants some time after the issues were settled, the order was set aside as illegal (7) And the name of a person who had been added as a defendant after the first hearing could not be struck out in any case, even if a notice could not be served on him on account of the non discovery of his whereabouts (8) If persons improperly joined do not move to be struck out and take a part in the defence they may be held hable jointly with the other defendant for costs of the action (9) And where a defendant having put in a statement of defence applied to have his name struck out he was refused his costs, as he had not applied at the first possible moment (10)

This distinction between orders striking out and orders adding parties has been abolished and either class of order may now be made before, on, or after the first hearing at any time, and either upon the application of the parts or of the Court's own motion It will be observed that the words in the second paragraph of the former section "order that any plaintiff be made a defendant or that any defendant be made a plaintiff do not now appear, but the same

⁽¹⁾ Ahmedbhoy: Vullcebhoy, 8 B 323 at

p 338 (1884) (2) Watson : Hurgobind, 22 W R 35

^{(1974) 1} cr Mitter J (3) Re Dracup W V (1892) I ng 43 (4) Debenturo Cerperation e Murrieta 8

Innes Rep 193

^(*) In re Harris n 2 Ch 319 (1817) (t) Jaturira i Saifaraj 14 C W

^{6.3 (1910)}

⁽⁷⁾ Singa Reddi : Malava Rau 20 V 360 (1896), and see Khadara Chatalah 9 B 610 (1884)

⁽⁸⁾ Abl ası Begam v Imdadı Jan, 18 1 3

⁽¹⁵⁹a)(0) I winberrow c Brail W N (78) 109

⁽¹⁰⁾ Vallance : Birmingham Land Corp.

^{2 (*} D 36)

power to order this remains, as in such a case a Court would strike the party off the side of the suit in which he had been placed and re add him on the opposite side Such a transposition is made frequently in, though not confined to, partner hip suits (1) Thus, in Eduly Munchery v Vullcebhoy, (2) the plaintiff wished to withdraw, and ten of the defendants supported his application, and on the application of two of the other defendants, the Court allowed them to be made plaintiffs, and the plaintiff to he made a defendant. A defendant who has assigned all his rights in the subject matter of the suit, and has no longer any interest in it, has no right to be made a co plaintiff (3)

"Ought to have been joined," "or whose presence may be necessary."-No provisions have been laid down in the Code as to the persons who ought to be joined, or whose presence may be necessary before the Court, and the question must be determined on general principles with reference to the object contemplated by the rule, which is "to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the suit" Other sections may, however, be considered to furnish a guide to the Court in the exercise of its discretion under this rule (1)

In the words of Lord Redesdale, "All persons materially interested in the subject ought generally to be parties to the suit, plaintiffs or defendants, however numerous they may be, so that the Court may be enabled to do complete justice by deciding upon and settling the rights of all persons interested, and that the orders of the Court may be safely executed by those who are compelled to obey them, and future litigation may be prevented" (5) Lord Hardwicke observed that "the general rule is that you must have all parties before the Court who will be necessary to make the determination complete and to quiet the question" (6) Lord Lyndhurst, in Small & Att-wood, (7) said that "the general rule is that all persons who are interested in the question must be parties to a suit instituted in a Court of Equity" A similar principle is expressed in Comyn's Digest, namely, "that all concerned in the demand ought to be made parties in Equity Not all concerned in the subject matter, respecting which a thing is demanded, but all concerned in the very thing which is demanded in the matter petitioned for, in the prayer of the bill, or, in other words in the object of the suit" But a person who has no interest should not be added, but only those whose claims must necessarily be taken into consideration before deciding on the plaintiff's title (8)

⁽¹⁾ See Krishnabai t Jonubai, 2 B H C. R 310 (186a)

^{(2) 7} B 167 (1883)

⁽³⁾ Sayad Abdul Huk : Gulam Jilam, 20

B 677 (1895) (4) Narami Kuar : Durjan Kuar 2 A

^{738 (1880)} (5) Mitford on Pleading, 164

⁽⁶⁾ Pooro v Clark, 2 Att 515

⁽⁷⁾ Yonge, 458 See Ram Taruck v Radha Bullab, 15 W R 97, 98 (1871) AH

persons are to be made parties who are either legally or equitably interested in the subject matter and result of the suit, Joy Gobind

Das v Gourceproshad Shaha, 7 W R 201 (1867), Bajendronath Dutt t Shaikh Mahomed, 8 C at p 50 (1881)

⁽⁸⁾ Ahajah Abdul Gunneo t Pogose, 12 W R 436 438 (1869), Government : Fer gusson, 9 W R 159 (1868), nor of a person against whom no rebef is sought. Surno Moyee : Bykunt, 25 W R 17 (1876)

been held not to authorize a plaintiff, who has no right to one, to amend be joining as co plaintiff a person who has such right (1) The object is only to improve the position of the plaintiff on record, and not to allow the suit instituted hy one person to be converted in a new suit hy another proper person The same view has been taken in this country, it being held that a person can be added as plaintiff only in a suit which, though partially defective, is to some extent properly instituted, and in which the origin plaintiff has some title to sue (2) The Court should not add persons so as i introduce a light of action which previous thereto did not exist (i) The m under the Code of 1859 also was the same, and it was often held that whe the plaintiff had no right of action against the defendants, he could no mend his case hy joining as parties to the suit other persons who had a righ of action against them (4) In a suit by a purchaser of goods against the render for damages, on the ground that the hulk did not correspond with the sample the persons who had agreed to sell the same to them cannot be made parties, as, though their presence would save great expense, and prevent further higa tion, it could not be said to be necessary to an effectual and complete adjudica tion (5) In the case cited, Pontifex, J, observed that the first vendor might be made a party under r 18 of English O 16, but that bad not been embodied in the Code, and that he was not at liberty to construe this section as giving the power under clause 18 of O XVI

In accordance with the principles regulating the joinder of parties, it is a general rule that every person who has an interest in the subject of a suit may be added as a party. The interest must, however, he an existing one. Thus, in a suit hy an adopted son against the widow for his father's property in her possession, it was held that a reversioner should not he made a co-defendant, as he had no interest at the time in the property, and his interest heigh contingent inpon the death of the widow, it was a question whether he would ever have my interest at all (6). But it is sufficient that the interest is in existence at the time of the addition, it not heigh necessary that the party added should have had a right at the time of the suit, or should have derived a right from an original plaintiff (7). There can thus be no ground for adding those persons is parties who, according to the original defendants, should be interested in a portion of the property claimed, if the plaintiff withdraws his claim to that portion is igainst them (8). It is on this principle that assignces pendente lite are in England,

⁽¹⁾ Wacott : Lyons, 29 Ch D 585

⁽²⁾ Chunder Coomar Roy v Gocool Chunder, 6 C 370 (1879), Dwarkanath t Grish Chunder, 6 C 827 (1881), Bhanu Tukaram

t Kashinath, 20 B 537 (1895)
(3) Dwarkanath t Grish Chunder, supra

⁽⁴⁾ Seo Gopal Kashi i Ramaba, 12 B If C R 17(1875), Subbanjari Kristnayar, 1 M 383 (1878) But though an action to restrain a nusance of a temporary nature must be brought by the occupier Jones v Chapell L R 20 Lq 53J, where the action is brought by the reversioner, Jermission has

been given to add the former as co plaintiff

Broder t Saillard, 2 Ch D 692 (5) Mahomed Badsha v Nicol, 4 C 350 (1878)

⁽⁶⁾ Hukm Chand, C. P. C. 453, Kristo Sunkur Dutt : Koylasnath Dutt, 15 W. R. 6

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^{(15.16),} as to addition of adopte I son, so Paravatant: Ambalavana, I M. H. C. I. 197 (1863)

⁽⁵⁾ Latorce Bibco : Buksh th, 21 W 1 101 (1875)

as well as in this country, generally added as parties (1) In a recent Privy Council decision where a party bad been joured as co plaintiff, being, by virtue of an agreement with the other plaintiffs, a co owner in an undivided share of the property claused by them, it was held that he could not maintain the suit after the other plaintiffs had compromised their claim, for he had no present existing interest (2) The necessity of the presence of persons other than the actual litigants on account of their interest in the subject of a suit generally arises in suits by or against co owners, including members of joint families, and specially in suits for partition (3) In suits against the Larnaian by any unember of the tarnad affecting the property or the rights of the tarnad, all the members of the tarwad must be parties actually or constructively (4) On a similar principle in suits for partition of any property all the co sharers must be parties (5) The same principles apply to a dissolution of partnership, and m case of the death of one of the partners, his representatives must be impleaded as parties in a suit between the remaining partners for the taking of the accounts (6) In a suit by a benamidar the real owner or his assignee may be added (7) A mortgago bond was executed ostensibly in favour of R, but J was the real mortgigec A suit was brought by R, the benamidar to enforce the boud , J, tho

- (i) Hukm Chand, C. P. C. 454, Ahmed bhoy t Vullechhoy, S. D. 323 (1881), Bbola Pershad v Ram Lull, 24 C. 34 (1897), Chunderkant Mookerjeo t Ramecomar Rocondu, 13 B. L. R. 530 (1874) [assign ment of share in proceeds of sunlj, as to limitation in the case of substitution of assignces, see Harak Chaud t. Decenath bahay, 25 C. 400 (1897), Valhadeve Balt, 26 B. 730 (1992), Mitras Lumitation, 4th ed. p. 761, the proper practice is to add and not substitute the assignce Juddeoputtice t. Chunder kant, 9 W. R. 300 (1868), Shusshee Bhoosum v Muddan Mohun, 2 C. L. B. 297 (1878)
- (2) Basant Singh i Mahabu Prasad, P. C., 35 A. 273 (1913), distinguishing Achal Ram v. Hazim Husain Khan, 32 1. A. 113 (1904), 27 A. 271.
- (3) Mammalı t Pukkı, 7 M 428 (1884),
 Mordiu Kuttı t Krishnan, 10 M. 322 (1881)
 (4) Hukm Chand, C P C 454, and see
- rr 1, 9, ante and post
- (5) Chudasama r. Partaj sang, 28 B. 20j. 214 (1903). Lakhmudand v. hachu Bhai 35 B. 393 (1911). Isali hanta t. Geuri Prosad, 17 C. 905 (1890) [all the shares must be before the Court]. Tout Bhoosun t. Farapresonno, 4 C. 756 (1879). Pahaladh Single Juchmundutty, 12 W. B. 256, 296 (1890). Parbatt Churn Deb c. Am ud den, 7 C. 577 (1813). Pandurang t. Bhaskar, 11

B H C R 72 (1874), Udaram : Ranu, ib 76 (1875) Ishwar Chunder v Ram Krishna Das 5 C 902 (1880) [apportionment of rent, co sharers parties], Ohhoy Gohind i Hurychurn 8 C 277 (1882) [sust for onhanced rent co sharers parties], Timappaya v Lakshmmarayaua, 6 M 284 (1883), Chandu v Kunhamed, 14 M. 324 (1891) [suit for possession of share in property of a Valiomo dan family), Sreenath Chunder v Mohesh Chuuder, 1 C L. R 453 (1878), Annoda Churn Roy t Kally Coomar Roy 1 C 8J (1878) [apportionment of rent, co sharers parties], Mohindrobhoosun v Shosheo bhoosun, 5 C 882 (1880), Sadu v Ram 10 B 608 (1892) [mortgagee, purchaser]

(C) Ramlal's Lashmuchand, 1 B M. C R hpp 51 (1861) As to parties in a suit to recover a partnership debt see Voltilal: Chellathas, 17 B 6 (1852), Vaidyvantha Chumasam 17 M 108 117 (1893), Devi Das v Actpat, 20 A 355 (1898), Ram Naram v Ram Chunder, 18 C 86 (1850) Lutchmanen v Siva Prolasa 26 C 343 (1890) [joint family business], Imam ud dim Liladhar, 14 A 524 (1892) [joint for damages for breach of contract of service], Alagappa v Velhan 18 M. 33 (1894) [releaso of certain partners suit by creditor against others), Murhdhar v Ram Pratab, 1 C W Xi. (1899), Murhdhar v Ram Pratab, 1 C W Xi. (1899).

(7) See notes to r 1, ante,

real mortgagee, made over the debt on a date previous to the sunt, but executed the formal deed of assignment on a date subsequent thereto. The assignes were then added as plaintiffs to the sunt. Held, (1) that a benamidar may sue, and that the assignees were rightly added as plaintiffs under this section. Held also, that the section corresponding to this rule was wide enough to meet ever a use of defect of parties, and, further, that the power to add parties mult be exercised with reference to the interests which those parties have at the time when the addition is being considered (2)

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hen], Hughes v Delhi Bank, 15 C 30 (1887) [or to determine rights of con tending mortgagees], Ibn Husain'r Ramdsi, 12 A. 110 (1889) [or for contribution], Par satam Saran v Mulu, D A. 68 (1886) [desth of solo mortgagee leaving several heirs, ale can sue], suit for mutation of names, \unsair" t Rama Doss, 15 M. 350 (1891) [collected necessary] Rent Law, suits by co shares Manohar Das : Manzur Ali, 5 1 40 (1882) Murlidhar t Ishri Prasad, b A 576 (1884) fara Chunder : Ameer Mundal, 23 W 1 394 (1874), Guru Wahomed : Moran # (96, F B (1878) [suit for fractional proportion of ront], Bindu Bashini Dasi : Post Mohun Bose, 20 C 107 (1901) [adjustment 6 proportionateshare of rent], Ishwar Chunde Dutt : Ram Krishna Dass, 5 C 902 (1880) F B . Obboy Gobind Chowdhry : Hur) churn, 8 C 277 (1882) [apportionment] Bheekoo : Oomarkhan, 1 N W P 2.00 (1869) Door, a Prosad Vyteo : Joynarau Hazrah 2C 474 (1877), Rashbhari Mulher, : Sakhı Sundarı, 11 C 644 (1885), Jogendo Chunder Ghoso : Nobin Chunder, 8 C 003 (1882) [cnhancement], Abdool Hossen t Lall Chand, 10 C 36 (1883), Santin Ram : Bykunt Parya, 19 W R 280 (1873) [measure ment], Tulsi Panday : Lala Bachu Lal 12 Doli Sati t C L R 223 (1883), F B Syed H.ram, 4 C L R 63 (1879), Harrndra Naram : Moran 15 C 40 at p 46 (1581), Ebrahun Pir : Cursetji, 11 B 644 (1857). Balkrishna v Moro, 21 B 154 (1896) [c)ect ment], Hradoy v Mohobutnessa, 20 C 20 (1892) [when patindars proper parties]. Mobieb Ali 1 Ameer Ras, 17 C 538 (15,0) [application under a 158 of Bengal Tenancy Wen Government a necessary of Krishno Lall i Bhyrub proper parts Chun ler, 22 W R 52 (1971) [to obtain sell! ment of Chur], (annon t Hasonath of L. R 151 (1879) [to recover Chir lat)

union vary (1). As regards the effect of the absence of parties of the suit cannot properly go on without adding a party and the planniff proceeds notwith than him object on, the suit must be dreint sed (2).

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settled with defentant] Sanlamingu r Ganpatsingh, 14 B 315 70 (1839) [suit regarding Talukdari settlement in Bombay] Nilkanthapa r Magatrate, 6 B 670 (1880) Balaram r Magatrate, 6 B 672 (1852) [order for removal of obstructs in from pullie read] Mali med Israilo r Wise 11 B L. R. 114 I li (15"1) [sut to set as lo settlement], Gobin la Chandra Shaha e Hemanta human & C W Y 657 (1 x/3) (suit to set an lo sale under Public Demanda Recovers Act], suit on abligation by heirs of alleger han this a Lat r Chandar, 7 L 313 (1981) Partnership, suit by surraising partner Golun Prasad r. Chan lar Shikhar, J. L. 486 (1867). Ram Naram Nursing Doss r. Ram Chunder, 18 C. 56 (15,0), 11de ant, p. 164 Igency \ga Tha Yah r Mi Khan Uhaw, 13 W. R. 413 (15"0), Buddree Doss t Heare Miller, 8 C 170 (1881) Suit by legate Purshottam : hala Gounds, 26 B 301 (1901) [addition of other legatees] Suit to declare projecty not liable to attachment Duria Charan Sarkar t Joundra Mohan Iacore, 27 C 4 /3 (189) [other but absent decree holders]. Suit for removal of trustee Sailajananda i Umeshananda, 4 C W V 462 (1839) Benamidar asto a benamidar s right of suit in his own name see the matter discussed in Hukm Chand, C P C pp 373-375, and in notes to r l, ante but whatever view may be taken of this right. any objection may be met by the addition of the real owner as beneficiary

(1) Seo following cases Government not mecessary pairy Chuni Lall Rain Lashen Sahu, 15 C 460 (1888), F B [obstruction to alleged highway], Goswami Ranchor v For Girdharqi, 29 A. 120 (1897) [Cur Fr C do, s 146 suit for possession of attached property] Bal Makoord Lalt s Jupubhan Roy, 9 C 271 (1882), Jalinnovi Chou-dharam v Secretary of State, 7 C W N 377 (1902), Balkuchun Das Smirgot C 283 (1898)

[suct to set as le sale for arrears of revenue] , laspar Apacaheli 16 B 649 (1541) [suit for electarate in that plaintiff is hadini Naik of a villagel. Suits against corporations. Nubern Chuncker Paul e Stephenson, 15 W R. 531 (1571). Seel Ameer Salub e Venkataram 1 16 M 2 H (1812), Harsabay Malis Maharay Smah, 2 1 -91 (1573), Krishnayya (Bellary Managal Council, 15 M 242 (1831) Hands front Hatt Vasuley r Mahadu 20 B 137 (1514) [loan from | int family funds] Ient but interienten, tide unte p 561, and as to VII P Rent Act 1881 Mc Madho Prasad + Ambar 5 A 503 (1883), Gobard Ram c Naram Das, 9 1 394 (1587) Separate l'egutration l'incher i Secrotary of State 26 1 1 16 (1898) [suit against Government cancelling order of zomindar and lessees not necessary parties]. Specife performance luckumsoy : Fazulla, 7 B 177 (1880), Mokund Lall : Chotay Lall, 10 C 1061 (1881) Purushattama t Raju, 11 VI 11 (1887) Probate Ward : Huckle 12 P D 110 festion of person interested in intestacy] Dirocce Ramsay e Boyle, 30 C. 489, 437 (1903) [intervent: n of alleged adulterers | Idministration Dhunral t Broughton 15 B I R 2 36 (1875) Oriental Bank t Gobard Lall Seal, 10 C 713 (1884) [manounder of third parties in possession of

assets]
(2) Ramsbuk v Ram Lall Ko n loo 6 C
815 (1881) [suit on joint contract all coin
tractors not parties], Rapiendronath Dutt i
Shaikh Mahomed 8 C 42 (1881) [suit for
possession of property by trustees in which
complete justice could not be done in absence
of one trustee], Durga Charan Sarkar v
Joingdra Mohan Tagore, 27 C 403 (1899),
objection should be taken Shricklii v
Ajheda f 6 B 297 (1890), and a person who
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pluntiff or defendant (I) The rule expressly provides for the addition as parties, of persons "whose presence before the Court may be necessary in order to enable the Court to adjudicate upon and settle all the questions involved in the suit" It has been held in some cases, that only those questions are deemed to he involved in the suit which arise between the original parties, and that where new questions will arise between them and any other person there is no justification for his joinder as a party (2) On the same principle, it has even been held that if in an appeal a responden dies, and on the appellant's application the name of a person is entered on the record as the respondent's representative, another person clauming to be such representative in heu of him cannot be impleaded as a part under this section and sect 107, as the question of representative till between the two persons is not a question involved in the suit (3) In the case first cited it was held that the questions referred to in the section must be questions between the plaintiff and the defendant, and not such as may ansi between co plaintiffs and co defendants inter se In the second case the majority of the Full Bench held that a person who is not, in fact, the legarepresentative is not a person who ought to be joined, and that if the section applied it would be the duty of the Court to decide on the representative title Mahmood, J, dissented from the decision of the majority of the Court and held that the applicant had "shown a sufficient cass to entitle her to be made a respondent without the condition precedent of any decision' as to let representative title to the deceased The same view had been taken by the Madras High Court, (4) in which Turner, CJ, observed "that where there appears a substantial doubt whether the person indicated hy the appellant is the representative of a deceased respondent or a representative for all purpo es connected with the matters in hingation, and if a person other than the person indicated by the appellant lays claim to the representative character and on good prima facie grounds, and where if he be not allowed to join, the interests of the person entitled to the estate of the deceased may be prejudiced we consider the Court ought to proceed under sect 32 to make him a party to the appeal ' The Madras High Court has in other cases also construed the expression under comment in a broad sense (5) Thus, (6) a person who claimed to be jointly interested with the plaintiff in a bond on which the built was brought was held to have been rightly made a party, the Court observing that the acceptance of a construction of the words restricting them to questions between the parties to the suit would involve the addition of the

⁽¹⁾ Narami Kuar v Duyan Luar, 2 A 738, 742 (1880)

⁽²⁾ Hul in Chand, G. P. C. 461, see following cases, in which addition disallowed hadian Rata: Ram Ratan, 18 A 300 (1896), of person who claimed by a title distinct from that un ler which parties to the suit claimed Hira Nandt. Vaya Dax, 1891, P. R. No. 83, cited in Hukm Chan I, C. P. C. 161, of a person who in a suit of one who claimed I to be cat thed to an interest in the property in 1st from: to the pil june-debtor.

⁽³⁾ Hur Naram Singh r Kharag Singh, p A 447 (1887), Muhammad Husam t hi s halo, 10 A 223 (1889), and Vithu r Minua 15 B 145 (1850), in which there was a ds puto as to who was entitled to represer b

deceased plaintiff
(1) Athrappa t Ayanna, 8 M 3:0 (1881).

ide ante, p 551 (5) Hul m Chind, C P C. 462

⁽⁰⁾ Yydianidayyan i Sitaranisiyan, 3 Vi 72 (1891)

words "between the parties to the suit," and that "there can be few, if any, questions which cannot be determined between the parties to the suit one way or the other, and of which the determination if they be material, will, as between the parties to the suit, not be final," and "on the other hand, the interpretation warranted by the terms would enable the Court to avoid conflicting decisions on the same questron which would work injustice to a party to the suit, and finally and effectually to put an end to hitigation respect ing them" In a suit against the personal representatives of the obligor of a bond, who was also the manager of a mull, it was contended that the bond debt had been meurred for the mutt, and the successor in the management was held to have been properly made defendant (1) The Calcutta High Court also took a broad view (2) of the expression in a case (3) in which certain lands belonging to a joint estate were held by one of the co sharers under a private arrangement and let out by him to painidars, and on partition they were allotted to another co sharer, who, in a suit brought by him against the tenants for reut, impleaded the patindars as defendants in order that the question of the tenants' liability might be decided in their presence, and the Court held "that they were properly made defendants in the suit and that the Courts were justified in trying the question of the right to receive the ront as between the plaintiffs and the painidars 'and that ' the trial of that question was in truth necessary in order to ascertain whether the relation ship of landlord and tenant between the pluntiff and the tenant defendants existed or not" The expression as used in the corresponding English rule also has received a broad but still a lumited interpretation (4) Thus it was said that the term "involved ' was somewhat elastic, and might be so con strucd as to include a great number of subsidiary or collateral rights but though it was difficult to define the meaning of it, there must be some reason able lunit (5) Esher, MR, said 'I can find no case which decides that we cannot construo the rule as enabling the Court under such circumstances to effectuate what was one of the great objects of the Judicaturo Acts, namely, that, where there is one subject matter out of which several disputes arise all parties may be brought before the Court, and all those disputes may be determined at the same time without the delay and expense of several actions and trials " (6)

Sub rule (3) Consent of person added as plaintiff—In the case of the addition of a person as plaintiff or as next friend their consent is

rule to secure that wherever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that up let the forms of law oil extensions have been been been been been been affected that the court shall have power to bring all the parties before it and determine the rights of all in one proceeding. See Hukm Cland, C. P. C. 461.

Thirthasami : Gopala 13 M 3.
 (1889)

⁽²⁾ See Hulm Chand 462

⁽³⁾ Hridoy Nath v Mohobutnessa 20 C 285 (1892)

⁽⁴⁾ See Hukm Chand C P C 463
(5) Nortis t Beazley, 2 C. P D 86

⁽⁶⁾ Montgomery t Try 2Q B 321 (1894), and in Byrne v Brown, 22 Q B D 657 it was held to be one of the chief objects of the

necessary (1) The section does not, however, require, as does the English rule,(2) that the consent should be in writing. The Court, if it thinks it necessary to add a plaintiff, may stay the action until his consent is obtained (3) Vide ante

Representative suits -See notes to O I r 8

Sub rule (4) - Defendant added, amendment of plaint-This rule, which corresponds with sect 33 of the last Code, is taken from O XVI r 13 of the Rules under the Judicature Act, but some confusion crept into the wording of that section in its modification with reference to the Indian law The words "if previously filed" thus appeared to be unnecessary, and what was intended to be served on the new and the original defen daut was evidently not only "an amended copy of the summons," but an amended copy of the plaint (4) The rule has now been amended so as to include service of a copy of the plaint. The rule does not contemplate that, upon the addition of defendants to a suit a cause of action different from that upon which the suit was founded, which may have occurred to the plaintiff against the added defendants, should be added to the claim. All that it requires is, that when a defendant is added the plaint should be ameuded in such manner as may be necessary, and that an amended copy of the summons and plaint be served on the defendants. The amendment there referred to is such amendment as is necessitated by the addition of a defendant, and not such an amendment as would add to or alter the nature of the suit as originally brought (5)

Sub rule (5) - "Subject to the provisions"-This clause formerly commenced with the words " All parties whose names are so added, etc " Accord ing to a strict construction of the section, these words referred to all the previous clauses of the section and therefore also to cases in which the Court had made a person a defendant of its own motion The power of a Court to add a party and the duty of that Comt to dismiss the suit as barred by limitation are two different questions, and a Court may under this section add a party necessary to a suit although it may be obliged by the Limitation Act to dismiss such suit after such party has been added (6) It had however been held (it is submitted erroneously) that no question of limitation could be raised by a defendant who has been added by order of Court after the period of limita tion But it has been held by a Full Bench of the Calcutta High Court that a Court acting under the second paragraph of sect 32 of the last Code is bound by the provisions of sect 22 of the Limitation Act (7) Sect 22 of the Limitation Act, which is the section generally applicable, does not apply where really new persons are not made defendants, but only the names of those already so are

⁽¹⁾ Umasundarı v Ramu 7 C 242 (1882) . if objection is taken the proper course is to make the party defendant, ib , and see Be harte Lall Doss t Radha Nath Doss, 22 W R 229 (1874)

⁽²⁾ See cases cited in Annual Practice, 1905 pp 107 168 and Cox a James 19 Ch

D C (3) Sec Canty Canty 30 Ch D p 71,

Roberts v Holland 1 Q B 1 619 CA (1893)

⁽⁴⁾ Hukm Chand C P C 468 (5) Hingu Lal v Baldeo Ram 24 \ '53,

^{555 (1902)} (6) Imam ud din . I iladhar, 14 1 724

⁽¹⁸⁹²⁾ (7) Ram Kull ar : Akhil 15 C "11 (1 11)

⁽LOT), HCWN30

expressly mentioned, as when a eferical error is corrected (1) or where the persons are comprised in the designation given (2)

"Shall be deemed to have begun "-It has been pointed out (3) that it is peculiar that this provision is different from that in sect 22 of the Indian Limitation Act, under which the suit is deemed to have been instituted in regard to a person when he is made a party The effect of the law of limitation in regard to the joinder of defendants under the present section is, that if the period of limitation for a suit against the added defendant shall have expired before the service of summons, and the claim against the original defendant is such as cannot proceed without joining as defendant the person against whom the claim is barred, the entire claim wiff fail even as against the original defendant. Thus a pre emption claim against one of the joint vendees will ful if the summons is not served on his co vender till after the expiry of the period of limitation for a suit for the claim (4) even though the delay in the service may not be due to the plaintiff. Where in a suit a person is added as a party defendant at the instance of the Court after the period of limitation sect 23 of the Limitation Act applies and bars the pfaintiff's remedy as against the added defendant (5)

There is no reference in this section to the Indian Limitation Act in regard to persons joined as plaintiffs but seet 23 of the Act applies also to the case of joineder of a plaintiff where the joineder is under clause 2 as well as when it is under clause 1 (6)

Appeal —See sect 104 and O MIII r 1 and notes thereto The Code of 1882 gave an appeal from certain orders under sect 588 clause 2 All orders under sect 32 were not appealable but where there was no appeal from the might have been attacked under sect 591 of the former Code on appeal from the final decree (7) An order based on an erroneous construction of the section was held not subject to revision under sect 622 corresponding with sect 115 post (8) A party who had assented to an order could not of course complain of it in appeal (9). Where an order adding a defendant under this section was not appealed against and no objection was taken thereto in the memorindum of appeal an oral objection taken on appeal to such order was disallowed (10)

⁽¹⁾ Vlanni i Crooke 2 A. 296 (18 9) Peary i Norendra 37 I A 27 (1909) 3

C 229
(2) Pragi Lal : Maxwell 7 A 284 (158a)

⁽³⁾ Hukm Chand C P C 466

⁽⁴⁾ Habib ul lalı t Achaibar 4 A 145 (1881)

⁽⁵⁾ Ramkonkar Biswas t Akhil Chan Ira Chowdhuri 11 C W V 350 (1907) 35 C 519, F B

⁽⁶⁾ See Fatmaba: t. Pirbhas Virp. 21 B 'So (1897), hrishnat. Vikhamperman 10 V 44 (1889) Jibanti Vath: Gokool Chunder 1.1 C. 760 (1891) (defendant cannot be made co pla ntill after limitation period). Hard Chan I: Deonath val ay 2.2 G. 409 (189)

[[]limitation applies to assignment after suit ride ante p 562]

⁽⁷⁾ Googlee Sahoe t Prendsll Sahoo " (148 (1881) see Rull nath Sahov t Copce Saloo 14 W R 30 (15 0)

⁽⁸⁾ Rabbabat Noorjehs: 13 C 90 (1884) As to action under the Charter Act see Judooputtee t Chunder Kant (W.P. 30) (1868)

⁽⁹⁾ Rakhal Doss t Protap Chunder 12 W R 455 (1569) Beer Chunder Roy t Slatkh Tumeezooddeen 12 W R 87 (1564) Shakh Lali Mahomed t Shaikh Leer Nazur

¹⁸ W R 112 (187.) (10) Bansa Lal v Ras js Lal 20 A 370 (18 b)

Under the present Code no direct appeal is given and the same rule as to revision will apply. The Code may, however, be objected to in the appeal from the final decree under sect 105, post

11. The Court may give the conduct of the suit to such conduct of suit.

person as it deems proper.

Conduct of suit.—This rule was originally part of sect 32 of the last Code which referred to conduct of suit by the plaintiff. The word "suit" does not ordinarily include defence, but, according to the English practice, the conduct of the defence also is often given to one of the defendants, as for instance when a surviving partner of a partnership was made a co defendant as one of the executors of a deceased partner, the conduct of the defence was given to the other executor on the ground that the interests of the surviving partner might conflict with those of the estate of the deceased partner (1) Apparently with a view to adopt that practice, the word "person" has been substituted for plaintiff

12. (1) Where there are more plaintiffs than one, any one of more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding; and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

(2) The authority shall be in writing signed by the party

giving it and shall be filed in Court

Appearance by one of several plaintiffs of defendants—0 III r I enacts that parties may appear and act themselves personally in all suits. The present rule provides for the actual representation of a party to suit in the course of its progress by another party on the same side, and 0 III r I listly enacts that a party may, unless the Court otherwise directs, be represented by a stranger to the suit, namely, by a professional adviser or by certain recognized agents specified in 0 III i 2, post it was held under the corresponding section of the Code of 1859 (seet 115), that it was sufficient if the authority was in writing, and that no general power of attorney was necessary (2)

13. All objections on the ground of non-joinder of misonder of misjoinder of parties shall be taken at the earliest possible opportunity and, in all cases where issues are settled, at or before such settlement, unless the ground of objection has subsequently arisen, and any such objection not so taken shall be deemed to have been warved.

[&]quot;Objections"-The objection dealt with by this rule is one for joinder

⁽¹⁾ Peck : Ray, J Ch 282 (1891) 103 (1865)

⁽²⁾ Ambaram : Him, tsing, 2 B H C. R

or misjoinder of purties. It does not refer to objections on the ground of want of a cause of action or right of suit in the plaintiff, which may not be disclosed until the case has been proceeded with and evidence has been taken (1). In the case of objections with which the rule does deal, the question whether there is or is not a want of parties in any particular case will depend out the substantive law applicable to it. The rule of procedure does nothing more than provide that certain rules of substantive law can only be enforced or given effect to in a particular way or under particular limitations. So while seet 45 of the Contract Act is a matter of substantive law, the rule includes an objection for want of a co promisee as a plaintiff, it being intended to be a restriction on the right or necessity, as the case may be, of joint promisors or promisees to sue or be sued together, just as other limitation and procedure rules are virtually restrictions on the exercise of rights which, but for them, would exist and be enforceable (2). O II r 7 enacts a similar rule as regards causes of action.

"At the earliest possible opportunity."-The necessity for this provision and that in O II r 7 is founded on the fact that if the objection is taken in time, the plaintiff may take steps to join the persons whose nonjoinder may be objected to (3) or remedy the misjoinder of claims objected to The first hearing of a suit may, however, be the earliest opportunity a defendant may have of raising the objection, which, if taken in the defen dant's written statement, cannot be considered too late (4) But the grounds of objection must have existed before the first bearing, otherwise an objection could not have been made or wanted. If it did not so exist an objection may be made after the first hearing at the earliest opportunity after it came into existence (5) The time now fixed is the settlement of issues As pointed out in the first of the cases last cited, "cases might occur in which sect 34 would not prevent the defendant from objecting to the want of a proper party even after the first bearing, viz where after the first hearing and before decree a co parcener or remainderman or reversioner is born, or where a woman (who is a party) is married to a man who is not a party to the suit. The objection did not exist at or before the first hearing and therefore could not have been made or waived by the defendant, and if he made it at the earliest opportunity after it came into existence, he would have satisfied the spirit of sect 31' The section has been amended accordingly

If the objection is admitted by the plaintiff, the Court should, in the case of parties, act under O I r 10 and not dismiss the suit (6) and the Court may,

⁽¹⁾ Heiniger t Droz, 25 B 433, 467 (1900), in which case the defect was in the plaintiff s title and not merely in the omission to add the real owner whose interest entirely excluded his own.

⁽²⁾ Per Powell, J., in Kale Khan r Seva. Ram, 1889, P. R. No. L.G., and in Jadullakhan e Bhana Mal. 1882 P. R. No. 58, cated in Hukm Chand, C. P. C. 463, 469.

⁽³⁾ Rajnarain t Universal Life Assurance

Co. 7 C 594 603 (1881)

⁽⁴⁾ Imam ud dine Liladhar, 14 \cdot \cd

⁽b) See Van Gelder r Sowerby, 44 Ch. D 374, and onte, p. 544

where it is possible, whether the defendant omits to object (1) or objects and the plaintiff refuses to admit the objection, exercise of its own motion the powers given by that rule. If the objection when taken is not admitted by the plaintiff, and he does not apply to amend, but maintains the correctness of the plaint, and the Court, without immediately deciding the point, tries the case, and at its conclusion finds that the objection is good on facts proved by the defendant, the suit must be dismissed (2)

"Waived."-Where an objection as to misjoinder (3) or of non joinder (1) is not taken in the Court of first instance it will be disallowed in appeal, and the claim will be disposed of on the merits. In Dhirm Das v Shama Soondri (5) the plaintiff widow made an adoption pending the suit, but the son was not made a party, and on an objection being taken as to that before the Privy Council, Lord Campbell spoke of it as "a safe maxim for a Court of Appeal to be governed by, that an objection, which, if taken, might have been eured and which has not been taken in the Court below, shall not be taken in the Court of Appeal And sec now sect 99 which amends the former sect 578 so as to include eases of misjoinder The former section con cluded with the words "by the defendant" It was pointed out (6) that these words showed that the section did not brut the right of the plaintiff to add parties at any stage of the proceedings. Thus, in the case cited it was said "Often a defendant may be indifferent to the absence of persons who ought to be parties, hut it, nevertheless, may be most important for the plaintiff to add them in order that they may be bound by the decree in the cause The plaintiff may not, until an advanced stage in a cause become aware that persous ought to be made parties who have not been so made The defendant may be well aware that those ought to be made parties, but purposely lets the first hearing pass without objecting to their absence from the suit and thus, so far as ho is concerned, waives the right to object But his waiver of that objection would not affect the absent parties and a decree made in their absence would not bind their. Hence it is that although sect 34 hmits the defendant's right to object, the second passage of sect 32 (corresponding with sect 29), leaves it open to the plaintiff 'at any time' before decree to obtain permission to make new parties" The words have now been omitted as unnecessary

Haldar 7 C 242 244 (1881)

Imam ud din v Liladhar, 14 A 524
 (1892), at p 526

^{(1992),} as p 529
(2) Boydonath Bag t Grish Chunder, 3 C
26, at p 29 (1877), Ramsebuk v Ramlall 6
C 923 (1881) Badri Dav t Jawala Pershad
18 il P R No Si, F B cited in Hukm
Chand C P C 469, Kalidos t Nathu 7
B -17 (1883), in Arumigam v Sindarajev,
N M I J R 3, the non joinder in the
jarticular case was held not sufficient to
justify dismissal

⁽³⁾ Lakiraja r Rudrapa 16 B 119 122 (1831) Lukhar Gopal Rai GA 632 (1881) Lukh ribir boll of partics and causes of

action], Magaluriv Narayana 3 M 359(1881) (4) Paramasiva : Krishina, 14 M 498 (1891), Modhikuttiv Krishinan 10 M 122 329 (1887) Hira Lal : Rainju, 0 A 57 (1834), Parshottam v Kala Govindi, ,26 B 301 (1901) Uma Sundari Dasi : Rainji

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Explanation—For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to

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Illustration

A lots a house to B at a yearly rent of Rs 1 200. Lee rent for the whole of the years 1000, 1000 and 1000 is due and unpaid. A size B in 1000 only for the rent due for 1000. A shall not after wards say B for the rent due for 1000 or 1000.

Previous provisions—The terms of sect 7 of the Code of lead at 1 of ect 13 of the list Code so Lar as related to test two paragraphs did not your mittriff. The former declared that every suit half in half the

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⁽¹⁾ Imam ud din : I ilwilhar 14 A 524 (1512), at p 520

⁽²⁾ Boydonath Bog i Grish Chun ler, 3 C 2: at p. 29 (1877), Ramsebuk i Ramlall 6 (93)(1881). Builti Davi Jawali Pershall 1841 P. R. No. 85, I. B. etted in Hukm Chanl. C. P. C. 469, Kaldos i Nathu. 7 B. 247 (1883), in Yennugam i Sun laraget, 8 M. L. J. R. 3 the non-jourler in the particular caso was hell not sufficient to just fed sin skal

⁽³⁾ Fahirapa i Tulraja 16 B 119 1-2 (1811) Tulsta i Cjal Par 6 A 632 (1881) Ir aj i tribith of jattus and causes of

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(4) Paramasiya r Krishiy, 14 M 198

⁽⁴⁾ Paramasaya r Krishira, 14 u r v (1891) Moidinkutti r Krishinan 10 U 322 (1884), Hira Lal t Rumju 6 A of (1884), Purshottimi r Kala Gorindji 26 B 301 (1901) Uma Sundari Davi r Ramji Haldar 7C 212 244 (1881)

⁽a) 3 M I \ 223 242 (1843) foll Hari Sarun

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Explanation -For the purposes of this rule an obligation and a collateral security for its performance and successive claims arising under the same obligation shall be deemed respectively to constitute but one cause of action

Hlustration

A lets a house to B at a yearly rent of Rs 1,200 The rent for the whole of the years 1900, 1906 and 1907 is due and unpaid. A sues B in 1908 only for the rent due for 1906 A shall not afterwards sue B for the rent due for 1905 or 1907

Previous provisions -The terms of sect 7 of the Code of 1859, and of sect 43 of the last Code so far as regards the first two paragraphs, did not vary materially. The former declued that "every suit shall include the where it is possible, whether the defendant omits to object (1) or objects and the plaintiff refuses to admit the objection, exercise of its own motion the powers given by that rule. If the objection when taken is not admitted by the plaintiff, and he does not apply to amend, but maintains the correctness of the plaint, and the Court, without immediately deading the point, tries the case, and it is conclusion finds that the objection is good on facts proved by the defendant, the suit must be dismissed (2)

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⁽¹⁾ Imam ud din : I dadhar 14 A 524 (1892), at p 526

⁽²⁾ Boydonath Ba, a Grish Chunder, 3 C 20 at p. 29 (1877), Rumesbuk, Ramhall 6 821 (1881), Ba iri Davi Jawala Pershad, 1841 P. R. No. 86, F. B., atted in Hukm (han), C. P. C. tiop, Kaldos V. Nathu 7 L. L. (1883), in Vrumugam t. Sumbrayer, 8 M. I. J. R. J. the non-join ler in the particular case was hell not sufficient to just by disansessal.

⁽³⁾ I skiraja i Pulrapi 16 B 119, L2 (15 ii) Iuldia i Goj il Rai 6 A, 632 (1581) [i si n ler beth of jurius and causes if

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⁽⁴⁾ Paramana t Krishna 14 M 498 (1891), Mondinkutto Krishna 10 M 32 329 (1887), Hira Lai t Ramju, 6 A 7 (1883), Purshottam v Kala Govindji, 26 K 301 (1901), Uma Sundari Dasi t Ramji Rahiya 7,6 23, 214 (1881)

Haldar 7 C 242 244 (1881)
(5) 3 M I 1 22J, 242 (1843), foll, Hari

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(6) Modho i Dongre, 5 B 609 612 (1881),
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whole of the claim arising out of the cause of action" The last Code substitutes the words "which the plaintiff is entitled to make in respect of," (1) and the clause "but a plaintiff may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court" were added. The cases there fore decided under the Code of 1859 were in point (2) so far as these two para graphs were concerned The last two paragraphs were, however, new, and were introduced to do away with the view taken under the Code of 1859, that the plaintiff, though prohibited from splitting bis claim, was not bound to pursue all his remedies at once (3) This section in the Code of 1882 was therefore, in this respect, more comprehensive in that it provided that a person entitled to more remedies than one in respect of the same cause of action must combine all his remedies in the first snit, unless be obtained the leave of the Court to leserve some of his remedies for a subsequent suit (4) The present rules are in substantially the same terms as the corresponding sections in the last Code, with the exception of the omission in clause 3 of r 2 of the words "obtained before the first hearing," as to which, see post

The section enacts the general rule that "contestants are not allowed to split up a cause of action, even where they have an election of different remedies, into different actions, or to supplement an incomplete remedy they may have selected at the first by availing themselves subsequently of another "(5)

Principle and scope of the two rules—R I contains provisions of a positive and directory character as to the framing of the suit with a view to procure finality of decision (6) Where, bowever, it was argued that the phrase "the subjects in dispute" in the former section connoted the corpus or object matter of the claim, and that therefore all possible claims to the same should necessarily be offered for decision in the suit, the Madas High Court (7) said. "In our opinion the expression "the subjects in dispute" signifies the general relation between the parties to the suit for the determination of which the suit is brought. In other words, the object of seet 42 (uow r 1) is to require the plaintiff to bring forward his whole case as to the mitter of litigation on the question of right involved in the suit, and not to require him to unite all the cances of action which he may have against the defendant in respect of the corpus or object matter of the suit." In this respect, therefore, r I bears the same construction as r 2, in which there is nothing to wirrain the inference that ill causes of retire ought to

⁽¹⁾ As to the words in respect of, and arising out of, see Venloba & Subbana, 11 M Lol, at p lod (185")

⁽²⁾ Duncan Bros t Jectmull Greedhireo Lall, LJC at p 378 (1832)

⁽³⁾ See Vidid I at pacer Bulsh's Monobur Dow 2 N W P 20 (1870) Jebunth Nath Khan r Shib Nath Chackerbutty, 8 C at p. 821 (1882), Saberer Pan r Kan Doss, I W I 1 D (1891) N Limits Man Doss, I W I 1 D (1891) N Limits Man Doss Cutter, as now, found to include in his 11 out II the ground to pion which his suit w a

based Abhram Das t Surum Des, 3 B L R, A C J 421 (1869)

⁽⁴⁾ Ramaswami Ayyar t Vythmatha Ayyar, 26 M at p 7.0 (1902), and see Govind t Parashram, 25 B at p 167 (1900), and see

⁽a) Wells, Res Judicati, § ...28

⁽⁶⁾ See eg Lala Surja Prosad : Golab Chaud, ...7 C 724, 761 (1300)

⁽⁷⁾ Ramaswami Ayyar'r Aythicitlia Ayyar, 26 M 700, 703 (1002) and sco 1 700, ib

he included in the alternative, or otherwic, in one and the same suit (1) The penalty for non-compliance with r 1 is provided for partly in r 2 and partly hy Explanation IV to sect 11 The former provides that if the plaintiff omits to include a portion of the entire claim, which has arisen at the date of the suit, out of the cause of action ou which the suit is hased, he shall be precluded from sung again in respect of such portion, and the latter provides that the matter of every ground which the plaintiff night and ought to urge in support of the cause of action on which the suit is founded shall be deemed to he a matter directly and substantially in issue in the suit, and decided therein whether such ground was actually relied upon or not in the suit. In other words, r 2 requires that the whole claim which has arisen, at the date of the suit, out of the cause of action shall be included in the suit so as to avoid splitting of a claim or claims arising out of one and the same cause of action And Explanation IV to sect 11 enjoins that every ground which could and ought to have been urged in support of the claim actually made in the suit, shall be deemed to have been adjudicated upon therein, whether it was actually urged or not (2) The rule embodied in r 2 does not operate to give the defendant a ground of exception to the first suit, but hy prohibiting a second suit it indirectly compels the plaintiff to include his whole demand in the first suit (3) and is thus a complement to r 1 To illustrate the operation of r 2 over the second suit and not the first where the plaintiff claimed, by night of inheritance, for partition of one out of a number of villages left by his ancestor, and the lewer Court dismissed the claim as untenable under the corresponding section of the Code of 1859, the Appellate Court held that though that section might operate as a har to ony future claim by plaintiff for partition of the remaining villages hy right of juherstance it could not be taken to he a har to the then present claum (4)

R 2, which provides against what is called the splitting of a cause of action, is founded on the maxim that no one shall be twice valid for one and the same cause (5). It is directed against two culls the splitting of claims and the splitting of remedies in respect of one cause of action. If a man omits from his suit a portion of his claim he shall not directwards sue in respect of it, if he omits one of his remedies he cannot afterwards pursue it (6). It has been said that there is no rule of procedure which is founded on better reason and good sense (7). At the same time it has been pointed out

⁽¹⁾ Ramaswami Ayyar v lythinatha Ayyar, 26 M. 777 (1902), side also post

⁽²⁾ Ib at pp 766, 767

⁽³⁾ Ittal pan t Manarakrama, 21 N. 15a, at p 156 (1897) There are, bowcer, cases in which the nature of the right is such that independently of the rule the plantiff is prehibited from severing his claim, ib See also Musumat Sconder t Khilloo Mull, 2 N. W. P. 90 (1870)

⁽⁴⁾ Choe hingh : Buliadoor Singh, 1 Igra, 55 (1860)

⁽⁵⁾ Balmakund t >an_oari 19 A, at ρ 383 (1837), Umed Dholchund t Pir Saheb t B 134, 136 (1883) >eo Whitley Stokes, μ. Anglo Indian Codes 33° Sadhe Saran t

Anglo Indhan Codes 39" Sadhe Saran e Hawal Panie, 19 A. 93 99 (1893), \arayan e Shamrao, 27 B 3"9 382 (1993) (6) Goognd e Parashram 25 B 161, at

⁽⁶⁾ Gottind t Parasaram 25 B 101, at p 167 (1900), Chhabil Das c Massu, 4 P I vol 49 p 4 (1914), Irimbal t Bhagwan Das, 23 B 343 (1893)

⁽⁷⁾ Hikmatulla Khan t Imam Mt, 12 M 203, at p 205 (1830)

that while in order to effect the good object of preventing unneces ary litigation, suitors are deprived of rights to which they would otherwise be entitled under the general law, the Courts should be careful in carrying out there provisions to confine their scope and construction within certain recog nized limits and principles so as not to take suitors unfairly by surprile and to do as little injustice as possible in individual cases (1) So far as regards the party sought to be barred, the principle is that where the cause of action is the same and the plaintiff has had an opportunity in the former suit of recovering and procuring what he seeks to recover in the second, the latter suit is barred (2) The distinction between this rule and that of res judicala 13 that whereas the latter rule prescribes that what has been decided or 15 deemed to have been decided cannot be raised again, the present rule prohibits that being put forward which should have been, but was not, offered for the Court's decision, and in respect of which in consequence of such omission no docusion has been given. The present rule depends entirely on the identity of the cause of action, the bar being created by the institution of the suit and not by the judgment (3) The bar exists not because the point has been decided but because it should and would have been decided if the plaintiff had put it forward

The plea under r 2, it has been held (4) does not involve a question of juit diction, and no Court is bound to take it up proprio meta. As it is intro duced snuply for the benefit of a defendant, to prevent him being harassed by numerous suits, he should expressly plead it before judgment, if he wishes to take advantage of it. Further, where objection is taken to the suit the onus is on the defendant to show that the causes of action are identical and that the suit is therefore barred, (5) and he cannot in this, any more than in any other matter, plead his own wrong (6)

ter, plead his own wrong (6)

The former section has been held applicable to suits under the NWP

was held

(3) Monsharam : Gone h, 17 C, W N 521 (1912)

(4) Muhammad Nur : Vahrvia, 1880, P R No 37

(a) Upendra Lal Mookerjee : Secretary of State, 20 C 716 (1893)

(6) Subhajja i Venkatesappa 6 VI 4J 53 (1883) In Shaikh Punja i Shaikh Oodoy, 1

question to the held. Is to means stent contentions, see Gandy; I Gandy, L. R. 30 Ch. D. 57, where it was held that a party was not at liberty to retain the benefit of a decision given on the fing that his hability under a covenant cutting d, and at the same time to misst that his hability under it had determined.

⁽¹⁾ Anderson, Wright & Co t Kalagarlu. 12 U 339, at p 345 (1885), per Garth, CJ The same learned Judge, in Pramada Dasi t Lakhi Narain Mitter, 12 C at p 63 (1885), Now speaking for myself, I am one of those who believe that, however construed, s 43 has done, and will do, a tast amount of injustice, and I am therefore particularly careful to give it a construction no larger than it will reasonably bear " There cannot, how ever, be any doubt that the rule, if applied properly, is one of justice and not mere technicality. In this as in other respects, if injustice ensu , it must be laid not to the rule but to its ini roper application to cases not falling within it, as pointed out in Herm Comm., § ...20, ented in Hukin Chand, C. P. C. ind If a party may divide a single and ectire cau de finction once, there can be no I r thattle caption of the well I the party theilleadin us it I the rule therefore 15 the field to supply a a serious _rayance

Banku v Gopal, 11 C L J 589 (1911)

(2) Sco Velson v Couch, 10 C B \ S 53,
Serrao v Nocl, 15 Q. B D 549, 556

Rent Act,(1) as also to suits under Act X of 1859, the principle on which it is bised being one of general equity, (2) but not to suits under the Dekkin Agriculturists Rehef Act, that Act having been amended so as to remove the bar created by this rule (3). The Act of a guardian binds a numor unless unreasonable or improper, and the rule is therefore a bar to a suit by a minor who has attained inajority, and whose guardian had previously relinquished a claim (4). The rule does not apply where there has been no adjudication and leave has been specially granted to bring a fresh suit (5).

"Suit."-The word does not here apply to execution proceedings R 2 deals with the frame and initiatory stages of a suit, and is not applicable after judgment and after the rights of the parties have been decided by a decree, in which the cause of action has merged, to proceedings in execution any more than, for example, sect 11 of the last Code (or O II rr 1, 5 of this) would be applicable (6) The question as to the applicability of the principle embodied in the section might arise in two ways Firstly, where the decree gives relicfs of a different character, such as a decree for possession and a decree for costs There is nothing in the Code to provent separate and successive applications for execution as regards each of them (7) Secondly relief of a single character may be given by a money decree for, say, Rs 1000 The Full Bench in the first mentioned case reserved its opinion whether in such a case the plaintiff would be entitled to split up the execution of the decree by successive applications to execute to the extent for instance of Rs 10 The rule has been held not to apply in a case where there were two suits, and where one being struck off on the objection of the defeadant, the plaintiff applied and was allowed to amend his claim in the other suit (8) An application to file an award is in many respects analogous to a suit and therefore the privilege given to a plaintiff in a suit to abandon portion of the claim in order to bring the suit within the jurisdiction of the Court has been held to apply also to a case where the party comes in with an application to cause an arbitration award to be filed (9) As to whether a proceeding for revocation of probate is a suit or not, see case cited (10)

"Shall include"—Ordinarily a claim is expressly specified. In some cases, however, the claim in the prior suit will be construed to include a claim which, though not specially stated, is naturally implied in it. So a prior suit for redemption of land was held to have included the trees on the land, and the Court having failed to adjudicate upon the portion of the claim relating to

Madho t Murh, 5 L 106, F B (1883)
 Adhirani t Raghu, 12 C 50 (1885),
 Purbhoo t Ramjeawan, 1 A H C R 119
 See Ram Sunder t Krishno, 17
 W R 350 (1872)

⁽³⁾ Laluchand t Girjappa, 20 B 469 (1895)

 ⁽⁴⁾ Gopal t Narasinga, 22 M 309 (1899)
 (5) Venkata t Ranga, 10 M 160 (1887),

⁽⁵⁾ Venkata (Ranga, 10 d. 100 (1851), Behari Lal Pal v Baran Vai, 17 4 53 (1891), see post, p 59J

⁽⁶⁾ Sadho Saran : Hawal Pande, 13 N F B 93, 100, 101 (1893), foll., Radha Mishen Lall : Radha Pershad Singh, 18 C 515 (1891)

⁽⁷⁾ Ib

⁽⁸⁾ Ram Farun koondoo e Hessem Huksh, 3 C 785 (1888)

⁽³⁾ Grish t Brojonath, _0 W R 50 (1873)

⁽¹⁰⁾ Ehrodamoyi Barmanı (Begela bun darı, 4 C. L. J. 192 (1906)

the trees a fre h suit based on it was competent to the plaintif (1) If a mort great in a suit for redemption of an usufructuary mortgage omits to claim surplus profits, a subsequent sint for the recovery of such profits is barred by this section (2) The omission in a prior sint against one of several joint pro misors of a part of the cause of action is no bar under sect 43 of the last Cole (now represented by this rule) to a subsequent suit against another joint promisor for the portion so omitted (3) A plaintiff who omits to sue for a portion of his claim, stating that he does not relinquish it but means to sue again for it, can gain nothing by such statement, but, on the other hand, neither can such a statement furnish a reason for holding the first suit to be barred (4) As regards a plaintiff's claim for relief, he must either include it or obtain the leave of the Court to onut it, if he does neither he is barred (5)

"The plaintiff '-It has been held that a defendant's claim to set off stands in the position of a claum by a plaintiff in a separate suit, and that he may in relation to his closs-claim, be rightly regarded as a plaintiff within the me mung of the section (6)

Conditions of applicability of the rule -Iho main conditions the caistence of which is necessary for the applicability of the rule, and which are dealt with in detail hereafter, are (a) the existence of a cause of action in the prior suit, (b) which was known to the party, (c) and which the Court had jurisdiction to try, and (d) the identity of parties, and (e) of the cause of action, the incaning of which last mentioned term in connection with the subject is subsequently defined and exemplified by reference to cases of tort, contrict, and of a miscellaneous character

(a) Existence of cause of action in prior suit presupposed -The first thing to be considered is whether the cause of action in the second suit is the same as in the first. If so, but not otherwise the second suit is barred in respect of any portion of the claim which was omitted from the first stat (7) Where there is in infringement of one right and one cross of action has arisen, the plaintiff must make his whole claim once for all in one suit If the plantiff had thus in opportunity in the former suit of recovering what he seeks in the second, the former suit is a bar to the latter action (8) But this rule, which requires the whole claim to be put forward, presupposes the existence of a cause of action and will have no application where it is found that the former suit had no came of action This will generally be the case when the former suit was dismis ed as premature, in which case the claim may be put forward in a suit brought on the maturing of the cause of action (9)

⁽I) Bak laram a Darku 10 B H C R 303 (1573)

⁽a) Rim Dit t Bhuj Sigah of 1 and (1305)

⁽J) Lamanjulu r Arasa Mudu 33 M. 317 (Lann (1) Mu a at world r Bibe t Khilloo

Mull _ Y H 1 (0) (15 0) at lee Malou ! 11 r Nare + Dr -) (Jan (15 a) () Managed this Naro + Dy 20 C Jen,

at 1 3-0 (10)_)

⁽⁶⁾ Sanbut Lattah : Mahe h Sarayun Lal 32 C bol (1505) (7) Kakapa Bajun 8 B H C R 205

^{-03 (15-1),} Ittappan t Manatakrama -1 W at 11 lot lot,

⁽s) Ib, at 1 1.00 (J) Halm Clint C I C JC Clin.

Mr. al Klan r Mehr Klan 18 3 1 1 **\0 3**2

There is no but if the plaintiff had in fact no cause of action in respect of his claim at the date of the institution of the prior and and so could not have sued or properly sued, (1) and where nothing is decided but that should be sue region (2) In short, only the claim which the plaintiff is able to make must be put forward, and only so much of the claim is required to be included is the plaintiff may be able to make at the time of institution of the suit (3) If, further, a person has a claim by revision of the defendant's default, but is cutitled to wrive it and does so, he is not precluded by such waiver from enforcing has claim in the case of a subsequent default, the cause of action not being the same (4).

(b) Which was known to the party.—An omission to suc can only be a bar when the claim was known at the date of the institution of the first suit. A right which a litigant possess without knowing or ever having known that he possesses it can hardly be regarded as a "portion of his claim" within the meaning of the section (5). A person cannot, moreover, omit or relinquish that of which he has no knowledge. The provision as to omitting a claim clearly involves the idea that the plaintiff so omitting was, at some time prior to the suit, aware, or informed of the claim or wave of the facts which would

(1) Venkoba e Subbanna, 11 M Jul. 1.3 felaun must have been enforceable at date of lormer suit], Shadi e Gainds, 1800 P R No 127, Raja Ndmani Singb : Annada prasad Moukerice, I B L. R. 1 B J7 100 (1868) (the 1 lamtif could not in the 1710r suit baye recovered dama_ca], Ballershina i Ilarl Shankar, 8 B H C R A C J . 64 . foll in Narayan Babaji t Pandurang Ram chandra 12 B H C R 148, 155 (1875) famt for partition held not barred, as the property being mortgaged was not avadable for actual partition at the time of the former suit]. aliter if the property was available for parti tion, Uhba t Daga, 7 B 182 (1882), dis approved in Monsharam t Gonesh, 17 C W N 521 (1912), Nund Lall Bose v Meer Aboo Mahomed, 5 C 597, 601 (1879) (the compensation money, subject of the second suit, had not been drawn from the Collector a Court until after the institu tion of the former suit], Mayiv \tathraman, 22 M 197 (1898), Chaladom v Kakkath 25 M 669 (1902) [conversion complained of was subsequent to date of former suit!

(2) Kahaji t Bapuji, 8 B H C R at p 208 (1871), this case was cited with approval in Becharji t Pujaji, 14 B 31, 50, 56 (1889), where the Court in the first case had refused to adjudicate upon a particular question (3) See Hukm Chand, (P C 503, and cases cited in n. (8) p. 551

(1) See Ram Bhai t David 1881, P 1; No 123 (provision in mortgago that i rincipal should be paid without interest within one year, il not paul monthly, interest jayable, in delault of payment of interest mortgages entitled to sue for both principal and interest Held no one was obliced to take advantage of forfeiture, and aust for interest did not bar second sust for principal and interest accrued due subsequent to former suit], Raman t Wazira 1886, P R 79 Mortgago provided that in default of payment mortgageo might sue for possession. On default suit brought for unterest due held not to bar suit for possession in case of subscripent default] Bade Bibi t Sami Pillar, 18 M. 257 (1892), and Hulm Chand C P C 501 503

(5) Amanat Bib t Imdad Husam 15 C 800 808 (1888), s c L R 15 1 \ 106 112 Following, this decision, the Punjab Chief Court held that to constitute the bar the plantiffs must have been aware of the facts which would have enabled them to make the claim, Shadis Gainda 1800, P R No 127, Batul Kunwar v Muni Lal, 32 A 025 (1910) Gorachand t Basanta, 15 C L J 260 (1911)

give him a cause of action (1) It has also been held that where the facts have been fraudulently concealed, the fraud gives a new cause of action on which the second suit may be brought (2) Where, however, a person knows of the facts before the institution of the suit and omits to make a particular claim by an oversight, it is no answer to say that such omission was due to mere mistake, and was not actuated by any fraudulent or dishonest motive. If the words of a law are clear and positive, they cannot be contested by any con sideration of the motives of the party to whom it is to be applied, nor limited by what the Judges who apply it may suppose to have been the reasons for enacting it (3) Nor, where the plaintiff is aware of his cause of action, is it necessary that the amount of damages resulting therefrom should be known or even be capable of being known. So it is a general principle in cases of breach of contract or tort, that where there is but one cause of action damages must be assessed once for all (4) In some cases of wrong the cause of suit is not complete until actual damage has ensued, but when once the cause of suit is matured, the subsequent occurrence of further damage, whether after or before this has been adjudicated upon, does not originate a fresh cause of suit , were it otherwise, higgation might have no cnd, for in few cases does the damage flowing from a wrong or breach of contract cease with one event (5) Therefore, as regards damage actually incurred, all must be clauned, and as regards those which have not actually accrued at date of suit, that future or prospective damage, the e not known may be estimated, and are therefore, in contemplation of law deemed to be known, and must be claimed for once for all (6)

(c) And which the Court had jurisdiction to try,—It is obvious that a plaintiff is not debarred from having a matter tried in a second suit if by reason of the absence of necessary jurisdiction it could not be heard in the first. He is entitled to have his claim adjudicated. All that the section says is that if he had an opportunity of having it adjudicated, which he neglected

(1) Viratagava t Krishnasanu, 6 M olt, 50 (1882), Ambu t Actilianina 14 M, 23 (1890), Manathode t Appu 15 M, 236, 27 (1892), Sankariu r Parvatlu, 19 M 115 (1885) And see observations in Door₆2 Nath t Kalce Narain, 24 W R, 242, 213 (1875)

(2) Lachman Suigh i Sanwil Singh I

singh, J.N. W. P. 27, 30 (1971)

(3) Moonshie Burlor Ruhnem a Shum as agenness. Begun, S. W. R. P. C. J. 12, J.J. (1907), a. c., 11 Moo. I. J. 531, 605, rd., Bulwant Singhi. Chitan Singh, J. N. W. P. T. (1871), which understood the P. C. ruhng as aptlying to knowledge as well as motivo, fold, in Games Charlier et Ran Kumr. B. R. R. A. C. J. 205 (1803), a case of loss of the matake. rd. J. Ram Charlier, a. D. Pap. M. V. L. 21, 127 (1872), where the

decree in the first httgation disclosed to the party thirt she had a larger interest than she thought foll Syed Modula + Hurkishin Singh 2 (L. J. 10 (1905) In Meer Mahomed + Forber 5 W. R. Let X., 70 (1804) a per on having such for in amount in a certain coin when it was due in a higher coin was held buried from sung for the difference.

(1) Serrao v Norl 15 Q B D 503, Darliy Min Collecty v Mitchell, 11 App Cas 127 (5) Rajah Ad Mono Singh e Issur Chunder Choshaf 9 W B 121, 122 (1809), for an instruce in which the cross of action is not complete until damage has accrued, see Darley Main Celliery e Mitchell, 11 App Cas 127

(6) See closes ented a de, and Bennett t Hool, I Agra, 4" (1866) I run her e Il im Theor, II Q B D - II to avail himself of, he cannot sue again. A reasonable construction must be put upon the section, and the words "whole" claim must be understood with the qualification, "in so far as it is cognizable by the Court in which the suit can be lawfully entertained "(1) It was intended to prohibit a second suit when the whole claim arising out of the cause of action was within the ordinary jurisdiction of the Court in which the plaintiff had brought his first suit, or such suit had been made cognizable by the Court in point of pecuniary value by the relinquishment of a portion of the plaintiff's claim under the express provision in the same section (2) If the first Court had, in fact, no jurisdiction in respect of the claim, or any portion of it, the plaintiff need not, and indeed could not, have sued If, in the same circumstances, and in the belief that a Court has jurisdiction, a party does sue, he cannot he said to relinquish or omit a claim which is put forward, even though erroneously If, therefore, as in the first case next mentioned, a party suce and obtains a deerce which is infruetuous for want of jurisdiction, or, as in the second case, he is refused a decree, he is not precluded from sung again. Where the cause of action was not split because the plaintiff did not in the first case either relinquish or omit to sue for any portion of his claim, and the necessity for the second suit arose out of the fact that the decree in the first suit was infructuous so far as regarded a certain portion of the property, in consequence of its having heen made without jurisdiction the section was held not to apply (3) And where a plaintiff had a right to sue his mortgagor for the mortgage debt in the Court within whose jurisdiction the mortgagor resided, the fact that he erroncously claimed in that suit relief against the lands which that Court had no jurisdiction to give, and therefore refused, did not har a subsequent suit in the proper Court to enforce the mortgage hy sale of the mortgaged property (4) The principle has been held to apply even where the jurisdiction might have existed with a permission which was never applied for So where at the date of the former suit the land in respect of which the subsequent suit was brought was subject to provisions which deprived the Courts of jurisdiction except where authority was given by Government to entertain a particular suit it was held not obligatory on a plaintiff to obtain the permission of Government The latter was not bound to give the Courts jurisdiction, and might possibly refuse it, or might give it after such a lapse of time as would be a bar to a party proceeding with the rest of his claim. Innes, J said 'If at the time of a cause of action so arising to a plaintiff, or in the interval between that and a subsequent date, any part of his claim is not cognizable by the Court, it cannot I think be intended that he must postpone his suit for the cognizable portion of his claim until the Court acquires jurisdiction over the portion at present uncognizable

Pattaravy Vudali r Au limula Vu lah
 M H C. R. 419 422 (1870)

⁽²⁾ Subba Ran r Rama Ra r M II (R 370 (1867) [ref., Pattarasy r M II (R 370 (1867) [ref., Pattarasy r M II (R 419 N hall single r Jonaya Suigh 1884 P R N 162, Grad-Chunder r Ramessarre 22 W R 305 (1874)] (Y) Bun, e Sunch r Soodust Lall, 7 C

^{739 747 (1881)} Grah Chunder i Baries sune 22 W R 308 (1874)

⁽⁴⁾ Narasinga : Venkatanarayana 10 M 441 (1832) See Ham Soon lure Ariahin : 17 W. R. 350 (1972) [where a former judgment lecified that the plaintiff 1 ad no cause of act in there was no cause of action used and 1 termined].

or be barred of all future semedy for the recovery of that portion" (1) Under the Code of 1859, where preperty was in two districts, it was necessary to apply to the High Court under sect 12 of that Code for sanction of the trial It was held in some cases that a plaintiff was not bound to include all such properties in one suit, and to apply for sanction, and that he might sue separately in each district (2) The Calcutta High Court, however, held that a plaintiff should include all properties and apply for sanction (3) Sanction, however, is no longer necessary for the exercise of jurisdiction over the whole property by a Court in which any portion of it is situate, and the plaintiff has now an absolute right to sue for the whole of the property situate in several districts, in any one of such districts A suit, therefore, for partition must include the property in all the districts, and a suit fer partition of property in any one district will not be allowed (4) The principle applies to defect of material as ef local jurisdiction The former Court must have had jurisdiction to try the particular question raised in the second suit. Where the former suit was instituted in the Revenue Court, a subsequent suit in the Civil Court is not barred in respect of a matter not triable by the Revenue Court (5)

(d) Parties must be the same -Not merely must both suits arise out of the same cause of action, but they must be between the same parties, or between parties under whem they, or any of them, claim (6) This rule buts a second suit only when the plaintiff in that suit was also the plaintiff in the first (7) But if a person would have been barred, se will a person claiming through him as heir, (8) or assignce And as a plaintiff having an entire demand cannot divide it into distinct parts, and maintain separate actions upon each by parity of reason he cannot by an assignment enable others to de it (9) In the under-mentioned case (10) it was held that the Advocate General as plaintiff in that suit was barred by a decree in a previous suit under this The trustees in that suit, having then onutted to ask for an account, could not sur again. The Advocate General represented the same interests as they did, and was therefore equally bound It was, however, held that even if that were not the case the Court, in the exercise of its discretion, would

⁽I) Pattaravy : Audimula 5 M H (R 119, 422 (1870)

⁽²⁾ Subba Rau : Rama Rau, 4 M H C R 376 (1867), ref., Pattaravy : Audimula, 5 M H C R 119 (1870), Milal Singh t Sowaya Singh, 1881, P R No 162 dist. Hari Narayan i Ganpatras Daji 7 B 272, 259 (1553)

⁽³⁾ Jumoons: Bamasoondery, 2 W R 148

^(154.5) (1) Anup Shah : Jasu ant Shah, 1591 P R V. 10 See Hukm Chanl, C P C. '07

anla 20, arte (a) Hakim i Nadim Gul, 15 h P R N. D. Banks a Made, 1 A 180 (1880).

linami e Gol n 1 4 1 319 (1852), Chunnl Lal r Banary at Smah, 9 1 23 (1856)

⁽⁶⁾ Balmakund: Sangari, 19 A at pp 383 384 (1897), and see Hingu Lal t Baldee Ram 24 1 553 at p 554 (1902) in which it was held that as regards the defendant Gancshi who was not a party to the former suit s 43 had no application

⁽⁷⁾ Dhani Ram Shaha : Bhanath Shaha, 23 C 192 at p 707, in which ease the I him tiff had been defendant in the former suit

¹⁴ regards minors tide ante p 577

⁽b) Soroj Pershad a Saheb Lal 3 W R. 25 (1865)

⁽³⁾ Gram : Ahlrich 38 Cal 514 (Amer.) cited in Hukin Chand (P C. 516

⁽¹⁰⁾ Misocate General of Bombay r Bu Punjahat 15 lt 351 (1844)

not direct the account asked for. As regards defendants, however, it is to be observed that this rule bas reference to the subject matter of the claim, and not to the persons against whom it may be made (1) It occurs in an Order which relates to the frame of a suit, and not to the array of parties. It lays down no rule as to who is to he impleaded as a defendant. and does no more than provide that the plaintiff must include, in the relief he asks for in his plaint, the whele claim he is entitled to make in respect of his cause of action against the defendant. It nowhere prescribes that where one person has two distinct causes of action, different in their uature and in their incidents, respecting the same property, one against one person, and one against another, he is bound to join those causes of action in one suit (2) Not only must the plaintiff be the same, but the bar applies only to a suit against the same defendant (3) This rule does not affect that which lays down the principle of har for jointness The principle of the maxim, Nemo debet his texari, upplies not only to the case of one individual being sued twice for the same cause of action, but also to the case of a person suing twice on the same contract (4) The rule that n decision against n joint, not joint and several, contractor, or n joint tortienser, is n bar to a suit against another contractor or tortfeasor, while preceeding also en the ground of unity of cause of action, is based on a different principle, viz merger of the right of action in a judgment (5)

(c) And there must be identity of the cause of action—In order that the action should be a bar, the cause of action must be the same in both suits, both claim and remedy have reference to the same cause of action. The rule has no application where the causes are distinct. The rule does not compel a plaintiff, who has several causes of action, to lump them together under the penalty of having a subsequent suit harred. It applies only where there has been a sphiting of a single cause of action. As pointed out by the Privy Council the "section does not say that every suit shall include every cause of action, or every claim which the party has, but every

the defendants were born subsequent to the

former suit, and of Ganpat Rai i Hira

⁽¹⁾ Nobin Chandra Roy e Magantara, 10 C. 924, at p 927 (1884)

⁽²⁾ Balmakund v Sangari, 19 A 379, at pp 384, 388, 389 (1897)

⁽³⁾ Sabeer Khan v Knit Doss 1 W R 199, 201 (1864) [if the present suit includes persons who were not defendants in the former suit, it is at least as to such persons wholly unaffected by the sections referred to]. Dial Singh v Jowala Devi, 1896 P R No 58 (the Court observed that is followed from the authorities that the identity of the defendants is essential when the bar under s 43 is pleaded] In Ramayya t Venkatratham, 17 M 122, 128 (1893) the section was held not to apply as

Singh, 1891, P. R. No. 29, Balinakund v. Sangari, supra. And in Madud t. Jaleem, 4. N. W. P. H. C. R. 142 (1872). Pearson, J. dissenting (in this respect, it is submitted, rightly) held that the section did not apply and said that the direction that "over; auit shall include ets is to be understood in respect of the defendants impleuded in that suit, but see also Virtir. Bhola Ram. 16 A. at p. 173 (1893).

⁽⁴⁾ Cambefort c Chapman 19 Q B D 32 (5) See the subject which is foreign to the section, treated in Bukin Chand, Res Jud 734 C P (551 and the leading decision of Kendall : Hamilton 1 App Cas 504, which has been referred to in numerous cases in this country which will be found in the text books etted

sunt shall include the whole of the claim arising out of the cause of action, meaning the cause of action for which the suit is brought" (1) It has also heen held, in the under mentioned case, (2) that a plaintiff was not bound to alter the nature of his suit upon the addition, at their own instance, of certain persons as defendants. In this case a suit bad been brought by A for the recovery of certain moveable property. Two persons were in possession of a house, which, as well as the moveable property, had originally belonged to the same person. They were, on their own application, added as defendants. In a subsequent suit hy A's son to recover the house, it was held that his father was not bound to set up a claim to the house in the first suit against the added defendants. To have done so would have heen to alter the nature of the suit as originally brought, and to have offended against the provisions of sect. 44 of the last Code and O. II rr. 4, 5 of this.

As in the case of res judicata, the claims in the two suits must have been made under the same office. The plaintiff must not only be the same person, but his must he suing in the same right. Thus, a suit for damages, under Lord Campbell's Act (corresponding to Indian Act XIII of 1855), is no har to a suit for damages suffered by the personal estate and effects of the deceased, masmuch as the action under the Act is not connected with the estate of the deceased, and the damages receivered form no part of that estate, whereas the second action is brought by the executor or administrator as representing the estate of the testator or intestate (3)

In order to determine whether in any case the causes of action in the two suits are the same, it is necessary to determine what was the cause of action

⁽¹⁾ Pittapur Raja t Surya Rau, 8 M 520, 721 (1985), s c, 12 I \ 119, Amanat Bibi r Imdad Husam, 15 1 1 111, 112 (1888) Mahomed Reasat Ali v Hasin Bann, 20 I A 157, 158 (1893), Subbayya 1 Venkatesappa 6 M 19, 52 53 (1882), Thyslat Lunhamed (M 308, 110 (1881), Pragp : Lndarp, 9 B H C R 257 (1872) [although the Code allows of claims arising from different causes of action being included in one suit, there is no trovision which miles it olligatory] Lirupati i Narasunha 11 W 210 211 (1887). 1mbu t Kethlamma 11 M 23 (1890), Bulwaut : Chittan IN W P 27 (1971), Ganesh Chau lea 1 Rain lannar, 1 B L. R "Go (156)), Bungsco Singh : Sochst Lall 7 C 739 747 (1881), Anh : Thatha, 10 M 117 (1857) [the class and the remedy rich tinelm & Hham hkinf and to the cause of action litigated in the prairies su t] I lmr 1 Raji, la 11, P R X 21, thumn Ld r Banrepit Singh 9 1 21 (1880), Bahrakun I. Sugari Pt 1 179, 53 (1517) [tlotworsertials are sin cars

of action and same parties], Munshed Buzloor Ruheem & Shumsoonnissa Beguin, 8 W R P C 312 (1867), Naro Balvant : Rumchandra, 13 B 326, 329 (1888), Bil. 1ama Singh t Prob Dial, 1889, P R No 129 cated Hukm Chand, C P C 501 [ejectment, claim for mesue profits], Purshottam t Atmaram, 23 B 597, 601 (1899), Narayan t Shamrao, 27 B 379, 388 (1903), Rama swann Ayyar v lythinatha Ayyar, 26 M 700 (1 102) [the real test is whother the cause of action is the same and not whether the transaction is sought to be established in different modes or by thiferent means], Preough Mukern r Bishnath Prasad -9 1 2 6 (1906) [cause of action the same], Uning Pet Ma Lou Ma Gale, 38 (. 6-) (1912), 31 J A 110, 14 C L. J 15, and for discree an I partition in Burmah

⁽²⁾ Hugu Lal i Balleo Ram 21 \ 7.3 (Ho.)

⁽¹⁾ Labotti ten d North ru Radwin (

in the former suit, and this cause of action, it has been held, must be sought for between the four corners of the plaint (1). The Court has not to see how the facts stood upon the finding of the Court in the first suit. The question to be determined turns not upon what was the proper suit for the plaintiff to have brought, or the proper remedies for him to have applied for, having regard to the facts as found upon the tril of the first suit, but upon whether the causes of action alleged in the plaints in the two suits are one and the same, or are distinct (2). The cause of action as alleged in the plaint cannot be altered by the result of the suit (3). So where a suit for confirmation of possession is dismissed upon the ground that the plaintiff is not in possession, such suit is no har to another for recovery of possession (4). And in the under-mentioned case (5) it was held that there was nothing in the former section which would justify the Court in going behind two honds to consider the circumstances out of which they sprang, albeit those circumstances might themselves at the time constitute a cause of action.

Meaning of "cause of action"—The meaning of the term "cause of action" has been discussed in the notes to sect 20 and O I r 1, ante. The question of the identity of the cause of action in the two suits will depend our siderably on the circumstance whether, in cases other than those in which the cause consists merely of a right, the term is used in its restricted sense of the infringement of a right, or in the wider sense both of the right and its infringement. The wider the meaning which is attached to the term 'cause of action," the more restricted is the operation of the section, for if the term is composed of only one element, there is more likelihogd of the identity of the two suits than where their identity is required in all of several elements. The term has, in connection with this section, heen defined in a number of cases in its wider sense, (6) though there are others in which the term appears to have

⁽¹⁾ Jibuni: Nath Khan v Shib Nath Chuckerbutty, 8 C 819, \$22 (1882), Nonoo Singh Vonda v Anand Singh Vonda, 12 C 291 (1885) As to plaintiff not knowing nature of defence, see lit Ackpov Lalls, 23 VR 409 (1875) In order to see whether there is a bar of res judicads, that is to see what was heard and decaded, it is necessary to look both at the pleadings and judgment Jagatjit Singh v Sarubjit Singb 19 C 159, 172 (1891), see notes to 8 11, ante.

⁽²⁾ Jihunti Nath 1 Shib Nath, supra, at pp 823, 824

⁽³⁾ Ittappan v Manavikrams, 21 M 153,

<sup>157 (1837)
(4)</sup> Jibunti Nath c Shih Nath, snpre, Nonoo Sungh v Anaud Sungh, supra Komola Namuny v I okenath Kur, 8 C 825 (1882), Yohan Lai v Bilaso, 14 A 512 (1892), ref., Thakore Becharji v Thakore Pupap, 14 B 1, 51 (1883), Ambu t Ketldamma, 14 W 23, 24 (1890) See, however, Nathus Budhu, 18 B 375, 52 (1893), the Court expressed an

opinion obster that s 43 must be applied as if the facts bad been as found by the Court and not as alleged in the plaint, Bande Ali i Gokul Visir, 34 A 172, 183 (1911)

⁽⁵⁾ Umed Dholchand : Pir Saheb, 7 B 134 (1883)

⁽⁶⁾ Jibunti Nath : Shih Nath, 8 C 819, 822 (1882), Nonce Singh : Anand Singh, 12 C 291, 294 (1885), Ittappan : Manavikrama, 21 M. 153, 156 (1897) Ram Bhaj t Devia, 1881, P R. No 123 Im which case the breach was one, but the antecedent rights were distinct, and in which Brandreth J. ex pressly observed that both the antecedent right and the breach were necessary to con statute the cause of action1. Sahma Bibi : Sheikh Muhammad, 18 A 131 (1895), Sheo Prasad v Laht Auar 18 4 403 (1895). Rano Koer t Debi Dial, 18 A 432 (1895), in Dial Singh : Jowala Devi, 1896, P R No 58, it was pointed out that while the term is also used in the Code in its limited sense, as in the former s, 26 [see Haramoni

been understood, though net expressly stated to have been used, in its restricted sense (1)

It was said of the last Code that the term " cause of action" had not been used in all its sections in precisely the same sense (2) It is to he construed with reference rather to the substance than to the form of action (3) The test has been said to be whether the same evidence and arguments apply in the two cases (4)

The cause of action must be distinguished from the subject matter (5) of the suit, as well as from the relief (6) claimed The words have no relation whatever to the defence, hut refer to the grounds set forth in the plaint (7)

Dassi i Hari Churn Choudhry, 22 C 833 (1895)], in the present rule the wider meaning was intended as has also been held to be the case for the purpose of former s 45 (see Jhaman Lal v Sant Lal, 1897, P R No 43), Murti v Bhola Ram, 16 A 165 (1893), citing Read v Brown, 22 Q B D 128, hut in which the decision of the majority was rather in favour of the opposite construction , Hukm Chand, C P C 511, Balmakund : Sangari, 19 A 379, 384 (1807), Dampana boyma v Addala, 25 M. 736, 739 (1902), Narayan : Shamrao, 27 B 379, 385 (1903)

(1) See Hukm Chand, C P C 511, 512

See cases cited post

(2) Anderson, Wright & Co v Kalagurla, 12 G at p 347 (1885), Mauly: Muhammad v Muhammad Abdul, 24 I A 22, 26 (1896)

(3) Dunean Bros + Jeetmull Greedbarco Mull, 19 C 372, 379 (1892), as in they are of the rule relating to res judicata 881-ao cause of action, into whatever Protean forms it may be moulded by the ingenuity of pleaders is to be regarded as the same if it rests on facts which are integrally con nected with these upon which a right and infringement of the right have already been once asserted as a ground for the Court's interference, per West, J, Vishmi t Krish narao, 11 B at p 165 n (18-1) Thoushiculty in the way of interpretation of this term in the Code has now been removed by the amen liment of s 26 (new O I r 1)

(4) Al Dasami v Ramasami, 9 M 279, 281 (1850), Narayan i Shamrao 27 B 379, 383 (1.03), s c., 5 Bom L R 233, Rangayya : Naryal 1 1, 24 M. 191, 199 (1901), P C., Brunel n : Humphry 11 Q B. D 118. in Naro Balvint i Ramehan Ira, 13 B 32J (1555), it was printed out that the evikneo in the two suits was escritially different In test, h wever, when to cepte I by large,

CJ m Murti v Bhola Ram, 16 A 165, 173 (1893), and in Anderson, Wright & Co t Kalagurla, 12 C 339 (1885), Garth, CJ held that the different actions required different evidence, though Wilson, J, held that the former s 43 applied on the ground that though there were several breaches they were under one contract More properly it can be described as a rough test Purshottam v Atmaram, 1 Bon. L R 76, 81 (1809), 6 c . 23 B 597 , and see as to different issue, Soorasoonderee Dabea v Gopal Lall Thakoor,

19 W R 141 (1873) (5) See Suddaruddin Ahmed v Banimad bub Roy Chowdhry, 15 C 145, 156 (1887), in which the Full Bench, holding that the dismissal of a suit for rent at an enhanced rate was no bar to a subsequent suit for rent at the rate originally fixed observed that it nught be the subject matter was the same

but the cause of action was not (6) Shankar Baksh v Daya Shankar, 15 C 422 (1887) [difference in the mode of relief does not affect the identity of the cause of setion1. Narayan a Shamrao, 27 B 379, 353 (1903). Nagathat v Ponnusami, 13 M 44, 45 (1889) in which case the relief was said to be substentially the same though the cause of action was different fault to cancel docu ment, suit to declare that it was not in tended to take effect], Ranguya i Nan Jappa, 21 M 191, 193 (1901), in which the relief asked for was different but the cause of action was identical in the two cases Narayan : Shainrac, 27 B 379, 383, 385 (1903)

(7) Dami umboyina v Ad lala, 25 M 736. 719 (1902), in which also, at 1 p 715-747, the chatinction between 'cruse claction and same matt r, ms 20 of the former Cod , is Pointed out

If the causes of action in two suits are separate, the fact that the suit which might have preceded in point of time has actually been posterior does not affect the question (1). Nor does the fact that joinder of claims might be under without being open to the charge of millifariousness take away the plaintiff's right to bring separate suits in respect of separate causes of action. Because a plaintiff has not formerly availed himself of the right to join separate claims when that is permissible, that is no objection under this section to a subsequent suit (2).

Prior valid causes of action cannot be made into one by a transaction which is inoperative in law and challenged as such in the suit. So a suit to cancel a release, obtained by duress of all claims against defendants, and to recover the amount of one such claim, was held to be no but to subsequent suits upon other causes of action so released (3). The same rule applies if a locument is madmissible in evidence and, in consequence, a party sues on the original transaction prior to such document. So where a balance was found due between the parties, and a promissory note was executed providing for its payment by instalments, and the note being madmissible for want of samp, the plaintiff had to sue on the original transaction, he was held to be bound to sue for the full amount, and a suit for the amount due for some of the instalments provided for in the note was held to bar a subsequent suit for the balance (4)

The duty to obey a foreign judgment is a new and separate cause of center from that of the original cause of action to which the judgment gave effect (*)

Each right which gives a right of action as also, as a general rulo, distinct acts, constitute separate causes of action (6). So as regards separate rights, a cause of action in respect of injury to a proprietary or permanent interest in an estate is not the same as that in respect of injury to a temporary or lease hold interest, (7) and the cause of action accruing to a co sharer by reason of exclusion from joint possession is not the same as that which he possesses to have the joint estate partitioned, (8) nor is the cause of action the same in a

⁽¹⁾ Doorga Nath Roy t Roy Kalee Narain 24 W R 212 213 (1875)

⁽²⁾ See In re Hurce Mohun Paramanick 15 W B 486 (1871) s c 14 B L R 418 419 Laluchan l v Girjappa, 20 B 469, 474 (1895), Dampanaboyina : Addala 25 M at p 745 (1902), as to alternative relief see Sudduruddin Ahmed : Banimadhub Roy 15 C. at p. 149 (1887) So the fact that a prior mortgagee might have been but was not imi leaded did not bring the case within the section Balmakund t Sangari, 19 A at p 388 (1897) Where there are separate causes of action against separate defendants in respect of which they are not jointly con cerned Raja Ram Tewary & Luchmun Pershad 8 W R 15 (1867) the plant will be rejected

⁽³⁾ Subbaya i Venkatesappa, 6 Vi 49

⁽¹⁸³²⁾ (4) Benars: Das v Bhikan Das 3 A 717

⁽⁴⁾ Benars: Das v Blikan Das 3 A 717 (1881) Oldfield J diss

⁽⁵⁾ Lakshmanan : Karuppan 6 M 2"3 1882)

⁽⁶⁾ Hukm Chand, C P C 513 514

⁽⁷⁾ Upendra Lal Mookerjee 1 Secretary of State 20 C 716 (1893)

⁽⁸⁾ Abdun Anair e Rasulan 20 C. 385 (1892) the sut however may be barred where the cause of action in each case was partition. So a suit to partition debts bars a subsequent suit to partition lands. Ukha t. Daga 7 B 182 (1882), disapproved in Monsharam t. Gonesh, 17 C. W. N. 521 (1912) In, however, Ittappan t. Manavi krama, 21 M 153, 168 161 (1897) it was held

suit to recover possession of land upon the strength of alleged title thereto, and a suit hased on the fact that there was no title, and that for the consideration money plaintiff got nothing (1) And when plaintiff had first sued for ejectment in the Revenue Court and afterwards for zent prior to ejectment under sect 34 of the Agra Tenanev Act of 1901, it was held that the causes of action were distinct and that the latter suit was not harred by rule 2 of this Order (2) A right of a Mahomedan widow to dower is distinct from a right to a life interest in the estate of her deceased husband (3) Similarly, a suit for maintenance is distinct from a subsequent claim for a share in ancestral property (4) If a suit for partition has been brought, but for some reason the properties have not been actually divided by the decreo made therein, it is open to any one of the joint owners to maintain a subsequent suit for partition (5) A Burmese Buddhist husband's suit for divorce is distinct from his suit for partition based on divorce (6)

Torts -As a general rule, every tort is a separate and indivisible cause of action So a claim in respect of a distinct prior tort need not be included in a suit on a subsequent one, and will not be barred by the suit on that other, (7) even though the suit brought might have embraced the claims on both the torts (8) Each of several wrongful ahenations of property constitutes a separate cause of action (9) A suit for recovery of land A from X is no bar to a suit for the recovery of laud from Y, though the title thereto is the same, and the causes of action may have arisen at the same time, both the persons withholding and the property being different (10) An act prejudicially affecting more than one person gives to each a separate cause of action, as if the act done to each were separate So a libel against several persons has often been held to afford a separate cause of action to each (11)

that the right of a tenant in common to have each field separately divided was different from the right to claim partition of all fields (1) Hanuman Kamuta Hanuman Mandur,

15 (51 (1887) (2) Nandan Singh + Ganga Prasad, 35

- A 514 (P B) (1913) (3) Mahomed Peasat Ali 1 Hasin Bann
- 21 C 157 (1893), s. c., 20 I A 155
- (4) Pramada Dasi t Lakhi Narain, 12 C 60 (ISSo)
- (a) Monsharam : Gonesh 17 C W A 21 (1912)
- (6) Manng Per Ma Lon Ma Gale 15 C W N 718 (1911)
- (7) Mahabeer hugh: Raud hajjan Sah 16
- (i) Looloo Singhe Rajendur Laha, SW R 14 (1867) Prage 1 n large, 9 H H C R. - 17 (1572), Rau Kuran Suigh i Fyz Mr 11 Moo I A 187, I to (1871) (a at to impeach alenati is la Hinli uilur ai lin tlir.
- (., 515 (1854) (8) Ilulm Chan I, C. P C. 518
- the same to Bl See also in connection with the subject of alienation Ram Lochuu Lall v Gour Pershad N W P 172 (1873) isust to set aside alienation of half share made by guardian, suit for share recovered by alience in execution in another suit]. Debi Prosad Choudhury & Golap Bhagat, 40 C 721 (F B)

sut to set aside mortgage granted by them

before alienations], Shafkat un nissa : Shib

Sahas, 4 A 171 at p 173 (1881), Jehan t

Sawak 1 Agra 1 B 109 (1866) [suit to

set asido alienations by Hindu widow to 1.

- (10) Dampanaboyma t Addala, 25 W 736 (1902) as to suits against several aliences, ede 1 p 712, 715 ab
- (11) Hukm Chanl C P ('27, and see th Serang r B 51 n, 11 (524 (15%), Salama Bibi e Sheikh Muhammad 18 1 171 at p. 138 (15 b) Rajjo Kuar i Ikbi that 18 \ \$32 (153) Ramanuja r Data marks a W #1 (15%)

Even in the case of the same person, if his rights in several capacities are infringed, there will be a separate cause of action to him, masmuch as he will be considered in each case as if he were a distinct person (1) Where the plaintiff's right is infringed by more persons than one, and by different acts done separately by each of them, the plaintiff has a separate cause of action against each of those persons (2) A tort, though connected with a contract, constitutes a distinct cause of action from breach of the contract, and so a suit for the hire of a carriage will not bar a suit for the injury done to it during the hirer's use of it (3) And so as regards distinct acts constituting distinct causes of action, where, for instance, some co sharers sell their shares on different dates to different persons, each sale gives a distinct and separate cause of action to the remaining co sharer claiming all the shares sold by right of pre emption (4) So also a suit on an unduly stamped instrument, for which the plaintiff had to pay duty and penalty, does not har a buit for recovery of amount so paid, (5) there being two distinct causes of action. one of which accrued since the institution of the former suit. Unity of title to different properties injured does not make the different acts e iusing the injuries a single tort. So a man's right to enjoy a piece of land may depend upon one and the same title, but if he is ejected from different parts of it hy distinct acts of ouster, each act of ouster would constitute a distinct and separate cause of action (6) There is, it is submitted no question but that there is no unity of cause of action in such cases where there is no unity in the act of dispossession, even though the plaintiff's title may be one and the same So, conversely, if the alleged wrongs be distinct and separable, committed by several persons, and proceeding from no combination or conspiracy of such persons, the wrong doors must respectively be sued separately in respect of their own misseasance, and not collectively in respect of wrongs to which they have been neither directly nor indirectly

(1) Hukm Chand, C P C 528, and authorities there eited.

(2) Balmakund e Sangari, IA \ a tp J84 (1897) It cannot be said that a cause of action against one person is 1 part of the cause of action against bother. Though it is in t a joint one against both Dampans bound a Valdala 25 W at p 740 (1902)

(3) Hukm thand, C. P. C. 528 came, Shaw t. Berrs, 25 Ma, 444 (Amer), and of Doorga Nath: Roy halee, 21 W. R. 212 (1875) [suit by lessor to recover lands resumed by lessor, suit to recover lands leaved].

(4) Kahan Sm_oh e Gur Dayal, 4 \ 163 (1831) Seo Balmakund e Sangari, 13 \ at p. 384 (1837) Seo Harbans e Tota Sahu 32 A. 14 (1809)

(5) Ishar Das r Masud Khan, to 1 76 (1883)

(1) Jardine Shinner & Co. e Rance Shama

Soonduree, 13 W. R. 196 (1870) Biavatullah Khan v Nasir Khan, 6 1 616 (1881) Nara van e Shamrao 27 B 373, 355 (1903) Quere whether Jumoona Dassee r Bamasoon derec 2 W 1: 115 (15/5) which held (+the contrary and as to which see Mad la Singh * Bukan Singh 1551 I' l. N. 9 was correctly decided. See on this case Hukin Chand, C. P. C. 532 O Kinealy C. P. C. 110 In Ram Souther Shaha, 20 W. R. 103 (1573) the Court remanded the case to ascertain whether there were separate and distinct at 1. · I de posse sion, and see case serted post, and ch Pittagur Raja . Suris Lau, 9 M 559 (1885), where there was unity of title, and Randurry Mondal r Mother Mohan, 39 W R. 450 (1573) [state for processor of shares of different preparties all bought with joint funds, but in diff rent names airl at different times?

suit to recover possession of land upon the strength of alleged title thereto, and a suit based on the fact that there was no title, and that for the consideration money plaintiff got nothing (1) And when plaintiff had first sucd for ejectment in the Revenue Court and afterwards for rent prior to ejectment under sect 34 of the Agra Tenancy Act of 1901, it was held that the causes of action were distinct and that the latter suit was not harred by rule 2 of this Order (2) A right of a Mahomedan widow to dower is distinct from a right to a life interest in the estate of her deceased husband (3) Similarly, a suit for maintenance is distinct from a subsequent claim for a share in ancestral property (4) If a suit for partition has been brought, but for some reason the properties have not been actually divided by the decree made therein, it is open to any one of the joint owners to maintain a subsequent suit for partition (5) A Burmese Buddhist husband a suit for divorce is distinct from his suit for partition based on divorce (6)

Torts -As a general rule every tort is a separate and indivisible cause of action So a claim in respect of a distinct prior tort need not be included in a suit on a subsequent one, and will not be barred by the suit on that other,(7) even though the suit brought might have embraced the claims on both the torts (8) Each of several wrongful alienations of property constitutes a separate cause of action (9) A suit for recovery of land A from A is no bar to a suit for the recovery of land from Y, though the title thereto is the same and the causes of action may have arisen at the same time, both the persons withholding and the property being different (10) An act prejudicially affecting more than one person gives to each a separate cause of action, as if the act done to each were separate So a libel against several persons has often been beld to afford a separate cause of action to each (11)

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- 15 C 51 (1887)
- (2) Nandan Singh : Ganga Prasad 35 A 514 (F B) (1913)
- (3) Mahomed Peasat Alt r Hasın Banu 21 C 157 (1893) s c, 20 I A 155
- (4) Pramada Dası v Laklıı Naram 12 C 60 (1885)
- (5) Monsharam v Gonesh 17 C W N
- 21 (1912)
- (6) Maung Pe : Ma Ion Ma Gale 15 C W N 766 (1911)
- (7) Mahabeer Suigh : Rambhajjan Sab 16 C 545 (1889)
 - (8) Hukm Chand, C P C 518
- (9) Looloo Suight Rajendur Laha SW R # 4 (1867) Pragu t Endarp, 9 B H C R 207 (1872), Rao Kuran Singh : Fyz Alt, 14
- Moo I 1 187 136 (1871) [smt to impeach lenations by If nh wilow and mother

- sust to set aside mortgage granted by them before ahenations), Shafkat un missa t Shib Sahai 4 A 171 at p 173 (1881), Jehan t Sawal I Agra F B 109 (1866) [sut to set aside alienations by Hindu widow to A the same to BJ See also in connection with the subject of alienation Ram Lochun Lall 2 Gour Pershad 5 N W P 172 (18 3) [suit to set asido alienation of half share made by guardian suit for share recovered by alience in execution in another sut] Debi Prosad Chowdhury v Golap Bhagat, 40 C 721 (F B)
- (10) Dampanahoyma : Addala 25 V 736 (1902) as to suits against several abences
- ude pp 742 745 ib (11) Hukm Chand C P C 52" and see
- Alı Serang v Beadon 11 C 524 (IS8) Salma Bibi v Sheikh Muhammad 18 1 131 at p 138 (1895) Rajjo Kuar : Debi Dal 18 A 432 (1890) Ramanuja i Deva nayka 8 M 3f1 (1881)

Even in the case of the same person, if his rights in several capacities are infringed, there will be a separate cause of action to him, masmuch as he will be considered in each case as if he were a distinct person (1) Where the plaintiff's right is infringed by more persons than one, and by different acts dono separately by each of them, the plaintiff has a separate cause of action against each of those persons (2) A tort, though connected with a contract, constitutes a distinct cause of action from breach of the contract, and so a suit for the hiro of a carriago will not bar a suit for the injury done to it during the birer's use of it (3) And so as regards distinct acts constituting distinct causes of action, where, for instance, some co sharers sell their shares on different dates to different persons, each sale gives a distinct and separate cause of action to the remaining co sharer claiming all the shares sold by right of pre emption (1) So also a suit on an unduly stamped instrument, for which the plaintiff had to pay duty and penalty, does not bar a suit for recovery of amount so paid, (5) there being two distinct causes of action, one of which accrued since the institution of the former suit. Unity of title to different properties injured does not make the different acts causing the injuries a single tort. So a man's right to enjoy a piece of land may depend upon one and the same title, but if he is ejected from different parts of it by distinct acts of ouster, each act of ouster would constitute a distinct and separate cause of action (6) There is, it is subnutted, no question but that there is no unity of cause of action in such cases where there is no unity in the act of dispossession, even though the plaintiff's title may be one and the same So, conversely, if the alleged wrongs be distinct and separable, committed by several persons, and proceeding from no combination or conspiracy of such persons, the wrong doers must respectively be sued separately in respect of their own misleasance, and not collectively in respect of wrongs to which they have been neither directly nor indirectly

(1) Hukm Chand, C P C 528, and authorities there cited (2) Balmakund v Sangari, 19 1 at p 381

Soondarce, 13 W R 196 (1870) Rayatullah Abone Nasa Ahan, 6 1 616 (1881), Aara tan t Shamrio, 27 B 379, 385 (1903) Quere whether Jumoona Dassee : Bamasoon deree 2 W R 148 (1565), which held to the contrary, and as to which, see Madda Singh e Bulan Singh, 1881 P R No 9, was correctly decided. See on this case Hukm Chand, C P C 532, O hineals, C P C 140 In Ram Soundar Shaha, 20 W R 103 (1873). the Court remanded the case to ascertam whether there were separate and distinct acts of dispossession, and see cases cited post, an I of Pattapur Raja i Suria Rau, 8 M 520 (1885), where there was unity of title, and Ramburry Mondul v Mothoor Mohun, 20 W R 450 (1853) [buits for possession of shares of different properties all bought with point funds, but in different names and at different times]

⁽²⁾ Balmakund v Sangar, 19 1 at p 353 (1897) It cannot be said that a cause of action against one person is 1 lart of the cause of action against another, though it is not a joint one against both Dampana boyina 1 Mdala, 25 M at p 740 (1902)

⁽³⁾ Hukm Chand, C P C 528 etting Shaw t Beers, 25 Ma, 443 (Suner), and of Doorga Nath t Roy halce, 24 W R 212 (1855) [suit by lessor to recover lands resumed by lessor, suit to recover lands leaved]

⁽⁴⁾ Kahan Suigh t Gur Dayal, 1 A 163 (1881) See Balmahund t Sangari, 19 A. at p 384 (1897) See Harbans t Tota Sahu, 32 A 14 (1909)

 ⁽⁵⁾ Ishar Das i Masud Khan, 6 A 70
 (1883)
 (6) Jardine Skinner & Co i Ranco Shama

parties (1) A question may, hewover, arise as to the unity of the cause of action where there is unity of the act of dispossessien, that is, infringement, but different rights infringed If the term "cause of action" he given its wider sense, then in such cases it cannot be said that there is identity of cause of action It has, however, been held that it is not the title upon which a party relies, but the infringement of it, which constitutes his cause of action (2) The fact that a defendant's title rests upon different and distinct transactions, supported by distinct and separate evidence, does not necessarily imply that to a party contesting that title there are different causes of action warranting separate suits (3) The unity of a tortious act is not affected by the different modes in which it causes injury Thus, in an action for malicious prosecution, the plaintiff may recover damages not only for his unlawful arrest and implisonment and for the expenses of his defence, but alse for the many caused to his good fame and character hy reason of the false accusation, aud, in consequence, a subsequent suit for the latter will be barred (4)

An act sometimes consists of a series, and se may an act constituting a tert. The various acts may thus constitute a single wrong, so as to furnish but a single oause of action. As a general rule, acts of a similar character, performed in pursuance of the same general purpose, constitute one act and one tort, particularly self the acts are done at the same time, or in actual continuation (5). So a linel constitutes a single cause of action, even though it consists of several statements in the libelless pamphlet. A litigant cannot select one portion of a libel as the ground for a second, and so on (6)

Generally, where goods are wrongfully detained after seizure, the deten-

to former s 43, Dampanabojima i Addala, 25 M. 736 (1902) In Ram Chunder t Omera Churn, 16 W R 155 (1871), there was held to be not a single cause of action though the defendants were alleged to have leagued to oppose the planntiff s possession by force, but no grounds are given for the decision

(2) Jardine Skinner: Shama Sondurki, 13 W R. 196 (1870), Kondun Lal v Rea Hummut Singh, 3 N W P 86, 87 (1871), it is, however, to be observed that in these cases the Court was dealing with the contention that it was the title alone which constituted the cause of action.

(3) Ram Soondur Shaha ν Delanney, 20
W R 103 (1872)

(4) Hukm Chand, C P C 519 [eiting Shiddon: Carpenter, 1 N Y 579 (Amer). Do La Guerra: New Hall, 55 Cal 21 (Amer)]

(5) Ib 620

(6) Mucdougall : Knight, 25 Q B D 1

Koondun Lal v Rao Himmut Singh, 3 N W P 86, 87 (1871), and see Musst Rutta Bibee v Dumreo Lal, 2 N W P 153 (1870), in which, though the plaintiff's title was one and the same, the different alienations sought to be set aside were held to constitute distinct causes of action The question of combina tion or absence of concert affecting or not the unity of the cause of action, has been con sidered with reference to misjoinder in the following cases —Gujadhur Pershad v Saheb Roy, 19 W R 203 (1873), Omur Ah : Weylayet Ali, 4 C L R 455 (1879), Loke Nath Surma : Keshav Ram, 13 C 147 (1886) There was held to be combination and one and the same cause of action against all defendants in Sudhendhu v Durga Dasi, 14 C 435 (1887), Ram Naram Dutt v Annoda Prosad Joshi, 14 C 681 (1887), Mangul v Girdhari, 1892, P R No 127, in Hurro Moneo v Onokool Chunder Mockerice, 8 W R. 161 (1867), it was held there was none Sco Hukm Chand, C P C. 519-521, and as

tion does not constitute a separate cause of action, but is only the consequence of the seizure So, after a suit for recovery of property, a suit for damages for wrongful detention of the same property is barred (1) In such cases there is one cause of action, for which damages must be assessed once for all, and different remedies. The same principle has in some cases been applied to suits for mesne profits of land from which the owner is dispossessed; (2) and a smt for possession of land has been held a bar to a suit for mesne profits of that land (3) It has, however, in other cases been held to the contrary, both on account of sect, 10 of the Code of 1859,(4) and sect 44 of the last Code, corresponding with O II rr 1, 5 of this, (5) that claims to recover possession of immoveable property and for mesno profits are distinct claims, (6) and, conversely, a suit for mesne profits of fand has been held not to bar a suit for its possession, the fact of the priority of the suit for mesne profits being immaterial so far as the construction of the Code is concerned (7) These cases proceed on the principle that the right to possess immoveable property and the right to enjoy the profits of such property are distinct causes of action causes of action in a suit to recover possession under seet 9 of the Specific Relief Act, and in a suit to recover mesne profits, are not the same, in that in the first case the party is entitled to recover possession though he had no title, whereas, if he were a trespasser, mesue profits would not be given against the true owner (8) But where a suit was brought for possession of mortgaged

(1) Shatth Punju v Shatth Oodoy, 18 W R 337 (1872), Szem Strder v Kama luddy, 22 W R 424 (1874), Serna v Nod, 15 Q B D 549, and see Dela Dala Singh v Jath Singh, 3 \(\) 53 (1818) in Munghroe of Gyaram, 14 W R 253 (1870), the cause of action being the detention of a boat, the plaintiff was held bound to sue for the whole of the demurrage due, Mohabut Mundul v Shoorenire Auth Roy, 4 W R, s c, C R 20 (1865) [sunt for value of cattle taken, suit for damaces]

(2) Venkoba v Subbanna, 11 M. 151 (1887) but see Trupati v Narasumha, 11 M. 210 (1887), which has been followed in Gutta Saramma i Maganti Rammedu, 21 M. 405 (1908), Mowa huar v Banarasi Pravad, 17 A. 533 (1893). See remarks of Privy Council in this case on appeal, 23 A. 227, 233 (1909), s. c, 5 C. W. N. 193, and Fatuma Bibi v Abdul Majid, 14 A. 531, 538 (1892), in which the opinion was expressed that the term "cause of action" had not been used in the same sense in s. 43 and in ss. 41-47 of the last Code

(3) Venkoba v Suhhanna, 11 M. 151 (1887)

(4) Chowdry Imdad Ali i Boonyad Ali, 14 W R 92 (1870), Baboo Issur Dutt v Alluck Nusser, 7 W R 429 (1867), Sitaram t Bhaotaut, t B H C R 100, A C J (1849), decaded under the Code of 1850, which, however, expressly dealt with the point. The decision in Ram Ruttun Audo t Ram Chunder Pal, 25 W R 113 (1876), is not to the contrary as there in the former suit messio profits were expressly prayed for In Rodenime According to The Rodenime According to The Rodenime According to the Roy, 21 W R 223 (1874), it was held that though a claim for messio profit was a separate cause of action, jet it cannot itself be divaded and every suit must include the whole of the messio profits which had then

(5) Lalessor Babui t Janki Bibi 19 C 615 (1891)

(6) Ib Bikrama Singh t Prab Dial, 1889, P R No 129, F B, which must be taken to supersede Phalls t Kesav bingh, 1832, P R No 138 And soc Pratag Chandra v Rani Swarnanayı, 4 B L R, F B 113 (1809), Mon Mohun Sirkar v Secretary ol State, 17 C 908 (1800), Subraya t Rathnavelu, 32 A 330 (1908)

(7) Monohur Lall v Gouri Sunkur, 9 C 283 (1882), Firupati v Narasimha, 11 M. 210 (1837).

(8) Sheo Kumar v Naram Das, 24 A. 501, 503 (1992) property and a deposit was made in Court, a second suit to recover mesne profits from the date of deposit to that of recovery of possession was held harred (1)

As to whether or not there is a new cruse of action in the case of con timing torts, the general rule appears to be that in the case of such torts as are not of a necessarily injurious and permanent character, there is a continuing obligation to about them, and the continuance of the noisauce is held to be a new tort and therefore a separate cause of action, but the rule is other wise in the case of all torts of a permanent character which continue to operate injuriously without any external agency (2) While if there are different persons injured there are different torts, the question as to the number of cluses of action which the same person may have, turns upon the number of torts and not upon the number of different pieces of property which may have been injured. Thus an act which damages two properties belonging to the same man it the same time and by the same means does not create two causes of action. The elements of damage are multifarious but the cause of it is a must, but it will be otherwise if the couse itself is not single and indivisible (3) A suit for certain moneys said to have been misappro printed by the defendant while acting is manager of a joint family, was held to bur a subsequent snit for the plaintiff's share of certain joint paddy held by the defendant at the time of the first suit, Mitter, J., observing causes of action in both the cases originated in the refusal of the defendant to give to the plantiffs then share of the properties realized by him as manager

the manager of a joint Hindu family holds possession of various items of property on behalf of the family. Our it he contended for a moment that each member of the family has a separate cause of action for his share in each item of those properties? (4)

An act which cluses injury both to person and property may constitute different torts. Both cluses of action may be founded upon one act, but they are not on that acount identical cluses of action (5). All the clums in

⁽I) Kul humbar r Venl itesl 31 B o. "

⁽²⁾ See Hukm (hand, C.P. C. 5-0 5-7 in Lea es there exted

⁽¹⁾ See 1h, ..., and Buzloor Ruheem e Shumsonniss, 11 Noo 1 \(\) 603 (1507) where the Pray Council joint clout that there was nothing to distinguish the deposit of the property of those which the Jinitial had deposited with it and recovered in the former suit, \(\) Pittigar Baja is surpa Rau, 8 \(\) 6.0 \(\) 1 \(\) 110 (1885), in which the concause of recraft lungs was held to be one cause of action but the Jarticular else was listinguished and the suit held not be bettered by its asy nor high prosession for land,

subsequent suit for person ity, same title to

⁽¹⁾ Canes Chardta & Rain Kumai, J. B. I. R. A. C. 65 (1869) s. c. sab nov. Ra libakshore t. Rain Coomar, 12 W. R. 73 Similarly a suit for certain sums missi fromated by a general agent has been held to bar a suit for all other sums misappropriated before the former suit, on the ground that the cause of action is not the misappropriation but the refusal to account on denand Vinoibur Dass t. Sectal Pershad, 23 W. R. 418 (1875).

⁽a) Brunsden t Humphrey, 14 Q. B. D. 111, Darl 3 Mani Colhery t Mitchell, 11 Apr. Cas. 111 Sea former case discusse l in Huhm Chard, C. P. C. 530-531

(1) Makeut Mr. Narjai Die 20 (- 222) (18 ta) her tor possesse in it bast on which ad join be pallettees, einfort Salarate in fath to pallettees]. Laffa Lu Jian in La mann Par Ivani, 20 W. B. 144 (1871) (and for declarating of table to inokurrune, ein Lumium of place decinded from account of that table.

(2) Sundar Singh in Blinda 20 A 322 (16/6) but see Sri Gopsila Pirthi Singby 24 A 4-3 433 (1902) is cital 1 A 118, and Barra Kusum 37 C 583 (1310)

(3) Unied Dhokhand : Par Sahkb, 7 B 134 (1853) For the purpose of the rule against impointer of cause of action a suit to set ande two honds alleged to have been executed as parts of the same transaction was held not to be bad, the cause of action leng under the circumstances ample. Mn hammad Baksh : Hamdaf, 1800, P R No. 5, Manitanarayan t Sawithis, 22 M L, J 231 (1911), 33 M 171

(4) Harros Strear is Massim Mundul, 21 M. 239 (Arth.) Junisona Dasa Pookhur Sin, b. 22 W. R. 131 (1870) in which it wis left that there was integrated or causes a faction and defendants. In Purum Sookh is Subblant 2 Myra 123 (1897) a credit resumt against sun it iro of discased was held not to bar a subsequent sunt against the facing for balance university.

(5) Gokal Chanle Khwaja Vi Shali, 1830 P R No 32

(6) See Hukm Chand, C. P. C. 534, as to several contracts forming part of one trans action and be achies of several continuits, inde

(7) Dunean Bros & Joetmull Greedhari Lall, 19 C 372 (1892) at proving of the opinion of Wilson, J. in Anderson, Wright & Co & Kalaguria Surjinatain, 12 C 333 (1885), dist in Banku & Gopal, 14 C L, J 589

(8) 1889, P R \o 129

post, p 596

(11211)

on an alleged mortgage which was dismissed, is no bir to subsequent suit on another mortgage of the sume property (1) A suit brought by a wife during the life of her hushand for the recovery of the prompt portion of her dower will be no bir to a subsequent suit for the recovery of the deferred portion (2)

In the following cases the cause of action was held to be the same—Where an occupancy terrint unde a mortgage with possession of his holding, a suit by the proprietor for the cancellation of the mortgage was held to bar a suit for the possession of the holding, as the cause of action in the two suits would be the same, the defendants taking possession under his mortgage not affording a second and distinct cause of action from the execution of the deed itself (3). A suit to redeem a mortgage on the ground of the mortgage having received more than the amount due in respect of mortgage bats a subsequent suit for the amount of the surplus received by him (4). Suit for redemption of kanam subsequent suit hased on admissions known to the plaintiff at time of previous suit that defendants were kanamdars under plaintiffs predecessed in title (5). Suit for possession of a portion of a house alleged to have been partitioned in proceedings before a Court of Revenne, subsequent suit for partition of the same house in a Civil Court (6). As to specific performance see below (7)

The general rulo is that every partition shall embrace all the joint property, but it is subject to certain exceptions—such as (a) where different portions of it are situated in and out of British India, (b) where a portion of it is not immediately available for partition, by reason of (i) its being in possession of mortgagees or (ii) because it was **inam** fand, which required Government permission to give jurisdiction to the Court, (c) where property is held in partnership by the joint family along with strangers, who have no interest in the family partition among the sharers and who could not there force be made parties in the family partition suit (3) The section was held not to apply where the title on which the former suit was based was exclusive

for sale?

⁽¹⁾ Thrikaikat Madathil v Thiruthiyil Arishnen 29 M. 153 (1905), Ram Sahai v

Ahmadi, 33 A 302 (1910) (2) Umda Begam 1 Muhammadi 33 A

^{291 (1910)} (3) Sarit Ram : Chanda Singh, 1886, P R

No 47 (4) Baloji Tamaji v Tamangonda 6 B

H C R, 1 C 97 (1869)

⁽⁵⁾ Rangasami Pillai i Krishna Pillu, 22 M. 259 (1898)

⁽⁶⁾ Balbhaddar Nath : Ram Lal, 26 1 501 (1904)

⁽⁷⁾ Nathu t Budhu, 18 B 537 (1893) [surffor specife [erformance and execution of sale det.d., surf-on sale deed executed 15 Court to recover [ossession but see Narayan) t Kandy vis. 23 M 22 ([888]], Chelambery t Simula t S M I J Pp (1, ent. I limbar

Chand C P C 515 [suit for specific per for mance, suit for recovery of deposit mones.] Parangodan v Perunitoduka, 273 in 350 (1903) Venkatarama t Venkata, 21 M 27 (1899) [suit for specific performance, sub sequent suit for money paid on a consideration that fulcd], Rangayya Goundan ton that fulcd], Rangayya Goundan to Kampapa Ran 2 1 V 401 (1901), s c, 3 man L R 791 [suit for possession and damages suit for specific performance and transfer basis of both actions an agreement

⁽⁸⁾ Purshott in r. Atmaram, 1 Bom. L. R. (1890), s. e. 23 B. 507 (the claim of \(^1\) to obtain his share of property on ned jointh by him and B cannot be said to have been founded on the saino cause of action as I is claim to obtain his share of property owned jointly by him and B and 10.

ownership, while that on which the subsequent suit was based was joint ownership (1)

The Laracian of a Malhar tarnad is not birred from bringing successive suits for land in possession of an anadraian, the cause of action heing the right to demand restoration of tarnad property at any time and it being in the discretion of the Laracian to leave any item of property he pleases in the Dossession of anadraians (2)

"Shall not afterwards sue'—The bar is not worded by an expression of intention to sue again (3) A plaintiff may, however, obtain leave to omit to sue in respect of one of several remedies. A suit, however which is with driwn with permission to sue again does not create any bar as the effect of such permission is to leave matters in the position in which they would have stood in no such suit had been instituted (4). The same principle was held to apply even when the suit was dismissed for non appearances of parties under sect. 110 of the N W.P. Act. 1881 with leave specially reserved to the plaintiff to bring a fresh suit, the reason assigned for the decision being that before the case was struck off the plaintiff could have so amended his plaint as to have included the claim in the first suit, and à fortiors there was no reason why he should not included it in the subsequent suit (5).

The bar affects the plaintiff in the second suit if he was plaintiff in the first, and those who claim under him. (6) and it is not avoided by the plaintiff having been a minor at the time of the former suit (7) The rule says shall having been a minor at the time of the former suit (7) The rule says shall not afternards size? It does not therefore apply where the suits are simultaneous and not successive (8) In the case cited below (9) the Madras High Court held that of the two simultaneous suits both would of course not be barred and the decree in either might strind provided the decree in the other was reversed, and option was given to the plaintiff to choose which would stand the other being dismissed. Tractions of a day are however recognized and where two suits are presented on the same day it must be presuned until the contrary is proved that the suits were presented and admitted in the order in

⁽¹⁾ Yarayan v Shamrao 27 B 3 9 (1303) as to title being the same but the cause of action different see ib at pp 386 389

^(°) Kannan v Tenju 6 M. 1 (1882) As to the position of a karnaran as understood in Malabar acc Vasudevan v Sankaran 20 M. at p 138 (1896)

⁽³⁾ See ante, p 577 Soonder Bibee v Khilloo Mull 2 N N P 90 (18 0) Chajju Singh v Nihal S ngh 1888 P R No 199

Maksud Ali t Nargis Dyo 20 C 322 (1892)
(4) See ante p 574 and Behari Lal Pal
t Baran Mai 17 1 53 (1894) and cases there

c ted

(5) Mulchard t Blakari Das 7 1 624

(1880) sed quare. As regards this case it has been submitted (Hukm Chand C P C, 559)

that this argum it does not appear to be

correct and the circumstance that a su t is dismissed and not decreed cannot affect the bar which has been attached by s 43 (now r 2) to the matitution of a suit as distinct from its decision to which s 13 (now s 11).

would at ply

(6) Vide ante p 502 Bata v Faiz Baksh

¹⁸⁹³ P R No 6 (7) Gopal t Narasinga 22 M 309 (1839)

⁽⁸⁾ Vithur Marayan 6 B H C R A C 30 (1868) Kaleshar r Jagan I A GAJ (18 8) Seva Ram r Kanshi Ram 1800 P R No 76

⁽⁹⁾ Appasam: t Ramasam: 9 M. 2 9 (1885), in Magu: Abdoola 8 M 147 (1881) it was held that the plaintiff should have been allowed to withdraw both suits and to file one suit in a computent Court.

which their numbers appear in the register (1) The rule only bars a subsequent suit. It therefore does not preclude a landlord from adopting any other remedy the law gives him to circlic him to recover his rint, as, for instance, by distraint under the Rent Recovery. Act (2)

"In respect of the portion so omitted or relinquished."—The Privy Council observed that the right which a litigant possesses without knowing, or ever having known, that he possesses it can hardly be regarded as a "portion of his claim!" within the meaning of the section (3) It has been said that a plaintiff must be taken to have abandoned or relinquished his claim on a real cause of action if he brings it in a false one (4) But this statement has been adversely criticized, (6) there being nothing in r 2 to warrant the inference that all causes of action ought to be included in the alternative or otherwise, and if it were correct it would make no difference whether the cause of action is false in the sense that the facts alleged as constituting it are false, or it is false in the sense that the facts alleged do not in law constitute a cause of action

"More than one relief"—The present rule, unble that of the Code of 1839, refers, as has been already pointed out, both to the splitting of remedies or rehefs as well as the splitting of claims (6) Both the claim and the remedy have reference to the cause of action litigated in the previous suit (7) There is no har where the remedy sought in the subsequent suit is in respect of a cause of action different from that which formed the basis of the rehef in the former suit (8) Further, the har in regard to the remedy is applieshle only where the plaintiff was at the time of the former suit entitled to more than one remedy, and where the plaintiffs were entitled to only one remedy in the former suit the provisions of the section are not applieshle to the second suit, (9) nor where a plaintiff's suit for a remedy has been dismussed on the ground that he is not outsided to it hut to autofier remedy, for which he

Murti t Bhola Ram, 16 A. 165, 172,
 173 (1893), overruling Zahur Husain t
 Muhammad Hasan, 1888, All. W N 147

⁽²⁾ Rajah Eswara t Venkatarayer, 21 M 236 (1897)

⁽³⁾ Amanat Bibi i Indad Husein, 15 I. A 106, 112 (1888) See this subject discussed, ante, p 579

⁽⁴⁾ Rangasamı Pıllaı t Krıslına Pıllaı 22 M 259

⁽⁵⁾ Ramaswami t Vythnatha, 26 M 760 at p 777 (1902)

⁽⁶⁾ Vide ante, p 575

⁽⁷⁾ Andr v Thatha, 10 M 347 (1887) [seat for declaration of right to enjoy separate possession of land, sub-equent surt for parts tion of that land]

⁽⁸⁾ See Nathu r Budhu, 18 B 537 (1893) [suit for specific performance, decree under which said deed executed by Court, subsequent suit on sale deed to recover possession not based on contract but on new cause of action arising from deed of sale]. In a similar case in the Madras High Court a contrary new was taken on the ground that the right to possession and conveyance ruse considerity, and suit for possession was not a separate cause of rection. Aarayana r Kandasami 22 M 24 (1898). The principle however, in the text was applied in Amb r kethlamma, 14 M 23 (1830).

⁽⁹⁾ Ram Sewak Singh : Nakche I Singh, 4 1 261 (1982)

subsequently succe(1) In a case in the Punjab Chief Court (1) Burney, J, observed that what the plaintiff "asked for in the former surf was nat a remedy to which he was entitled, and was, therefore, nat one of the other alternative remedies between which the plaintiff could have chosen," and in a subsequent case (3) in the same Court, Tremlett, J, observed, that "if the defendant's contentions were sound, we should have to hold that the construction of sect 13 (now r. 2) is that a plaintiff entitled to only one remedy on his cause of action, who by mistake sucs for what the Court considers is not the remedy to which he is entitled, will be precluded from subsequently suing for the praper ane, 'an l, "put in this form, it is clear that the language of the section cauntenances no such proposition."

Tha rule applies to the case where there being identity of causes of action in the two suits, the plaintiff was cutilled in the first suit to more than one needy (1) either cumulatively or alternatively. If without the leave of the Court he suit to suo for any of such remedies he cannot do so afterwards. So a personal dictro for maintenance and a declaration that it is o charge on family property are two remedies referable to the same cause of action, viz the right to receive maintenance, and therefore two separate suits cannot be brought in

respect of the two remedies ogainst the same defendant (5)

It is not very easy to define what constitutes "a claim" as distinguished

from a "remedy," for the former appears to include the latter to some extent. Doubtless the two terms were intended to overlap. While a claim has been defined as a demand af right, a remedy has been said to be the legal moans to recover, right (6). It has also been broadly defined to denate the decree or decretal order with its proper legal results, which is the successful suitors warrant for obtaining the rehef he has ochieved by his suit (7). Vortgoga cases are comman instances in which there is mare than ano remedy. Where a person asks for rehef and anciliary thereto far on injunction there is mare than one remedy. In many cases there is an option of sung on the contract are for breach af the contract, and in these cases there is more than one remedy, but the remedues are olternative (8). In some cases the twa terms 'claim and 'remedy' are used indiscriminately. So it has been held that a suit for specific perfarmance hors a subsequent suit far damages for failure ta per form, as bath claims arise out of the same cause af action namely, the breach

⁽¹⁾ Pears v Ahrali 3 A 867 (1881) Similarly the diamissal of a suit for confirmation of possession on the ground that the plaintiff was not in possession is no bar to a suit for recovery of possession ride and e p.85 and cases there cited of case in last part.

⁽²⁾ Prab Devi v Haskislen Das 1884 P R No 47

⁽³⁾ Parmeshri v Vasdeo 1885, P R. No 35

⁽⁴⁾ These words can scarcely mean a emedy against more than one person Kalidhun t Shiba Nath, 8 C at p 496 (1882)

⁽⁵⁾ Rangemma t Vohalayja 11 M 127 (1887) and see Sammatha t Rangathammal, 12 M 285 (1889) Bhagratha t Anantha, 17 M 268, 276 (1893)

⁽⁶⁾ hal dhun : Shiba Nath 8 C 495 496 (1882)

⁽⁷⁾ Ram Sewak v Nakched Singh, 4 A at p 2"0 (1882) there is hovers, a distinction between relief and the mode or procedure for obtaining such rehef Bhobo Sundan v Rakbal Chunder 12 C 583 (1886)

⁽⁸⁾ Kalidhun : Shiba Nath 8 C 496, and cases there cited.

of contract (1) And where a plaintiff was entitled both to recover rent and to forfeiture for non-payment he was held baried after suing for the lint from suing to enforce a forfeiture for non-payment of the same rent, as both the claims arose out of the same cause of action, namely, the non payment of rent (2) Similarly, a suit for au injunction against a defendant directing him to abstain from excluding the plaintiff and pre venting him from using his house has been held to be a bar to a suit for damage; for the exclusion from the house (3) The amendment now substitutes the word "relief" for "remedy"

Upou the question formerly discussed, whether in execution of a simple money decree, only the rights of the debtor pass and the mortgagor retains his hon, see below (4) Sect 99 of the Trunsfer of Property Act restrained a mortgagee from selling the mortgaged premises, except under a decree for sale (5) Under the Code of 1859 a declaratory decree might be sued for and obtained, and a subsequent suit brought for the consequential rehef (6) But see now seet 42 of the Specific Rehef Act, which virtually repeals sect 15 of the Code of 1859 Under the special provisions of the amended Dekkan Agriculturists Act oxcluding the operation of this section, a suit by a mortgagor for account does not bar a subsequent suit for redemption, (7) though prior to the amendment of this Act the contrary was held upon the principle enacted by this section (8) If mesne profits are not asked for in a suit for specific performance of a contract to reconvey a plot of land, a subsequent suit for them will be barrod by this rule (9)

Leave to omit relief—The words in the last Code were "obtained before the first hearing" It was, however, held that leave might be applied for and obtained when the case was called on for first hearing and before anything had been done towards the hearing of the case (10) Though these words have been omitted probably the same rule will hold now Such leave should be obtained from the Court before which the original suit was pending (11)

3. Save as otherwise provided, a plaintift may unite in the Joinder of causes of same suit several causes of action against the same defendant, or the same defendants jointly; and any plaintiffs having causes of action in which they are jointly interested against the same defendant or the

Shib Kristo v Abdool Sebhan, 15 W
 408 (1871), see Specific Relief Act, 1877,

ss. 30, 19
 (2) Subbaraya t Krishna, 6 M. 159 (1882)
 (3) Chajju Singh v Mihal Singh, 1883,

P R No 190

(4) Rashbehary Ghoso's Law of Mortgage,

⁽⁴⁾ Rashbehary Ghoso s Law of abrigage 3rd ed. 712, 733, and cases there cited.

⁽⁵⁾ Sec O 34, r 14 and notes

⁽⁶⁾ Kalidhun t Shiba Nath, S C 183, F B (1882), foll, Sarsuti t Kunj Behari, 5 A 345 (1883), P B

⁽⁷⁾ Laluchand v Girjappa 20 B 474

⁽⁸⁾ See cases cited in last mentioned decision, and as to decree ordering payment, and in default sale, and subsequent suit for redemption, Govinda t Mayi, IS97, Bom P J 364

⁽⁹⁾ Ganesh Ram v Mohesh Ram, 13 C W N 669 (1909)

⁽¹⁰⁾ Pestonp: Vidool, 5 B 163 (1880)

⁽¹¹⁾ Muhammad Layaza Kallu, 33 A 241 (1210)

same defendants jointly may unite such causes of action in the same suit.

(2) Where causes of action are united, the jurisdiction of the Court as regards the suit shall depend on the amount or value of the aggregate subject-matters at the date of instituting the suit.

Origin and scope of rules relating to joinder of eauses of action .-The first paragraph of r 3, which corresponds with sect 8 Act VIII of 1859, is taken from the Linglish O 18, r 1, which, though it does not contain any reference to the case of more than one defendant, has been construed as if it referred to the "same defendants also, it having been held (I) that " to bring into one claim distinct causes of action against different persons, neither of them having anything to do with the other (and only historically connected as one matter in the transaction), is not contemplated by O 18, r 1, which authorizes the joinder, not of several actions against distinct persons, but of several causes of action" It was, however, pointed out that the provisions contained in several of the Lingbah rules had been omitted from the Code, and the inference therefore was that it was not intended to introduce into this country the wide scope now afforded to suits in the English Courts, and that r 3 is different from the much more general language of the English r 1 and r 6, which provide that claims by plaintiffs jointly may be joined with claims by them or any of them separately, and were diametrically opposed to the probibition of sect 31 of the last Code, that plaintiffs might not join in respect of distinct causes of action (2) The rule is based on considerations of convenience, the misjoinder contemplated leading to complication and difficulty of dealing with the case of each defendant separately, and heing vexatious and hurassing to the defeudants (3)

Objections (as to which see O I r 13) on the ground of misjoinder are favourile ones in this country. There may be misjoinder of plaintiffs or mis joinder of defendants. This matter is dealt with in the preceding Order. The rules under discussion relate only to joinder of evises of action. They assume that the action has been rightly constituted under the provisions relating to the joinder of parties (4). Then there is misjoinder of subjects of suit, which is sometimes called multifuriousness, though the term is not used

(1) Burstall t Beyfus, 20 Ch D 35, per Selborne, L.C. In England it is settled law that two separato causes of action cannot be charged against two defendants in one and Muthappa v Muthu, 27 M 50, at p 53 (1903)

(2) Natsungh Das t Mangal Dubey, 6 A 163, 176, 179 (1882), F B, a leading decision which deserves careful study Mahmood, J, was, however, of opinion (at p 178) that the Code did not presente a narrower rule upon the natural point then under discussion in Muthappa t Muthu, 27 V so, 83 (1993).

it was also said that the terms of the English rule were wider and more general than the terms of the Code But this case has not been followed Arjathurai v Santhu Meera 31 M, 252 (1908) See now O I r 9, ante.

(3) See judgment of Peacock, C. J., in Raja Ram Tewary i Luchmun Pershad, S. W. B. 15, 16 (1867), s. c. B. L. R. (F. B.) 731, Imrit Nath v. Baboo Roy, 18 W. R. 288 (1872), Sudhendu v. Durga, 14 C. at p. 438 (1887).

(4) Hannay : Smurthwaite, 2 Q B 125 (1893), per Boatn, L J

in the Code Multifariousuess, however, properly so called, exists when one of the defendants is not interested in the whole of the relief sought (1) This is prohibited by the first clause of r. 3, where the parties have distinct and separate interests (2) Visjoinder of subjects of suit is where two subjects distinct in their nature are united in one suit, and, for convenience sake, the Court requires them to be separated Whether the various subjects shall be dealt with together is a matter of discretion to be determined upon considers tions of convenience with regard to the circumstances of each particular case (3) This matter is dealt with in r 6 In other words, while multifariousness strictly so called is, in cases coming within the terms of the first paragraph of r 3, absolutely probabited, an alleged misjoinder of subjects, as it was formerly called, not amounting to multifariousness in the former sense, is left to be dealt with according to the discretion of the Court R 3 applies to cases where there are only one plaintiff, one defendant and several causes of action, and to eases where the plaintiffs or defendants, though consisting of two or more judividuals, may be considered as an unit with reference to all the different causes of action Where there is more than one plaintiff or defendant, the test is-is there community of interest in the issues to be determined? in other words, joint interest in the questions raised by the litigation is a condition precedent to the joinder of several causes of action (4) The question of absence of cause of action and misjoinder must be distinguished. It may be, for instance, that certain defendants can substantiate pleas which, as a matter of substantive law or on the merits, would absolve them from liability But this circumstance has no effect upon the question of misjoinder, which is purely a matter of adjective law or procedure (5) While, as already stated, the rule enacted in r 3 is hased on substantial grounds of convenience, it must also he cmeinhered that the policy of the law is not to favour multiplication of suits, (6) and it is exceedingly undesirable that any suit should fail on account of any such technical objection. (7) unless it has been taken, and is thoroughly well founded

⁽¹⁾ Pointon τ Pointon, L R 12 Eq o47, at p 541 (1871), and see Narsingh Das ν Mangal Dubey, 5 A at p 172 (1882), and at p 177, as to the sufficiency of each party having an interest in some matters in the suit and that they are connected with the

⁽²⁾ See Burstall : Beyfus, 20 Ch. D 35, in which also the present English procedure which supersedes the demuner is consulered.

⁽³⁾ Pointon t Pointon, supra, at pp. 531, 512, Coates t Legard, 19 Eq 56 (1874) "The plaintiff will not be allowed needlessly to enlarge the area of the dispute ' per Collins, VI R, Saccharin Corp t Wild, 1 Ch D, p. 122 (1903)

⁽⁴⁾ See Bhagwati r Bindeshri, to 1 100, 108 (1883), Naramah Dasa Manal Dubey,

A 163, 171 (1882), Sarala Sundari Dasi t Saroda Prasad Sur, 2 C. L. J. 602 (1904), ref to in Jaggeshwar Dutt t Bhuban Yo

hau Mitra, 33 G 425, 441 (1900)
(5) Aarenigh Das t Mangal Dubey, 5 A
at pp. 178, 179 (1882), per Mahmood, J. In
Janokanath t Ramrunjun, 4 C. 949 (1879)
t was held that the fact that the claim for
possession or reut against certain defendants
was uncustainable in fact was no ground for
dismissing the whole suit for musjoinder
This distinction does not appear to have been
preserved in the judgment of Stuart, CJ
in Babeshur t Rum Churan 5 V M C. R
55, 28 (1872)

⁽⁶⁾ Shoroop : Mothoor, 4 W R 103, at p. 110 (1855), Narsingh Dist : Mangal puber, 5 A at p. 179 (1882)

⁽⁷⁾ Sudhenfu t Durga, 11 C at p 138

It was held that the previsions of sect. 15 of the last Code did not apply to suits for aircars of cent under the Agra Tenancy Act, 1901, so as to admit of a joint suit being brought in respect of aircars of cent due in respect of several holdings (1).

Summary of rules on this matter .- I summary of the rules which deal with the joinder of parties, shows that any number of plaintiffs may join in respect of relief claimed arising out of the "same act or transaction," that they may not join in respect of distinct causes of action in cases not within () I r I, arte, that any number of defendants may be joined where rehef is sought a unst them under () I r 3 or in respect of any one contrict under O I r G, that no suit shall ful for mero misjoinder, and that except where plaintiffs have joined in respect of distinct cruses of netion as above stated the Court may in every suit deal with the matter in controversy as far as regards the rights and interests of the parties actually before it (2) Putting it shortly, the rules provide that a suit shall include the whole claim, that any plaintiff or plaintiffs having several causes of action in which they are jointly interested against one defendant or several defendants jointly may unite them in the same suit, but unless such causes of action are of the kind mentioned in clauses (a) (b) or (c) of r f of this Order they may not be joined. without leave of the Court with a suit for the recovery of immoveable roperty, that where a pluntiff or pluntiffs have united in the same suit several causes of action against a defendant or defendants the Court of its own motion, or on the application of the defendants or upon agreement of the parties may order separate trials or confine the scope of the suit, or exclude causes of action and direct amendment of the plaint, where by the joinder of several causes of action inconvenience and confusion are likely to be caused (3) Is to whether sect 15 of the fast Code was a restrictive provise to sect 28 of that Cole see post

"May unite"—It is a pre requisite of the light to Join in one suit more than one cruse of action against a defendant that the Court to which tho plaint is prescuted should have jurisdation over all the causes of action (4). In the case cited, it was observed that "unless the plaintiff could lawfully unite them, the Subordinate Indge had no jurisdation over either and that he should have returned the plainti, although, without amendment, it could not have been presented in either Court which had jurisdation over either cause of action. It is, however, proper to unite several causes of action in a suit when the tritle to all the property to which the defence relates is the same though the lands

(1887), Haranund v Prosunno 9 C at p 765 (1683)

under the last Code The text is therefore, in this and other instances, altered to meet the resent provisions

⁽¹⁾ Jagan Nath Prasad v Torr, 29 A 18 (1906)

⁽²⁾ See Narsingh Das v Mangal Dubey, 5 A 163, at p 167 (1882) 1 B, a decision

⁽³⁾ Ib, at p 169 (1882) h B

⁽⁴⁾ Khimji Jivraju i Purushotam 8 M 171 (1883)

claimed may not be in one district (1) For recent applications of the provision, see cases cited (2)

Was sect 45 of last Code a restrictive proviso to sect 28 of that Code ? The effect in this respect of the amendments -There was force in the argument which answered this question in the negative, though the contrary was held under the last Code by the majority of the Full Bench (3) in which it was raised Chapter III of that Code dealt with the parties to a suit, and Chapter IV of the same Code with the frame of a suit The former assumed the existence of an ascertained subject matter in dispute and from that point of view laid down rules as to the persons who might be made parties to the suit Chapter IV assumed the existence of ascertained parties and dealt with the subject matter of the suit The two modes of dealing did not clash with one another. Where there was identity of subject-matter the rules governing the case were to be found in Chapter III , where there was identity of parties the seepe of the action was to be limited by the rules in Chapter IV The two Chapters thus regarded an action from two different points of view, and the rules contained in one could not, in this aspect of the care be regarded as provises to the rules contained in the other By sect 26 of the last Code all plaintiffs might join in respect of the same "cause of action" By sect 28 all defendants might be joined against whem the right to any relief in respect of "the same matter," whether jointly severally, or in the alternative, was alleged to exist The term "matter in sect 28 of that Code was not convertible with "cause of action," hut was more comprehensive-a conclusion which received support not only from the circumstance that the two expressions were used in con tiguous sections (26 27 28) of the same Chapter and could therefore scarcely he construed to have the same meaning but also from the fact that the last part of sect 31, which prohibited plaintiffs joining in respect of distinct 'causes of action' was meant to be a bmitation of the latitude allowed hy Chapter III as to the joinder of parties in respect of the "same matter" Se long, then, as the matter in dispute was identical the plaintiff was entitled to bring before the Court all persons whose presence was necessary to afford him full relief in respect of that matter Seot 45 was not applicable to cases in which the subject-matter of the suit was the same but related to cases in which the causes of action were entirely distinct Sect 28, on the other hand, related to cases in which the subject matter was one and the same and seet 45 was not a restrictive provise to sect 28, for the effect of such a view would be to nullify an important part of the latter section The essence of the provisions of sect 45 was that there should be joint rights in the plaintiffs and joint liability of the defendants, whilst sect 28 contemplated the granting of rehef against the defendants not only jointly and in the alternative but also severally, and it could not be conceived how this could be done in a case in which the bability

⁽¹⁾ Harchandar Singh t Lal Bahadur Singh, 21 A, 3.09 (1894)

 ⁽²⁾ Shib Prosad Chandhuri v Vakai Pah,
 C. 601 (1900), Sarada Charan Chatterji
 Iswar Samb, 11 C. W N 1154 (1907)

[[]enhancement and increase of rent], Parthasarathy t Thandavaraya, 17 M L J 515

⁽³⁾ Narsingh Das : Mangal Dubey, 5 A 163 (1882) 1 B

of the defendants was joint, as required by sect. 45. The latter section did not limit the operation of sect. 28, nor did sect. 28 extend the scope of sect. 45 Not John a rule which was distinct from and independent of the rule embodied in sect. 15 (1)

According to this view of the two sections, a sint might have been brought against several defendants against whom the right to any relief in respect of "the same matter existed, and also a suit uniting several distinct causes of action against several defendants jointly.

The inspority, lowever, of the Pulf Bench held that it was deficult to interpret the expression "same matter" in sect 28 as meaning more than the same "cause of action"; and that Chapter III must necessarily be read with and controlled by the subsequent provisions of Chapter IV If, then, sect 28 and sect 15 were read together, the joint, several, or alternative hability of defendants mentioned in sect 29 meant such a hability in respect of one or reveral causes of action, which cause or causes of action were united in the same suit against the same defendants jointly, in other words, while the cause or causes of action had to be joint as to all the defendants, the rehel asked might be joint, several, or in the alternative (2) It might, it was said, be that the term "same matter" was more comprehensive than "cause of action," and that if seet 28 stood by itself it would in effect allow a joinder prohibited by sect 15 But if as was held that section did not affect but was, on the contrary, controlled by sects if and 15, which regulated the founder of different cruses of action, then seet 28 was restricted in its application to cases in which different causes of action might be joined in one suit this view, sect 28 did not affect the question of joinder of causes of action. which was entuely regulated by the provisions of Chapter IV, and a suit, though not had for missemder of parties under sect 28, might be had for misjoinder of causes of action under sect 45 It was not clear, bowever, why the two different expressions should have been used and neither of the views stated was free from difficulty (3)

The case of several hability is retained in O I r 3, corresponding with sect 29 of that Code But the words "in respect of the same matter" have been new omitted from O I r 3. For the reasons given by him, the opinion of Valimood, J, would still seem preferable even had this not been so. The position would now appear to be thus O I r 1 allows plaintiffs to join where the related claimed (whether the claim be joint or several) is in respect of or arises out of "the same act or transaction". The necessary cerollary of this is that if all persons may be joined as defendants against whom rehef is claimed in respect of "the same matter" this phrase must include what is understood

defendants on the ground that there was but one cause of action Loke Nath: Keshah Ram, 13 C 147, 152 (1889). Ishan Chandra : Rameshwar 24 C 831 (1897), though it has never held that the two terms are synony mous See also Luckumsey v Fazulla, 5 B 177, at p 179 (1880), Janokinath: Ram runjun, 4 C at pp 952, 953 (1879), Mit thappe v Muthu, 27 M 80, at p 83 (1993)

Narsingh Das : Mangal Dubey, 5 A.
 172 cl seq., per Mahmood, J

⁽²⁾ Ib, 5 A, p 166 et seg

⁽³⁾ It has also been held in a recent Madras case that the words 's same matter " are wider than the term cause of action Dampanaboy in a v Addala, 25 W 736, at pp 745, 746 (1902) The Calcutta High Court has in some cases justified the jounder of

by "the same act or transaction" in O I r 1, that is, cases where, though the cause of action may not be the same, relief is claimed on a common ground. The quadrication is now omitted, but the same result would follow even if O I r 3 had not been (as is the case) expressly amended to bring it into conformity with the provisions of r 1 of that Order. But where the subject matter of the suit is not the same as regards plaintiffs and defendants, and the causes of action are entirely distinct there being no common ground, then under r 3, in order to justify joinder, there must be joint rights in the plaintiffs and joint hability in the defendants.

Cause of action -As aheady elsewhere observed, this expression has always had a signification which cannot be said to be precise or definite (1) being sometimes taken to mean the right, together with the infringement, or the title together with the injury, in order words, all the circumstances which a plaintiff is required to allege in order to show a right to relief, and being sometimes used as indicating nierely the injury, which is the cause of the plaintiff coming into Court (2) or as indicating the plaintiff s right merely (3) These differing definitions account in part for the differing views to be found in the cases under this as other sections (1) So the right has been treated as the whole cause of action (5) On the other hand, it was held that the term as used in sect 31 of the last Code, and in the section cerre sponding with r 3, had the same sense as in English lan, viz of every fact which it was necessary for the plaintiff to prove to support his right to the judgment of the Court (6) The title on which a plaintiff suce is only one of several sugredients su the cause of action, and that term includes also the infringement of the plaintiff's right (7) The question under the section which r 3 replaces, has often arisen in cases of ahenations of joint propert) by a coparcener, or of a Hindu widow's estate by the widow, and sometimes in other cases. The cases upon the point are in conflict, and it is not possible to recoucile them. The determination of the question whether there is a misjoinder in respect of cause of action, where one suit is brought against all the ilienees, depends upon the view which is adopted of the meaning of the term " cause of action," and also on the question discussed in the last paragraph

⁽¹⁾ In Fatuma Bibs v Abdul Mapd, 14 A at p 536 (1892) at was and that the term 'cause of action had not been used in as 43, 44, 45, 46, and 47 of the Code of 1882 in precisely the same sense

⁽²⁾ Narsingh Das v Mangal Dubey, 5 A at p. 173, per Mahmood, J

⁽³⁾ See cases cited post

⁽⁴⁾ See Ameerun v Wasechun, 11 W R 11, where there was a difference of opinion, see the cases cited post, and Hukin Chand, C. P C 007, 568

⁽⁵⁾ Ishan Chunder: Rameswar, 21 € 831 (1897) [diss. from Ram Prosad: Sachi Dassi, 6 C. W. N. 585 (192)], Sami Chetti: Ammani 7 M. H. C. R. 200 (1873), and cases

ested past note &

⁽⁶⁾ Sahma Bibi t Sheikh Muhammad 13 A 131 (1895) Ram Prosad t Sachi Dassi 6 C W N 585 (1902)

⁽⁷⁾ Ram Frosad: Sachi Dassi, supra, ap p. 589 So also in Koondun Lal 18 and Himmet, 3 A. H. C. R. 80, 87 (1871), the Court said, It is not a plaintiff a title which is to be regarded in a suit of this nature in considering a plea of misjoinder, but rather the wrongs alleged, 'and pointed out that if these wrongs were distinct and separable the wrong done must, in the absence of combination, bettered separately. New Yorkin Lally Gordban Lally Maharaj 35, V. 283 (P. C.) (1913), proof of title by Sub-hait

In the cases, the decaration in fariour of the unity of the cause of action proceeds up a the thory that the plaintiff a right is the cause of action (1) If the lover, and there be unity as to the right, there is no majorater chance of arts non a ent in which the several aliences are defendants (2) Spart from the question as to the corrector's or otherwise of this siem, fractival electron have been unand against punder in such cases. It has been card that one alience is not interested in an alienation of another part of the relate made at another time to another retion. Evidence against one activitate that he is the admired to against another. Different questions has since as to having profits. The procedure may prove vexations and harvern's to the defendants, each of whom has to want whilst the eye is a mid on apartice of ere, and to detain his nitureses meanwhile. The case is can plicated in both the Court of tiest instance and appeal, where each tion may have to be argued as a reputate and distinct raise (3). Even where the action was feld sustainable, the Court observed that reparate milions against the abeness was the better procedure (1). As against this it

(I) Sami Chatter Aminani, TM H C R zer (1872) In this tam, which was a suit bring ht against the alcrews of the plaintell a father's will be to liverer the far ferties which had been alienated by the willows dating his non-gats, the flowers, Ag. C.J. said. "The dutye was that the tauer of acts in against each of the jourchasers is a distinct one. The plaintiff claim a his abare of family property. His cause of setion, the right, is his telation to the family to which the projectly appretains, and not this right, if established, and if he is not otherwise barred from recovering, he will be entitled to that share where refound The fact that various persons during his minurity hate affected to hundane parials of the property does not destroy the unity of his ground of action." tiel in a suit by reversioners of B against defendance, who see up trajective teths to deflerent plots of land by purchase from B. it was also lield there was no nistoinche, the Court ladding that the cause of action was that identiffs were reversioners of B: Ishan (Runder : Rameswar, 14 C 831 (1897), des from m Ram Prosad 1. Sachl Dassi, oC W. N 585 (1902), appst in Parbuti Kunwar i Mahmud Fatma, 29 A 267 (1907) In Mahomed r Krishnan, 11 M 106 (1886), a suit by junior members of a tarnad against the larnaum and others, including persons to whom he had altenated tarnad property, the Court observed (at 11 tll) that it made we difference whether the tight enloreed was that of a copartner or reversioner, and that in the west blust her jump; yound disction to the interest systed in precession as regards the whole of the property in our titer is unity of title, and the claim made is one in respect of the same cause of action. See also the cases in the following note, which may have proceeded upon the same permission.

(2) Nasulevar Kukadi, 7 M B C. R. 269 (1974), Malai v. Ayaga, 12 M 234 (1893), Milai v. Ayaga, 12 M 234 (1893), Milai v. Ayaga, n. B B I C. R. A. C. J. 30 (1865), Nanth Naram v. Frent Lad, 3 W B 102 (1865), Shoroopy Mothou, 4 W B 109, at p. 110 (1865), Krishina Gopaul v. Hurry Nath, 25 W B 50 (1976), Haragamid Mozandar v. Frommo Chunder, 9 C. Tod (1883) [where the alemation was in execution]. At also Interesting surprised and given the flevenur Commissioner had taken possession of the plantial vlands and given them to various definition. In some of these cases, however, the alterior was n party, as to which, we pre-

(3) See judgment of Peacock, C.J., in Raja Rain Tewary: Luchmun Pershad, 8 W.R. 15, 10 (1867), and judgment of first Court in Name 1. Aumana, 7 W. H. C. R. 260, 261 (1874).

(4) Vithu i. Narayan, 5 B H C R , A C, J, 30 (1868). Suluamunya i Sadasiya, 8 M, 75 (1884) may be said that the policy of the law is not to favour multiplication of suits (1) And in some cases, as observed by the Midras High Court, (2) "it is manifest that the number and nature of the alienations are no unimportant clements for the determination of their propriety. It is most desirable that the whole of them should be at once before the Court called upon to decide the question, in order to secure the soundness of the particular decisions, and perhaps the avoidance of discordant decisions in different cases upon facts nearly the same" It would probably be best if the Courts were given, as to procedure, a discretion to be exercised in a manner to the con venience of trial and of the parties and to the advantage of substantial justice It is, however, necessary to determine the question by reference to the defini tion of the term under discussion and the other provisions of the Code If therefore, on the other hand, the words "cause of action" denote both the right and its infringement, (3) there has been said to be distinct causes of action against each of the aliences, and in consequence juisjoinder,(4) except perhaps where the suit is both against the ahenor and the ahences. In such case it has been said (5) that (there being a complete cause of action both ss to right and infringement) against the defendant alienor, it is necessary to bring the aliences on the record to afford ground for decision of the whole dis pute, and that it cannot be said that a separate cause of action exists against the alienor "in conjunction with each group of aliences, the alienations not being the causes of the present action, (6) but merely incidental thereto "(7) In a case, however, where the alienor was a party, the Bombay High Court held that the plaintiffs had distinct causes of action against the several defendants, and that there was a susponder (8) Whether, however,

⁽¹⁾ Shoroop t Mothoor, 4 W R 109 at p 110 (1865), where it was also said "Rever soners frequently bring one suit to set asido such claims, and such a suit has never been held to be madmissible."

⁽²⁾ Vasudeva v Kulcadı, 7 M. H (R 290, 293 (1874)

⁽³⁾ Ganeshi Lol t Khairati, 16 A 279 (1894), where the Court pointed out (at pp. 280, 281) that "the relationship of the re-erisioner to the widon s husbands could not firm the cause of action, but only a part of the cause, which comprised among other thungs the wrongful possession of the separate acts of delendants over the lands held by them respectively, and sec cases in next note.

⁽⁴⁾ Ganeshi Lal : klimirati, supra [dust in Parbuti Kumwar : Mahmud Fatimra, 29 267 (1907)], Kacharbhoj i Bai Rathore, 7 B 289 (1833), Raja Ram Icearry et Iuclimun Pershad, 8 W R 15 (1857), F B , Josham Mustafa : Sieco Soondjince, 10 W R 1-7 (1865), Tewarce Raghoonath : Syud Mahr incl. 4 A II C R 1908 (1871)

⁽⁵⁾ Chuhar Mall & Bakhtwadth, 1890, P

R No 149 See Hukm Chand, C P C 508,

⁽⁶⁾ In the erso in question apparently the cause of action was held to be the refusal by the absence to recognize the plaintiff's rights to share in the family property.

⁽⁷⁾ In the following cases, which have been already etied, the alk nor was a party to the action Sam Chetti v Ammani, 74 H C. R 200, Mahomed t Arishnau, 11 M 106, Abdal t Ayaga, 12 M 234, Chuhar Mall t Bakhwadi, 1800 P R No 149, Hara nund t Prosunno, 9 C 763, 14thn the Narayan, 5 B H C R 1 C J 30, Kanth Narann t Pron Lal, 3 W R 102 103, where

⁽⁸⁾ Kachar Bhoj v Bai Rathore, 7 B 289 (1883), ref, Sadu Bin Raghu v Ram Bin Govind, 16 B 608, 611 (1892), and in Mata v Bluganisco, 1 4 H C R 128 (1800), the soft was held bal for misjoin ler, as though the alector (a guardian) was a part, no rehrf was sought agunst her

the smt is open to objection for imsjoinder or not, the Court may always in its discretion direct separate trials to be held Similarly, in a suit for possession of immoveable property against two defendants, the cause of action being that the first defendant had no title to mortgage the property to the second defendant, it was held that there was no misjoinder, and that there were not two causes of action, but one, namely, the infringement of the plantiff's right by the first defendant, ont of which flowed the title asserted by the second defendant, who derived title from the first defendant, and whose case stood or fell with his (1) A fortion, there is but one cause of action against a defendant and others who are not real but merely estensible purchasers from him (2) So, again, a defendant who, under a decree, subsc quently reversed, onsts a plaintiff from possession, may be sued with persons to whom, subsequent to the onster, he has leased the land they stood in the shoes of their lessor, and were jointly hable with him to be ousted (3) The joinder of several persons in doing an act does not affect its muity or the unity of the cause of action constituted by that act, as in the case of an obstruction or ouster by a number of persons who are illeged to have acted in combination (1) It was held that different causes of action could not be joined in one suit against different parties, where each had a distinct and separate interest (5) that the Courts should reject plaints against several defendants for causes of action which had accrued against each of them separately and in respect of which they are not jointly concerned, (6) that there was no section of the Code which permitted a person to sue various defen dants together in respect of various causes of action, (7) and that plaintiffs could not join in one stut in respect of ennses of action in which they were not all wintly interested (8)

(1) Indar Kuar : Gur Prasad 11 A 33 (1888) For similar cases of suits against mortgagors adienating property, see Bal Kishen : Bistoc Churn 22 W R 572 (18 4) in which both mortgagor and his alexans were parties, also Krishina Gopaul et Hurry Nath, 25 W R. 09 (1876), Srmath Das a khetter Volum 16 C, 693 (1888)

(2) Wise v Gureeb Hossein, 13 W R 271 (18,0)

(3) Antu w Vishuu 22 B G30 (1897)
(4) Loke Nath Surma w Kreshab Ram 13
C 147, L52 (1856), Muthwispa w Cheeka lingam, 19 M 335, 336 (1896), and see as to ousters by different persons on different dates committed as part of the same contest, Harchandar v Lal Bahadur, 16 A 359, 361 (1894), Varajial w Ramdat, 26 B 2.9 (1991) [joint assault], eliter where it is not shown that, the defen lants acted in concert or under some common title. For acts done by different persons are not deemed one unless done in concert Sutiliendu; Durga Dasi, 11 C 435.
(1887), Ram Narain i Amoda Prossol, 14

C 681 (1887), Koondun v Rao Himmut, 3 A II C 88 (1871), Burro Moneco Onookool, 8 W R 461 (1867) In Shooroop v Mothoor, 4 W R 109 (1865), in which the Court expressed adoubt as to whether there was misjoinder, at is not clear whether there was misjoinder, at is not clear whether there was not combinations or not. In Busheshur v Rain Churun 5 A H C 25 (1873) Pearon J hell that as there was collision there was no cause of attent against first defendant, a different matter from misjoinder though he held that the suit was hed on that groun! In Rain Prosad v Sachi Dass 6 C W Ses (1992), there was no combination.

(5) Baroo t Vassum 21 W R 206 (1874)
(6) Baboo Motto t Rance 8 W R 64
(1867) in which it was held that the defendants hal no common interest and that

the causes of action were distinct.

(7) Ram Varain r Anno la Prosad, 14 C.

481, at p 637 (158s)

(8) Rayjo Kuar v Debi Dial, 18 A 432 (1896), ride post

The following suits have thus been held to be bad for inisjoinder -A joint action for the price of timber against defendants, who purchased each one pair of tunber separately from the other, (1) A sold to X and B sold to X, a suit by Y against A, B, and X to enforce a right of pre emption, (2) a suit claiming possession against all of defendants, with mesne profits against some and damages against others, (3) a suit by a talookdar against the zamındar and several purchasers to set aside sales to them respectively of five patni taluks sold for arrears of rent due separately upon each , (4) a claim to set aside sale against auction purchaser and for damages against zurpeshoidars, (5) a suit against several persons, each a party to a distinct contract, (6) a suit as against one defendant for specific performance of a contract to sell land and as against another for a declaration that he was not entitled to any charge upon the same lands, the cruses of action being distinct as against the defen dants, (7) a suit against one person, an alleged agent of a firm, for breach of contract and against another as partner to have accounts taken and the partner ship wound up (8)

It is necessary now, however, particularly in the case of suits by reversioners above mentioned, to consider the effect of the enlarged scope of O I r 1 and its effect on the question of joinder of defendants, for now apparently all reversioners might join in any suit any number of defendants in respect of several properties, provided they base their claims (which need not be joint but may be several) on a common ground

The relief —The cause of action must, as in other cases, he distinguished from the relief claimed. So where plaintiff, a creditor, brought a suit on his own behalf and on behalf of other electitors, asking on his own behalf to set uside a deed as void, and on behalf of other creditors for a declaration that the deed was voidable, it was held that both the plaintiff and the other creditors had one cruse of action, namely, the right to treat the deed as one which could not affect their rights, although as the plaintiff had obtained a decree which he

Baroo v Massun, 21 W R 206 (1874)
 Bhagwati v Bindeshri, 6 A 106 (1883),
 and see Kalian Singh v Gur Dayal 4 A 163

⁽¹⁸⁸¹⁾ (3) Narsingh Das 1 Mangal Dubey, 5 A 163 (1882), F B, Mahmood, J, dissent The majority of the Court held that the suit was not against defendants jointly (p 168), and that nothing in ss 28 or 44 of the Code of 1882 authorized a suit by a plaintiff against A for dispossessing him or opposing his obtaining possession with distinct claims against B, C, D, and I for damages for separate years in respect of such primary wrongful act on the part of A (at pp 170, 171), and that what was contemplated by the Code was a suit for recovery from a tres passer or trespassers in possession at time of suit, and the pander of claim for mesne l routs against such trespasser or trespassers

⁽ab) Mahmood, J considered (at p 179) that the case was similar to Janokinath t

Ramrunjun, 4 C 949
(4) Imrat Nath : Baboo Toy, 18 W R 288

<sup>(1872)
(5)</sup> Ram Kishen - Chowdhury Frebeni

⁽⁵⁾ Ram Kishen : Chowdhury Frebent 1 (W. N. cm. (1897)

⁽⁶⁾ Namasıvaya v Kader, 17 M 168 (15 13) und as to sol arate contracts see case in last

⁽⁷⁾ Luckumsey v 1 azula, 5 B 177 (1880) dast, Mokund Lall v Chotay Lall, 10 C 1061 (1884), Jamsetji v Kaehnath, 26 B 327, 328 (1991), Krishnasanin Sundarappayyar, 18 M, 415, 417 (1891), r.f., Alagarpa i Suvaramasundara, 19 W 211, 216 (1820), Ramehandra v Ramehandra, 22 B 46 (1820), and see Probhot rain t Robinson, 11 W R 188 (1860)

⁽⁸⁾ Mutha pa v Mutha 27 M So (1 83)

wished to execute, he for that purpose required relief by setting uside the deed as yould (1)

A planntiff may always put forward an alternative case, (2) provided that the facts stated as the basis of alternative relief are the same. Where there is a single came of action, or saveril causes of action against the same defendant, no difficulty arises. Where the first defendant dispossessed the planntiff of land sold to him by the second defendant, and he sued for possession and means profits, or in the alternative for the refund of the purchase money from the second defendant, it was held that there was but one cause of action, namely, the dispossession and no misjoinder (3). Two separate alternative causes of action a, units the same defendant may be noted (4).

A claim for possession by plaintiffs, four onna zemindars to receive a four anna share in a patin alleged to be in possission of all six defendants, or the alternative, except as a gainst one defendant, for rent, was held not to be laid for inisponder, it being further held that notwithstanding that the claim for possession or rent might be unsustainable in fact as against some of the defendants, that was no a tround for dismissing the suit generally for

nn-joinder (5)

"Does sect 15 (now rule 3) contemplate a case where plaintiff has really only one cause of action upon which he can succeed, but being in doubt as to which of his alleged causes of action will be successful proceeds upon both with the intention of obt unma relief out of one of them? Are not the several causes of action contemplated by sect 45 causes of action which, it is alleged. cicli afford grounds for separate relief, and combined for cumulative and not alternative relief?" (6) In England it has been held that if two persons could not be tomed as defendants unless the causes of action against them were exactly the same, the object of the Legislature would be entirely defeated (7). It would sum from the cases cited that the fact that ofteruative reliefs were claimed did not authorize a joinder of soveral causes of action against several persons not jointly interested. So where a suit was brought to set aside the sale of a mehal against the persons who had purchased it at on auction sale held for default in payment of Government revenue by zurneshaidars, to whom the mehal had been let, or in the alternative for damages against the zurpeshandars who had defaulted in the payment, it was dismissed for multifariousness as the two claims were based on distinct causes of action (8) And where a plaintiff contracted for sale to bim of a house for Rs 2500, and sued illeging a subsequent sale by the defendant to a third party, and prayed for

Lbrahm v I oolbat, 4 Bom. L. R 180, 184 (1902)

⁽²⁾ Lakshmibar v Harr, v B H G. R I (1872), in habir Khan v Khawani, 1897, P R No 41, the planniff asked that he might be declared to be the projector of the whole village, or, failing that, an occupancy tenant, and it was held there was no misjonder.

⁽³⁾ Scrajal Huq : Abdul Rahaman, 29 C 257 (1302), a. c. 6 C W N 300

⁽⁴⁾ Bagot t Laston 7 Ch. D I , Ann

Pr 130a p 2.3

⁽⁵⁾ Janokmath v Rammunjun 1 C 343 (1849), approved by Mahmood, J, in Narsingh Das v Mangal Dubey 5 \ at p 179 (1882)

⁽⁶⁾ Patima Begum v Muhammad Zakariâ,

^{1895,} P. R. No. 96, per Rivaz, J.
(7) Child v Stenning, 5 Ch. D. p. ~02, and see Ann. Pr., 1905, p. 223

⁽⁸⁾ Ram Aishen : Chowdhury Trebens, 1

C W N cm. (1897)

a decree either for specific performance of the contract of sale on payment of Rs 2400 (Rs 100 having been paid as earnest money), or for pre emption on the sale on payment of Rs 2500, or whitever might be the market value of the house, Chatterjee, J, observed, that two distinct claims in the alternative, based on distinct causes of action, could not be joined under the section corresponding with rule 3 Rivaz, J, also doubted the correctness of their joinder, putting the query already quoted (I)

Same defendants jointly.-It has been already pointed out that joint interest in the main questions raised by the litigation is a condition precedent to the joinder of several causes of action against several defendants, the test being whether there is community of interest in the causes to be determined (2) It was held that there was no provision of the Code allowing distinct causes of action against distinct sets of defendants, that is to say, causes of action in which the defendants are not all jointly interested, to be united in the same suit (3) The mere similarity of the claim is no ground for joining in one suit claims which, though similar, are several and distinct against several persons, (4) nor is the convenience of their tital by one Court (5) Where a cause of action arising out of a joint account of two defendants was united with another arising out of a transaction in which one of the defendants alone was concerned, it was held that the causes of action were not against the same defendants jointly (6) Where the defendants are not jointly hable, each distinct cause of action must form the subject of a separate suit. So where A sold to X, and B sold to X, whereupon Y sued A B, and X to enforce a right of pre emption, it was held to he a misjoinder, there being distinct causes of action in respect of which the defendants had no common interest (7) So where plaintiffs in a suit for partition joined as defendants a number of cultivating roots, whom they sought to eject, it was held that the suit for partition was of little interest to the ryots, and the question of ejectment was a distinct one in the case of each ryot (8) So, also, there has been held to be a misjoinder where the right to relief against one defendant was in respect of the non fulfilment of a contract, and the right to a declaration against another was in respect of a threatened disturbance of the plaintiff's possession (9) The same has been held in a suit against defendants for possession, and against some of them for damages, and against others for mesne profits, (10) and in a suit to recover possession of certain lands by reversal of certain deeds,

Fatima Begam v Muhammad Zakana,
 P R No 96, Hukm Chand, C P C

⁵⁷¹ (2) Bhagwatt v Bindeshri, 6 A 106, 108

^{(1883),} vide ante (3) Mullick Kefait i Slico Pershad, 23 C

⁽³⁾ Alphick Relate t Suco Persual, 23 C at p 826 (1896) (4) Koondun Lal t Rao Himmut, 3 A If C R 86, 87 (1871), as to trial by one

Court, ib, and Harchandar v Lal Bahadur, 16 1 at p 362 (1891)

⁽⁵⁾ Koondun Lal t Rac Hummut, sngra

^() Sama Mal : Shah Bag, 1888, P R

No 189

 ⁽⁷⁾ Bhagwati v Bindeshri, 6 A 106 (1883)
 (8) Saminada v Subba, 1 M 333 (1877)

 ⁽⁸⁾ Sammada v Subba, I M 333 (1877)
 (9) Luckumsey v Fazulla, 5 B 177 (1881).

dist in Mokund Lall v Chotay Lall, 10 C 1061 (1881), where the co defendant who was not a party to the contract had no distinct interest and was such as the branindar of the real defendant. This decision is not of po-ed

to the first
(10) Narsingh Day : Mangal Dubey 5 1

^{163, 163 (1882)}

some of the deeds being of absolute, and some of conditional, sale (i) Although there must still be community of interest where the causes of action are entirely distinct, it will be necessary in each case to see whether this is so or whether though the causes of action are several there is a common ground justifying their joinder. On the other hand, there was held to be no mis joinder in a suit against a defendant who had obtained possession under a decree which had been reversed, as also against his lessess the latter standing in the shoes of their lessor and heing jointly hable with him to be ousted (2) In a sust against joint decree holders for the plaintiff's customary fourth share of the profits realized by the decree helder by an execution sale of different houses at different times, the decree helders were held to be joint, though their hability to give the share in respect of the sale of each house was separate (3) So, also, a suit instituted to eject all the tenants holding separate lands in a village, and to recever arrears of rent from them was held not to be bad for misjoinder, as all the defendants claimed by inheritance or by pur chase or otherwise under one and the same person, or under one of two persons who had executed the muchalla for the lands and the plaintiff therefore had a common cause of action igainst the defendants, and was not obliged to sue their separately (1)

As in other eases, (5) a person who is a party in different capacities is not the same defendant—a principle which though partly recognized in rule 5 is of general application. Thus, where a person is a party in two capacities there is misjoinder, unless each cause of action affects him in both capacities (6)

Plaintiffs jointly interested —The words "jointly interested were first introduced by Act XII of 1879 Under the Code of 1859, it was held to be a misjoinder where the causes of action of the plaintiffs were different and distinct in their nature (7) A suit brought by three persons for the possession

⁽¹⁾ Raja Ram v Luchman Pershad, B L R. (Γ B) 731 (1867) This case was distin guished in Haranund t Prosunne, 9 C 763 (1883) [suit by purchaser of property subse quently sold in execution against parties to the decree and purchasers in execution of different portions of property), and in Ram Naram v Annoda, 14 C 681 Iplaintiff talook dar obtained decree for ejectment of tenant In execution of decree opposed by defendants One suit against judgment debtor and all parties opposing but without collusion] In the first of these suits it was held there was no misjoinder, and in the second that there was Both cases however, based the decision upon the question whether the plaintiff had one object and the defendants a common defence As regards these cases it was pointed out (Hukin Chand C P C 573) that the test for joinder was the unity of the cause of action and not of the object of the suit, and the unity of the defence was not

knowable until after the institution of the suit

⁽²⁾ Antu v Vishnu 22 B 630 (1897)
(3) Nanku v Board of Revenue, 1 A 444

<sup>(1877)
(4)</sup> Thiagaraja v Giyana Sambandha San

nadh: 11 M 77 (1888)

⁽⁶⁾ I ide ante p 528

⁽⁶⁾ See Hukm Chand C P C 571 572

⁽⁷⁾ Romoons t Muneko 0 W R 5.25 (1858), m which Phear J pointing out the inconveniences of such a suit said that saving all questions of abatement and matters in amendment of the record, I have mover in my memory heard of a suit decreed in favour of one oc plaintiff and dismissed as against the other co-plaintiff. And that negative fact of usage is I think influential to show how very unpracticable quite apart from any matter of law it has been found that combined suits of this charveter should be united together and treated as if they were

of numoveable property, in which two of them claimed half the property under a title by inheritance and the third claimed the other half in virtue of a sale thereof to hun by the first plaintiff, was held to be bad for mis joinder of causes of action (1) The Court said "Although it appears to us that seet 8 of Act VIII of 1809, the first paragraph of sect 45 of Act X of 1877 and the first paragraph of the present Code mean the same thing, we assume that the Legislature by the amendment of 1877, by the amend ment of 1879 and by the wording of the first paragraph of sect 45, as it it present stands, intended to make it clear that their intention was that several plaintiffs could only join in suing several defendants in one suit for several eruses of action when the plaintiffs were jointly interested in each and all of such causes of action and that the second part of the first paragraph of sect 45 is merely enacting that several plaintiffs jointly interested in the same causes of action against the same defendant or several defendants jointly may sue in the same manner, as by the first part of that paragraph it is enacted one plaintiff may sue one defendant or more jointly in one suit on several causes of action to which the defendants if more than one were parties and that it did not intend to confer a right by sect 45 on several plaintiffs to sue on causes of action which were not jointly vested in them one or more defendants, although the nets of all the defendants jointly inight have completed a separate cause of action of each several plaintiff and afforded him a cause of action on which he could sue alone ' It was assumed however by the Judges that the Legislature did not intend "directly or in dire the to prohibit the joining by Hindu or Vahomedan heirs in one suit of their causes of action in respect of what had been the property of their incestor or of the family and that it had been the practice in the North West Provinces to allow Hindu or Mahomedan heirs, even where their interests were several to join in one suit for the recovery of property which had belonged to a common ancestor through whom title was claimed, and that they regarded the decision in Ram Sewak Singh v Nakched (2) as necessarily confined to the maintenance of that practice. The same principle was followed in a subsequent case (3) in which it was held that several creditors to each of whom separate debts were owing by the same debtor could not jointly sue for the avoidance of a deed of gift executed by the debtor, which deed was alleged to have been made fraudulently with intent to defeat or delay executant's creditors the cruse of action of each separate creditor not being the same as that of the others Similarly a suit by two brothers for a declaration that the parts of the house attached in execution of decree against their father belonged to them and not to him was held to be irregular though the Court observed that the plaintiffs might well have thought that the case came within the latter part of the first paragraph as in one sense their title was a common title which was assailed by one and the

⁽¹⁾ Salima Bibi v Sheikh Muhammad 18 \ 131 (1835) The plaint was returned as that if e plaintiffs might elect which of the is should proceed with the sunt foll. Rul in Biksh v Amiran B bi 18 \ 1 \ 21)

⁽¹⁸⁹⁶⁾

^{(2) 4} A. 261 (188_)

⁽³⁾ Rajjo Kuar : Debi Dial 18 \ 132 (1695)

same action of the execution creditor, and they were jointly interested in opposing the attachment and sale, although a sale would only have affected each man's separate interest (1). Where the cause of action in the case of the first plaintiff aimed at the establishment of the title of the first plaintiff as issueless widow of M G to succeed him jointly with the other widows, whereas the cause of action in the case of second plaintiff aimed at the establishment of the title of second plaintiff by reason of an adoption to take the estate of M. G to the exclusion of all others, it was held that it could not be said that the two plaintiffs were jointly interested in these inconsistent causes of action The establishment of first plaintiff's title would exclude second plaintiff from all right to take or share in the estate, and the establishment of second plaintiff's title would equally debar first plaintiff from any share in the estate, but a right to be maintained out of it-a right which was not brought in contest (2) The Court added "Sect 45 permits of the joinder in the same suit of several causes of action in which several plaintills are jointly interested against the same defendant. These plaintiffs are jointly interested against the same defendant in the sense that it is the object of both plautiffs to show a title in one or other of them to the whole or a portion of the estate in competition with the defendant, but this is not enough . they must each he jointly interested with the other in the second causes of action-not necessarily coughly interested but jointly interested , i c as we understand, not jointly interested as a mere matter of affection, but jointly interested as to the subject matter of the suit which the causes of action have in contemplation" (3) When two persons are interested in a pieco of land—one as meliaramdar, and the other Ludicaramdar—ind a third party commits a wrongful act which affects the rights of the persons so interested it may he properly held that the land is common to both to the extent of entitling them to sue jointly in respect of the wrongful act, treating such act as giving rise to but one cause of action affecting the two persons more or less (4) So long as several causes of action are by the same or jointly interested plaintiffs and against the same defendant or defendants jointly, they may be joined subject only to the Court's discretion of ordering their separation There are no restrictions as to the nature of the cause of action which may be so joined, as it is stated (5) there are in most of the Code States of the American Union , but the restrictions there may sometimes prove a good guide here as to the advisability, as apart from the legality, of the joinder (6) Seet 26 (now O I r 1) has now been amended so as to permit plaintiffs to join in whom any right to rehef exists in respect of, or arising out of, the same act or transaction that is, where if separate suits were brought any common question of law or fact would arise

Procedure to be followed where misjoinder—Under the last Code where a plaint was presented which was bad for misjoinder of causes of action,

⁽¹⁾ Behari Lal t Kodu Ram, 15 A 350 (4) Muthuvijaya t Chockshingam 19 M (1893) 335 (1996)

⁽²⁾ Langummal t Venkatammal 6 M 239 242 (1882)

⁽⁵⁾ See Hukm Chand, C. P C. 575
(6) Ib.

⁽³⁾ Ib, at p 242

it might at any time before the settlement of issues have been returned for amendment (I) If the plaint, having been returned for amendment, was not amended, it might have been rejected (2) If this was not done and subse quently objection was taken by the defendant, which might be either in the written statement or in a motion to take the plaint off the file or on the settlement of issues, (3) or the Court, on further consideration, considered that there were grounds for considering the plaint bad for misjoinder, the Judge should have raised an issue and decided it, and dismissed the suit (4) If, however, the Judge felt doubtful whether his decision on the point of mis joinder would stand, he night have properly framed the issues of fact for the determination of the case, and then dismissed the suit for misjoinder without recording any finding on the other issues (5) Further, the circumstances must have been such that the first Court had no alternative open to it but to proceed to trial of the matters of fact upon the prehimnary determina tion of which the point raised as to misjoinder turns It might then have dismissed the suit (6) As to the present Code, vide post Where the District Judge disallowed the objection on the ground that it was not taken at the

⁽¹⁾ Section 53 of last Code . Ram Prosad : Sachi Dassi, 6 C W N 685, at p 588 (1902). Ganeshi v Khairati, 16 A 279, 281 (1894), Muthappa v Muthu, 27 M at p 84 (1903) In Behari Lal : Kodu Ram, 15 A at p 381 (1893), the Court said 'that in the great majority of cases in which two or more plaintiffs sue in one suit in respect of causes of action which are not joint, it would be proper to return the plaint for amendment and leave the plaintiffs to elect as to which of them should be struck out, but they doubted whether a Court should, without giving the parties an opportunity of amendment, absolutely dismiss the whole suit Aldridge v Barrow, 34 C 662 (1907) the plaintiffs were put to election

⁽²⁾ Sect 54 of last Code In some of the earlier cases the plaint appears to have been in the first instance rejected, or it was held that it should have been rejected. Narsingh Das v Mangal Dubey, 5 A 163, 171 (1882) [rejection stated to be under s 53 of the Code of 1882, sed qu], Raja Ram Tewary v Luchmun Pershad, 8 W R 15 (1867), Baboo Motu v Rance, 8 W R 64 (1867), Sudhendhu t Durga Dasi 14 C 435, 439 (1887), Towarco v Syud, 4 A H C 108 (1871), Mussumat Rutta v Dumree I all, 2 A H C 153 (1870)

⁽³⁾ Rum Dyal v Ram Doolal, 11 W R 273 (1863) The Code, however it was held, dil not up; mently contemplate in application by 1 | arty that a | laint be amen led Mutha pa

v Muthu, 27 M at p 84 (1903) (4) Kachar Bhoj v Bai Rathore, 7 B 289, 291 (1883), Ram Prosad v Sachi Dassi, 6 C W N at p 588 (1902), Bhagwati v Bindeshri, 6 A 106 (1883), Baroo v Massim 21 W R 206 (1874) The plaint might also be returned for amendment under s 53 before settlement of issues In Sud hendhu v Durga 14 C at p 439 the Court held, that with reference to ss 31 and 53 of the Code of 1882, the Court should not have dismissed but rejected the plaint It is not clear whether issues had been settled but neither sections appear to apply S 31 related to misjoinder of parties, and s v3 dealt with rejection for want of cause of action In Janckinath v Ramrunjun 4 C at pp 953 954 (1897), the Court said that when distinct causes of action are improperly joined the Court should not dismiss the suit but try them separately This observation was obiter, and s 45 contemplated separation, not where the joinder was illegal, but where it was permitted, though a joint trial was inconvenient (vide post) In Hurro Monco v Onookool, S W R 461 (1867), it was said that the Court should have called upon the plaintiff to elect against which defendant he would proceed

⁽⁵⁾ Imrit Nath v Roy Dhunput, 9 B I R 241 (1872), s c, 18 W R 288, Kachar Bh n v Bai Rathoro, supra

⁽⁶⁾ Bhagwitt v Bundeshri, 6 1 106, 105 (1883)

earhest possible moment, namely, in the written statement but the objection was taken at the settlement of issues before trial, it was given effect to on second appeal (1) The power given to the Court to return a plaint was only discretionary, and if it was shown that the form of a suit was bad, by reason that there has been misjoinder of parties, or of causes of action, it could not be said that a party was precluded from raising the objection and taking it at the hearing of the sint or on appeal. There was nothing to warrant the proposition that when a Court of first instance decided a question of misjoinder in favour of the plaintiffs, there was an end of the matter, and that the defendant was precluded from raising the question in appeal (2) Where such a question has been raised, the Appellate Court has allowed a suit or claim to be withdrawn (5) Where the appeal has proceeded, the question has been raised in some eases whether the Appeal Court was precluded from reversing a decision on the ground of misjoinder, by reason of seet 578 of the former Code In some cases, misjoinder of causes of action has been considered an irregularity not affecting jurisdiction or the ments of the ease (4) In other eases it has been held that, assuming but not deciding that misjoinder was a more irregularity, it did affect the merits (5) In other cases it appears to have been held that misjoinder of causes of action was of the nature not of an irregularity but an illegality (6) The law upon the point

being so that he ret seeded

Namaswaya t Kadir 17 M. 168 175
 (1893)

⁽²⁾ Muthappa t Muthu, 27 M 80, at p 85 (1903) In Shunkur t Lala 2 A H. C 443 (1879), it was held that misjoinder was not a ground of special appeal, but this it is subinted in not so.

⁽³⁾ Tara Prosumo v Koomaice, 23 W R 389, 390 (1875). Ganeshi r Khairati, 16 \ 283 (1894), in which case the appeal proceeded against those defendants in respect of whom there was no misjoinder

⁽⁴⁾ Ivalana Singli i Gur Dayal, 4 i 106 (1881) [hel I majorador of causes of actionard parties, objection taken by one defendant, held, Court should not having regard to a, 578 have rocered kercel, Wise r Gurceb Hosseu, 13 W R 271, 272 (1870) [held no majoral er as objected, but, if any, the Court would inquire into mental]. Behari Lal r kodu Rain, 15 A, 380, 382 (1839) [held to be irregularity thou, in objection taking to firm of suit, and a, 578 applied], M hund Lall r Chotay Lall, 10 C at p. 100s, per Mitter, J (1884)

⁽⁵⁾ Ganeshi i Khairati 16 A. 273, -3 (1894), Molund Lall e Chotay Lall, 10 C 100 Fee Pigot J (1884), Namannaya e Kadir, 17 M. at 1 pt 175, 170 (183), M. 1 irra Chandra i Atul Chandra, -1 C 547 544

^{(1897) [} even if it were granted that an objection like the one that the defendant raised involves only a question of irregularity, a point which is by no means free from doubt.], Muthajia t Muthu 27 M, 80, 84 (1903)

⁽⁶⁾ Musst Amierun t Musst Wasschun 12 W R 11, 12 (1869) [objection in first Court held m second at real by Glover J . it appears to me something more than an stregularity, something in fact extressly for balden and consequently an illegality 1. Baroo e Masum 21 W R 206 (1874) (though the term allegal was used this particular question was not discussed]. Varailal r Ramdat, . 6 B 2.9 (1 01) (a. 5"8 at plus to mutales and arregularities subsequently commutted in a suit which has been instituted in such a way as to give the (urt jurnshitten to try it. The suit however must first be instituted in the manner allowed by law Cf upon the question of purishetion Mall L helat r Sheo Pershall 23 C 521, 5.0(18 to)] 1 mo mar Manuto 9 W R one off (1905) [Holbone J sast that joind a of causes of action was forbolk n ex alt where authorized and that a dear in In a suit in which cause of action were wrongly justed was contrary to law and

was thus unsettled (1) Probably in some cases it will be found that the merits were affected. Where, however, this was not so, and particularly where no objection had been taken (a circumstance in itself indicating that the party has not suffered disadvantage), the Court would probably have acted rightly in not dismissing the suit upon what, in the supposed circum stances would be a technical objection. Where effect was given to the objection, the Appellato Court, in the under mentioned case, (2) did not dismiss the suit, but rejected the plaint, directing the plaintiff to pay the costs through out. In other cases the Court both in first and second appeal, has dismissed (3) the suit for misjoinder. As to the present Code, nide post.

Objections to misjoinder, as all other objections to the frame of a suit, should, of course, be taken as early as possible. An objection taken not in the written statement, but at the settlement of issues before trial, has been given effect to (4) An objection has been held to be too late after the case has been tried and decided (5) And it has been said that an objection taken for the first time in special, or possibly in regular appeal, might not be allowed to prevail (6) Phoar, J said (7) "As a general rule, if an objection on this ground is pressed and carried to a decision in the first Court, this Court will, even upon special appeal, upon its being shown to be well founded, give the objector the benefit of it But, on the other hand, if it is not pressed aud carried to a decision in the first Court, and if the parties go to trial in the same way as if the objection had not been made, then the objection will not be givon offect to at a later stage, unless it appears clearly that there was a defect in the original trial, in consequence of the misjoinder of the causes of action This Court has always held that it is to which the objection is directed the duty of the first Court, which receives the plaint and entertains the suit to take caro that the parties are not prejudiced by any unfair complication in the matter which the plaintiff charges against the defendants But if the parties have chosen to go to trial and have not insisted upon the first Court taking a step of this kind, then it may very fairly he taken against them at a

Misjoinder of parties, it has been held, does not affect either merits or jurisdiction Rim Kangay v Prosumo, 13 W R 175 (1870) In some of the cases previously cited there was misjoinder both of subject matter and parties.

⁽²⁾ Sudhondhu v Durga, 14 C 435 439, 440 (1887), sed qu as to grounds of decision, tide ante. As to amendment on appeal, see Lingammal v Chinna, 6 M 239 (1882), Karan v Muhammad, 7 A 860 (1883)

⁽³⁾ Ram Naram v Annoda, 14 C 681 (1887), Romoona v Mantolo, 9 W 15 225 (1868), Namasioa) a v Kadur, 17 U 168, 178 (1893), Bhagwatt v Bindeshir, 6 A 166 (1883), Wuthappa v Muthu, 27 M 56 (1901), and cases cited ante passim In Bance Arr-linan v Accordin Lal, 2 A II C 221 (1870), Koondun Lal v Ras Humunt, 4

A H C 85 (1871), Iowareo v Synd Mo hamed 4 A H C 108 (1871), the Court dismissed the sun, stating expressly that it did so on the ground of majornder only and not on the merits which the plaintiff could raise again in another suit Quere as to the decision, Suroop v Nimchand, 13 W R 284 (1870) A dismissal for misjonder in one a hearing or determination within the rule of ret yudicate Futteh Singh t Mussa

mut Luchmee, 21 W R 105 (1873)
(4) Namasivaya z Kadir, 17 M 168, 175

^{(1893),} cited ante. (5) Ram Dyal : Ram Doolal, 11 W R 273

⁽⁶⁾ Mahomed v Potun, 20 W R 147, 148

⁽⁷⁾ Iarinco v Hunsman "0 W 1., 210

later stage of the appeal proceedings that they have not an fact suffered any material disadvantage in the trial unless it be distinctly slown that there was such disadvantage

To turn to the present Code at does not as sect 53 of the last did specifically deal with return for amendment but O VI r 17 allows of amendment and the Court may it is presumed return the plaint for that purpose Under the last Code (sect 54 (d)) a plant so returned and not amended was rejected This provision has not been re enacted but O VI r 18 deals with failure to amend after order As regards an objection on the score of misjoinder r 7 of this Order provides for its being taken at the earliest opportunity and if not so taken the objection is deemed waived. Even if taken the objection will under sect 99 count for nothing in appeal unless it be shown that such misjoinder has affected the ments of the case. Here therefore as elsewhere the Code has diminished the importance of merely technical objections

4 No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery Only certain claims to of munoveable property, exceptbe joined for recovery of

ii imoveable property (a) claims for mesne profits or arrears of rent in respect of the property claimed or any

part thercof,

(b) claims for damages for breach of any contract under which the property or any part thereof is held and (c) claims in which the relief sought is based on the same cause

of action

Provided that nothing in this rule shall be deemed to prevent any party in a suit for foreclosure or redemption from asking to be put into possession of the mortgaged property

No claim by or against an executor administrator or hen, as such shall be joined with claims by Claims by or against or against lum personally, unless the last executor administrator or mentioned claims are alleged to arise with

reference to the estate in respect of which the plaintiff (1 defendant sues or is sued as executor, administrator or heir or are such as he was entitled to, or liable for jointly with the deceased person whom he represents

Origin of rules -These two rules represent with the amendments italicized sect 44 of the last Code which it was stated was not very lappily expressed (1) R 4 is taken from English O 18 r 2 the words or to obtain a declaration of title to triviocable property in the former section were

^(186) Hukm Chan 1 C. 1 C AL (I) Ganesh : Je ach 3I C. at 1 2 -(1903) Cl lan bara t Ramasan : J 161

added to meet the decision in Gledhill v Hunter, (1) but have been now omitted R 5 is taken from English O 18, r 5, the word "heir" having been added, as in this country it is not an executor or administrator alone who represents the estate of a deceased person (2) The words after "heir" have also heen added

Objections for misjoinder - Under sect 51 (d) of the last Code, the plaint might have been rejected in ease of failure to amend, on its being returned for the purpose under sect 53 of the same Code (3) If the Court, instead of rejecting the plaint or returning it for amendment, proceeded to trial, it should . not, it was held, subsequently dismiss the suit for misjoinder, but dispose of it on the merits (i) The objection being of a dilatory character, and beside the merits, must have been taken in the Court of first instance, if not, it was deemed waived (5) It was not allowed to be taken for the first time on appeal, and where it was raised for the first time on appeal, the High Court, on second appeal declined to entertain it (6) A successful objection for misjoinder is a cause for which time may be deducted under sect 14 of the Limitation Act (7) Sect 54 is now O VII r 11, hut clause (d) has not been re enacted See now O VI r 18

Leave -It will be observed that leave can only be applied for in the ease of 1 1 R 5 is absolute Application should be made before the plaint is filed, though possibly, on good reason shown, leave may be given afterwards (8) A plaintiff may, with the leave of the Court, join causes of action, but he is nowhere compelled to do so (9) And even in regard to the excepted causes of action which may be joined, the exception implies only a permission of joinder but does not render it obligators (10) Where leave is applied for, the question whether it will be granted must depend upon convenience and the eircumstances of the case Amongst these, the Court will consider the connection between the claims sought to he joined So leave has been given to join where it was sought to recover immoveable and moveable property comprised in the same instrument, and to join claims in respect of personal and real estate, where both estates rested on a common gift in the same will (11) No appeal lay from an order rejecting an application for leave, but where the effect of the order was to reject the plaint it was held that the order was a deerce, and, as such, appealable (12)

Jurisdiction -Where causes of action are united, jurisdiction depends on the value of the aggregate subject matters (13)

"Cause of action "-The rule presupposes a case where there Rule 4

^{(1) 14} Ch. D 192, in which it was held that an action to estal lish title to land and to recover rent, but not claiming possession. was n t an action for lan l

⁽²⁾ Ahmad ud din : Sikan lar, 18 1 at p 253 (1896)

⁽³⁾ Sanna t Ganapa, o Bom L R 185 (1903), in which case the Court refused to dismiss the suit in second appeal.

⁽¹⁾ Kishna t Rakmini, 9 1 221 (1887) () Dhondiba : Ramchandra, 5 B 554, "61 (1881) . Maula t Gulzar, 16 1 130 (1833)

⁽⁶⁾ Maula v Gulzur, sujra (7) Venketer Murugat ja 20 M (8(1836) I B

⁽⁸⁾ See Ann Pr., 1905, 225, O Kincaly

and to file separate suits Cf rules as to leave under O I r 8, ante

⁽⁹⁾ Sheo v Sheosahar, 6 A 358 (1884). ref , Becharji v Pujaji, 14 B at p 53

⁽¹⁹⁾ Lakssor v Janki, 19 C 615 (1891)

⁽¹¹⁾ See Ann Pr., 1905, pp. 225, 226

⁽¹²⁾ Bundhan v Solhu, 8 A 191 (1886)

⁽¹³⁾ See O II r 3, and as regards the

eld Irocedure, see Inchnice : Kallas 10, B I R (I B) 0.0

are two or more various causes of action, one of which is to recover immoveable property Several causes of action to recover immoveable property may be loined The rule does not probibit this, but a joinder with such causes of action of a different character, except as excepted in the rule (1) If, however, the Court considers it madvisable to try the several causes of netion in one suit, it can order separate trials (2) There is nothing, moreover, irregular in seeking to recover in one suit immoveable and moveable property if the cause of action is the same in respect of both (3) These decisions appear to be embedied in the new clause (c) And even a claim for possession of certain immoveable property, based on the first paragraph of sect 2 of the Specific Rehef Act, may it has been held, be joined without leave, with a clum for title to that property, and for damages for dispossession from it (1) Claims which do not amount to a new cause of action, but which are mere machinery, such as a prayer for an injunction or receiver, may be joined without leave (5) But it has been held that an injunction cannot be asked for where it was not merely ancillary to the claim for possession (6)

"Suit for the recovery of immoveable property"-The expression " sunt for the recovery of immoreoble property," which is that used in sect 16, is more limited than the expression " suit for immoreable property " or ' for land " within the meaning of the Charter A suit may be one "for land ' within the meaning of the latter, and not within this rule (7) So it has been held that a claim for specific performance of an agreement to soll a share in a house might be joined with a claim on a promissory note (8) So, again, a suit for recovery of a mortgage debt with an alternative prayer for sale, has been held not a suit for recovery of immoveable property (9) Wilson, J said (10) "It seems to me that a suit for 'the recovery of immoveable properly' is a suit founded upon an existing title in which the plaintiff seeks to get possession of the property itself The words 'to obtain a declaration' etc, seem to me to apply to a case where a title exists, and the plaintiff asks to have that fact declared, not to a case where he seeks to have something done, which, when done will give him a title" Immoveable property in this rule includes a right of way (11)

Rule 5 -As to the object of the corresponding English rule, see Padwick v Scott (12) There is a conflict as to the words, " or herr as such, between the Bombay and Allahabad High Courts Sir Charles Sargent in the former

⁽¹⁾ Chidambara t Ramasami, 5 M 161 (1882), Ambika v Ram Udit, 17 A 274, 277 (1895), Raghubar v Jwala, 25 1 229 (1993) As to court fee in case of exception (a), see Reference, 16 A. 401 (1894)

⁽²⁾ Raghubar v Jwala, supra

⁽³⁾ Ganesh v Jewach, 31 C 262, 272 (1903), a c, 8 C W N 150, 30 I A. 10, m which the P C approve Giyana v handa samı, 10 M. 375, 506 (1887), which was followed in Nistariney v Nunda Lall Bose, 3 C W N 670 (1899), s c, m appeal, 7 C W N 353, Mazhar v Sallad, 24 4 358 (1902)

⁽⁴⁾ Ram Harukh v Sheodihal, 15 A 384 (1893), not followed in Ramasanna Paraman,

²⁵ M 448 (1901)

⁽⁵⁾ Gledhill v Hunter, 14 Ch D 494

⁽⁶⁾ Hambling t Wallam, 1889, W (Eng) 133

⁽⁷⁾ Cutts v Brown, 6 C 328, at p 332

⁽¹⁸⁸⁰⁾ (8) lb (9) Govanda v Mana, 14 M. 284, 286

^{(1890),} and see Gorachand v Basanta, 15 C L J 258 (1911)

⁽¹⁰⁾ See Cutts : Brown, 6 C at p 332 $\{1880\}$

⁽¹¹⁾ Beloy Chandra t Banku, 13 C W N

^{451 (1909)} (12) 2 Ch D 736, 743 and see O Kinealy.

C. P C , Hukm Chand, C. P C. 565

Court, said "Now, when can it be said that a claim is made by "an heir as such '? Plainly, such a claim is made when the plaintiff rests his claim entirely on the allegation that he is the heir of another, and, as such, asserts a right against the defendant" So where a portion of a claim was founded upon the plaintiff s alleged right as heir of A, and another part of the claim had no reference to A's estate, it was held that there was a misjoinder, and that one of the claims must be struck out (1) The Allahabad High Court has, however, dissented from this decision, holding that the heir referred to in the rule is an heir suing or being sued in his representative capacity, who, like an executor or adminis trator, represents the estate of a deceased person, and that it is impossible to hold that the rule precludes a person from joining a claim for property acquired by himself, with a claim for property inherited by him from another, when he does not represent persons other than himself (2) And more recently Jenkins, CJ, explained the meaning of the rule to be as follows Those to whom it relates have the common characteristic that they owe their legal condition to the death of another But there are others of whom this can be predicated as for instance legatees or next of Lin who are not named in the rule Executors administrators, and heirs have this characteristic in common not shared by legatees and next of kin, namely, that not only do they acquire title from the deceased, but they may represent him (3) And in a recent case in the Bombay High Court it was held that a claim for maintenance by the widow of a Mitakshara coparcener was not against the estate of her deceased husband (since his interest was extinguished by his death), but was against the property of which he was a coparcener, and therefore there was no misjoinder when she sued the surviving copareeners for her stridhan property and also for maintenance out of the joint estate (4)

6. Where it appears to the Court that any causes of action

Power of Court to joined in one suit cannot be conveniently tried
order separate trials or disposed of together, the Court may order
separate trials or make such other order as may be expedient

Joinder of causes of action—This rule corresponds, subject to certain alterations with the second paragraph of sect 45 of the last Code and with O 18, 1 1 and position of O 16 1 1 of the English rules See note to O II 1 3 the first paragraph of which embodies the first paragraph of sect 45 of the Code of 1882 That rule relates only to the joinder of causes of action. It assumes that the action has been rightly constituted under O I 1 1, ante (5) Under the English rule it has been held that save in actions for the recovery of land and in actions by a trustee

⁽¹⁾ Ashaba't Haji Lyeb, 6 B 390 (1882) In Gokibat t Lakhmidas 14 B 490, 192 (1890), the Court gretered the Haintiff to cleck, directing that sky ample proces I with either claim subject to he, I paying any costs specially caused to the arkindant by the majorn ler, but this case has been dissented for im Jankilat t Shrimtas Canesh, 38 H. 40 (1913)

⁽²⁾ Ahmad ud din : Sikandar, 18 1 2'6

<sup>(18 16)
(3)</sup> Hafizaboo v Mahomed Cassum 31 B
105 (1900)

⁽⁴⁾ Jankibai i Shriniyas Ganesh, 38 B 120 (1913), dissenting from Gokilai i Lakhmilas, 14 B 490 (18 0)

⁽f) See 1er Bouen L. I., in Hannah t Smurthwaite, 2 Q B (25 (18)1)

in bankriptey, the plaintiff may without leave, but subject to juke 8, 9, join in one action, not several actions, but several "causes of action (1) which term has been held to comprise every fact which is material to be proved to enable the plaintiff to sneeced, (2) the entire set of facts which give rise to an enforceable claim, every fact which, if traversed, the plaintiff must prove in order to obtain judgment,(3) so connected that, is regards evidence, etc., they can conveniently be disposed of together (4) But this joinder is "always subject to the underlying principle that the burden lies on the plaintiff of proving his case, and that no extra burden should he imposed on the defeudant through the plaintiff needlessly enlarging the area of dispute "(5)

Order for separation -The Court might, under the terms of sect 45 of the last Code, order separate trials of any "such causes of action -that is causes of action which might have been joined in the same suit under the first p gragraph of that section The second paragraph, therefore, had no application in cases of missonder of causes of action forhidden by the first paragraph, is to which the only course open to the Court was that of returning the plaint for amendment, or rejecting it if not amended, or dismissing the sunt (ride aute) (6) Under seet 45 the Court could, suo motion or on the application of the party, order separate trials. This can be done now under this rule which consolidates the provisions of the second paragraph of sect 15. and of sects 16, 47 of the last Code The power given did not, it was held extend to an order for the dismissal of defendants, and that a fresh suit should be brought against them. Such an order would not be one for the "separate disposal" (or separate trial) of the several causes of action, it would be an order preventing the disposal of them in the suit before the Court If the Court found that the separate causes of action could not be conveniently tried together, it should, it was held, deal with them separately as suh suits under the title and number of the principal suit from which they spring (7) So m a suit on title in which the recovery of immoveable property and mesne profits are claimed, the Court may order separate trials in respect of the claim for the recovery of the immoveable property, and in respect of the el um for mesne profits (8)

A direction to file separate plaints did not, it was held come within the scope of the section which did not require the plaintiff to file separate plaints, but provided for the separate trial of the several causes of action contained in the one plaint, filed on the institution of a suit (9). As already stated, the

⁽¹⁾ Burstall t Beyfus, 6 Ch. D 30, C 1

⁽²⁾ Cooke t Gill, L. R & C P 1 116. Buckley t Hann 5 Ex. 43 As to meaning of term, see notes to s. 20, O I r 1, arte

⁽³⁾ Real t Brown, 22 Q B D 131

⁽i) Inn. Practice, notes to O 18, r 1

⁽⁵⁾ Per Collins, M.R., Saccharin Cerp. r

Wild (1903), 1 Ch. p. 422

⁽⁶⁾ bee Hukm Chand, C. P. C. 576, the statement in Janokinath r Ramrunjun, 4 C. at pp. 303, 951, that when distinct causes of action are impreperly joined the Court mate and

of diamassing the aut should try them separately was obtar and it is submitted, cronicous. The order for separation under the last Code applied only where there was no misjounder. Cf. Sarals. Sun lair. Dast v. Saroda Prosad but 2.6. L. J. 002 (1.04)

roda Prosad Sur 2 (L. J. 602 (1,01) (7) Ahadar r. Chotilulu S.B. 616 (1881)

⁽⁵⁾ katıma Bibi e Abdul Majid 14 L 531

⁽⁹⁾ Mussi Rulta r Domree Lal 2 A. H. C R. 153 (1570)

order which the Court might make was one for separation, and that only in the case where joinder was not forbidden. In the under-mentioned case,(1) however, the Court appeared to consider that even if two causes of action had been combined in the suit, it had power under sect 45 of the last Code and would be justified in allowing two causes of action to be united in the ease, masmuch as it was convenient that the matter should be disposed of in one suit rather than two The power, however, which was given by that section was to order saparation, and a definite provision of law cannot be evaded on the graund of convenience (2) In an earlier case in which the Judge stated that, evidence having been gone into, he preferred trying each cause of action against each defendant separately, instead of rejecting the plaint on the ground of musioinder, it was pointed out that he had misconceived the extent of his powers in the matter in considering the matter one simply of convenience, and that if he were dispased to try the causes of action against all the defendants in one suit, he was at liberty to do so (3) Nor again, of course, cauld the Caurt, where there had been a musianuder, even though no inconvenience might have resulted to the defendants, pass a separate decree ignust each of them (1) An Appellate Court had power, apparently, to arder separate trials (5) Except where the parties agreed, the order could only be made before the first hearing (6) There is no such express limitation now, but doubtless the same rule will be endinarily fellowed

Order confining suit .- Sects 46 and 47 of the last Cade dealt with a different order from that in the second paragraph of sect 45 Under the latter motion, the Court dealt with the causes of action separately as sub-The farmer, however, enribled a defendant, who was embarrassed by the form of the suit to get the trial confined to a reasonable aggregate of cannon of action and in such a case the other causes must needs be left ever for another and (7) This provision, as the other, assumed that the causes of action might be legally joined, though such joinder might be inconvenient, in which case a defoudant night apply or the Court night act. It did not apply whata there was unspounder. It applied where there were several causes of action against the same defendant, or the same defendant jaintly A case where reparate causes of action were alleged against two defendants did not come within the rule (4) In sect 16, as m sect 15 of the last Code, the world " before the first hearing" were held to be imperative (9) Order XVIII into 9 of the Judicature Acts (10) allows such amendment as may be

- (1) Scraful Hay v M bil R denorm, 20 C. 267, 269 (1902); the observation was, haveover, obiter, un the Cast fell there were only one cause of action, in ald he me this section had no applied in
 - (2) Ram Prently St hi Dood, & C. W. N
- 585 (1902) (3) Inti Prosumera Section . . I W. R JoJ (1875), m which it was about inted out that several distinct come as I not to must be tried to other against the same it felt int.
- but not as against several defeat inte (4) Baroo : Musing, J W R am (1874) (5) Sheroop : Motheor, I W It pay, 110

- (1705)
- (6) Sungar Madavi, 20 M 360, at 1 362 (15 M). Demoder : Gol al, 7 1 79, at p 100 (1881)
- (7) Khadar Selieb e Chotabiba, 8 B 619
- (1881) (5) 16 . Muthappa Chetti t
- Pilini, 27 31 80, 81 (1003)
- (9) Dimoter Die i Gelif Chinh, 7 A 715 at p. 100 (1551)
- (10) See Sie learna Cerp i Wild (1903) 1 th the C V, wh remain action for infringe ment of twenty three patents the Court lunte (the 1) dutil to these instances

necessitated by the procedure adopted (1) In the nucle mentioned case it was held that it was not necessary to dismiss a suit in which claims upon different causes of action and against different persons have been joined together, and this it ought to be tried, so far as relates to the joint claim, is unstall the defendants, the Court evoluting from its consideration any claim not common against all (2) But this could be done only by amendment by the plaintiff, as the second paragraph of sect 45 of the former Code was applicable only to the causes of action which might have been joined in the same suit (3)

The present rule does not expressly refer to orders confining sints but the present rule does not expressly refer to orders confining sints but the from the use of the word "deposed" and the authority given to the Court "to make such other order as may be expedient," which would include such an order confining the suit as was referred to in sects 45 and 47 of the last Code, which this rule is intended to replace

Consolidation of suits -The rule deals with the separate trial of causes of action united in one suit. Neither does it, nor does any other section of the Code, provide for the consolidation of several suits Com solidation in a ho ordered by consent of parties (4) And where the parties do not a ree, consolidation is sometimes ordered by the Court as a matter of expediency (5) on general principles of equity and justice. So where the parties to the suit sought to be consolidated were the same and the subject matter of the suits also was the same, the Court made an order for con schdation (b) Where, on the other hand the parties and the subject matter were different, cousohdation was refused (7) And three suits were held to have been improperly tried together, where, from the very nature of the case the evidence in each suit had to be given separately (8) In the Falls of Ettrick.(9) an application by the impugnant for the consolidation of three salvage actions was refused, as the promovent resisted it on the ground that the several claims were based upon different circumstances and were in themselves conflicting. Sale, J. observing that there being no general or special rules for the consolidation of actions, the only course left in the case was to follow the analogy of the practice of the Court of Admiralty in England The order for consolidation may be obtained either by a plaintiff (10) or

⁽¹⁾ See Damodar Das : Golal Chand, 7 \ nt :> 100 (1881)

⁽²⁾ Ram Coomar Myt(v) Koomar Naram

Dass, _0 W R 482 (1873)
(3) Hukm Chand, 579

⁽⁴⁾ The Falls of Litrick, 2 C at p 317 (1834), Biswanath : Collector of Mymen singh, 7 B L. R App. 42 (1871), and see Soorundro Pershad : Nuudun, 21 W R 136

⁽⁵⁾ Nehal Singh t Mai Mined, 15 W R 110 (1871)

⁽⁶⁾ Peacock t Byjnath, 10 C. 58 (1853). Kahcharan i Surja Kumar, 17 C W N 526 (1912)

⁽⁷⁾ Soorendro Pershad : \undum, 21 W R 196 (1874)

⁽⁸⁾ Juggut Chunder i Ear Nahomed 18 W R 217 (1874) The High Count however, held that the Subordmate Judge was win in diamissing the suit because the cour co taken though suggested by the I luntil was sanctioned by the Viun il It accord mitly maderal a runaud

^{(9) 22} C oll (1854) The claims were ordered to be heard successively subject to one set of costs being alloyed, if it were found that the application for consolidation had been wroughy resisted

⁽¹⁰⁾ Martin t Martin & ω (1837) 1 Q B 423, Peacock t Byjnath, 10 C ω8 (1883), Schal Sm_ok t Alai Mimed 15 W R 110 (1871)

order which the Court might make was one for separation, and that only in the case where joinder was not forbidden. In the under mentioned case,(1) however, the Court appeared to consider that even if two causes of action had been combined in the suit, it had power under sect 45 of the last Code and would be justified in allowing two causes of action to be united in the case, masmuch as it was convenient that the matter should be disposed of in one suit rather than two The power, however, which was given by that section was to order separation, and a definite provision of law cannot be evaded on the ground of convenience (2) In an earlier case in which the Judge stated that, evidence having been gone into, he preferred trying each cause of action against each defendant separately, instead of rejecting the plaint on the ground of musjoinder, it was pointed out that he had imsconceived the extent of his powers in the matter in considering the matter one simply of convenience, and that if he were disposed to try the causes of action against all the defendants in one suit, he was it liberty to do so (3) Nor again, of course, could the Court, where there had been a misjoinder, even though no luconveuienco might have resulted to the defendants, pass a separate decree against each of them (1) An Appellate Court had power, apparently, to order separate trials (5) Except where the parties agreed the order could only be made before the first bearing (6) There is no such express hinitation now, but doubtless the same rule will be ordinarily followed

Order confining suit -Sects 46 and 47 of the last Code dealt with a different order from that in the second paragraph of sect 45 Under the latter section, the Court dealt with the eausos of action separately as sub suits The former, however, enabled a defendant, who was embarrassed by the form of the sut, to get the trial confined to a reasonable aggregate of eauses of action, and in such a case the other causes must needs be left over for another sut (7) This provision as the other, assumed that the causes of action might be legally joined, though such joinder might be inconvenient, in which case a defendant might apply or the Court might act. It did not apply where there was misjoinder It applied where there were several causes of action against the sams defendant or the same defendant jointly A case where separate causes of action were alleged against two defendants did not come within the rule (8) In sect 46, as in sect 45 of the last Code, the words "before the first hearing" were held to be imperative (9) Order XVIII rule 9 of the Judicature Acts (10) allows such amendment as may be

⁽¹⁾ Scrajul Huq v Abdul Rahaman, 29 C 257, 259 (1902), the observation was, how over, obiter, as the Court held there was only one cause of action, in which case this

section had no application

⁽²⁾ Ram Prosad : Sachi Dassi, 6 C W N 585 (1902)

⁽J) Iara Prosunno : Koomarce, 23 W R JaJ (1875), in which it was also pointed out that several distinct causes of action may be traci to ethe a ainst the same defendant, but not is a annot several defendants

⁽¹⁾ Baroo t Massim, 21 W R 206 (1874) (5) Shoroop : Mothour, 4 W R 193, 110

⁽¹⁸⁶⁵⁾

⁽⁶⁾ Singa v Madava, 20 M 360, at p 352 (1896), Damodar t Gol al, 7 A 79, at 1 100

⁽¹⁸⁸¹⁾ (7) Khadar Saheb : Chotibibi, 8 B 61J (1884)

Muthappa Chetti t Muthu (8) Ib .

Palani, 27 M 80, 84 (190J) (9) Damodar Das t Gol il Chind, 7 1

^{73.} at p 100 (1881)

⁽¹⁰⁾ See Saccharm Corp 1 Wild (1903), 1 Ch 110, " 1, where in an action for infinite ment of twenty three latents the Court limited the | Limited to three instances

necessitated by the procedure adopted (1). In the under mentioned case it was held that it was not necessary to dismiss a suit in which claims upon different causes of action and against different persons have been joined to ether, and that it ought to he tried, so far as relates to the joint claim. i, unst all the defendants, the Court excluding from its consideration any claim not common against all (2) But this could be done only by amendment by the plaintiff, as the second paragraph of sect 15 of the former Code was applicable only to the causes of action which might have been joined in the same suit (3)

The present rule does not expressly refer to orders confining suits but the provision in this respect which fermerly existed still seems to remain as appears from the use of the word "disposed" and the authority given to the Court "to make such other order as may be expedient," which would include such an order confining the suit as was referred to in sects 16 and 17 of the list Cede which this rule is intended to replace

Consolidation of sults -The rule deals with the separate trial of causes of action united in one suit. Neither does it, nor does any other section of the Code, provide for the consolidation of several suits. Con solidation may be ordered by consent of parties (4) And where the parties do not o rece, consolidation is sometimes ordered by the Court os o matter of expediency (5) on general principles of equity and justice. So where the parties to the suit sought to he consolidated were the same, and the subject matter of the suits olse was the same the Court made an order for con solidation (b) Where, on the other hand, the parties and the subject matter were different, consolidation was refused (7) And three suits were held to have been improperly tried together where, from the very nature of the cose the evidence in each suit had to be given separotely (8) In the Falls of Lttrick.(9) ou application by the impugnant for the consolidation of three salvage actions was refused, as the promovent resisted it on the ground that the several claims were hased upon different circumstances and were in themselves conflicting, Sale, J, observing that there heng no general or succial rules for the consolidation of actions, the only course left in the cose was to follow the analogy of the practice of the Court of Admiralty in England the order for consolidation may be obtained either by a plaintiff (10) or

Dass, 20 W R 482 (1873)

- (3) Hukm Chand, 579
- (4) The Falls of Ettrick, -2 6 at p 517 (18J4). Biswanath t Collector of Myman smah, 7 B L R App. 42 (1871), and sce Soorendro Pershad : Nundun, 21 W R 196
- (5) Achal Singh v Mss Mmed, 15 W R 110 (1871)
- (6) Peacock : Byjnath, IO C 58 (1883) . Kalicharan t Surja Kumar, 17 C W N 526
- (7) Soorendro Pershad e Nundun, 21 W R 196 (1874)

(8) Juggut Chunder (Lar Mahomed, . 1 W R 217(1874) The High Court however, held that the Subordinate Judge was wr mg in dismissing the suit becarse the court so taken though suggested by the pluntiff was sanctioned by the Mun if It accord

(9) ... C 511 (1834) He claims were ordered to be heard successively subject to one set of costs benn allowed, if it were found that the application for consolidation had been wrongly resisted

ingly ordered a remand

(10) Wartin : Martin & Co (18J7) 1 Q B 429, Peacock t Byjnath, 10 C 58 (1883), Nehal Singh v Alas Ahmed 15 W R 110 (1571)

⁽¹⁾ See Damodar Das : Golai Chand, 7 1 at 1 100 (1881) (2) Rain Coomar Myteo : Koomar Narain

ORDER III.

Recognized Agents and Pleaders.

1. Any appearance, application or act in oi to any Court, is a Appearances, etc., may required or authorized by law to be made oi be in person, by recognized agent or by pleader. where otherwise expressly provided by any law for the time being in force, be made oi done by the part, in person, or by his recognized agent, or by a pleader duly appointed to act on his behalf.

Provided that any such appearance shall, if the Court so

directs, be made by the party in person

"Appearance"-These words ("appear" and "act") have a well defined and well known meaning To appear for a chent in Court is to be present and to represent him in the various stages of the litigation at which it is necessary that the chent should be present in Court himself, or by some representative (1) There may be appearance if the pleader, though instructed, is not prepared to proceed with the case (2) Under the last Code it was held that where, on the day fixed for hearing, a party was present in person merely for the purpose of applying for an adjournment, which was refused be must be taken to have "appeared 'within the meaning of Chapter \ II of that Code, the provisions of which are replaced by this and following rules party has appeared in person. The purpose for which he appeared or the action which he took on appearance, are immaterial. But where the party is absent and an application for adjournment is made on his behalf by a pleader who has no other instructions, and whose functions are at an end when the adjournment is refused, in that ease the party had not appeared within the meaning of the Chapter (2) Where the pleader who apphes for an adjournment is accompanied hy a recognized agent of the party, but the latter neither makes any application, nor does any act, the question is whether he intends to appear and in fact, does appear for the party in the exercise of his powers under this rule

⁽I) hali Kumar r. Nobin Chunler, o. C. Sangh, 35 C. 1023 (1308) (Woodn ffe, J.), 55 (1803), per White, J. Satah Chandra Malerjee r. thara Provid., (2) Rain Chandra: Maithay, 16 B. 23. 34 C. 403 (1907), and post, notes to O. 9, (1801).

⁽³⁾ See had r hhan v Juggeswar Prasad

This rule is merely permissive and enabling. If the recognized agent although able to do so, does not think proper to conduct the case on behalf of his principal, his mere presence in Court is not an "appearance" in the suit. An appearance may be made by a pleader or a recognized agent, but the concurrence of the pleader or ngent is essential. As soon as he ceases to intend to represent the principal, the latter is unrepresented (1) The words in the last Code after "party" were "to a suit or appeal." These words are now omitted. The section will still apply to appeals as proceedings in suits.

"Act"—"To act for a client in Court is to take on his behalf in the Court, or in the offices of the Court, the necessary steps that must be taken in the course of the hitigation in order that his case may be properly laid before the Court '(2) The word "ext" is, however, taken to refer only to ordinary acts, and thus not to include the instituting or defending of a suit, which a recognized agent cannot do in his own name (3) Nor does a mere power to sue authorize an agent to onter into an agreement with a pleader to pay him more than a reasonable remuneration (4)

"Except where otherwise expressly provided"—This may be either by the Code itself or by any other law for the time being in force. Thus, this rule is expressly made subject to O XXXIII r 3 in respect of appheations to eue in forma pauperis (5). Again, clause 10 of the Charter provides that no persons but advocates, vakils, or attorneys of the High Court shall be allowed to plead or act (6) for any suitor in the High Court. So it has been held that the former section did not authorize a recognized agent to address a High Court as the suitor lunself may do, because that clause forbids that for overy person whatever except advocates and vakils (7) and that an authorized agent could not file a pertition of appeal on the appellate side of the High Court (8). Under the Rules of the High Court an advocato may appear and plead only. He cannot therefore file an appeal in the registrar's office (9)

"Party in person"—Where a barrister or pleader appears before the Court as a hitigant in person, he must not address the Court from the advocate's table or in robes, but from the same place and in the same way as any ordinary member of the public (10)

"By a pleader"—As to the meaning of this term, which includes advocates takils and attorneys see sect 2, ante II a party has more

(2) Kalı Kumar v Nobin Chunder, 6 C 585 (1880), per White, J

(6) See Moran : Down Ali Serang 8

B L R 416 420 (1872)

(7) Pranath Chowithry v Ganendra Mohm Jagore 3 W R 108 (1855) As to the Allahabad High Court, see s. 9, Letters Patent

(8) Burl ul Kareem + Ramgopal Manna, 8

50. 211 (9) Ram laruel Burck : Sulles mee, 13

N R 60 (1870) (10) West Hop town Ita Ce, 9 1 180

(1850)

Soonderlal v Goorprasad, 23 B 414
 (1898)

⁽³⁾ Choonee v Hur Prasad, I N W P H
C R, 277 (1899) Curter v Misreo Laj. 2 N
W P H C R 174 (1870), Jadko Prashal
i (mr. 2 Prashul, 4 N W P H C R 59
(1972), Mokha Harakraj v Bisewar Boss, 5

B I R Apt 11 (1970), s. c., 11 W R 341 (4) Keshay Bajupt t \arayan, 10 B 18

⁽¹⁸⁸a) () See I & parte_Desgrig un, 1 B H C R.

¹ G J 91 (1867)

t and nife. It, the sea in has the carrie control of the case, and it is not open to to full a find to take now great I of appeal which the con or has not "I would be to which except when the senior has obtained the permission of the Court to the taking of that course (1) A pleader represents both councel at last very in that he can beth plead and act, whereas the former pleads and the latter acts. As to the respective powers of these various classes of ireal practice range a subject witch is beyond the wope of the work, see the refree re gien b 'ix (2) The Calcutta High Court holds (3) that administraine .. 's required to be discentive of ces of the Courts may be done on a trader's respect to by his bere pile clerks, and a District Judge has no and ritr to it not eme's a neb may be so done by the pleader himself and ly his clocks to , chiefy, as High Courts afore possess such authority. The Purple Corf Court however, has discoved from this decision, maximuch as the Cale das a tiplocale fire edelegation by a pleader of any portion of I admies the feet at lend'e ground that if a pleader is allowed to perform so we of them by de, why there is no reason why he should not be allowed to do in as regar let' e wlo'e (1)

"Duly appointed."—The Court may inquire as to the agent's authority, and if under r I it sales' takes the name of the principal, it does not deed that the arent had an hourit (3). The words "duly appointed" do not simply mean a person duly appointed by the party in the suit, but a pleader duly appointed according to t'e has regarding pleaders in force in the particular appointed according to the appointment must be considered with reference to the general law relating to the employment of legal practitioners. Thus a so into or aftorney, having discharged his client, cannot change sides and act f it to epiposite party (1). As to persons authorized to act for Government or appointed to prosecute or defend Princes and Chiefs, see O XXVII or 2, i and seet 55. Valadamamahs, whether executed by principals or their attempts or agents, and modelitarisms, under the authority of which valadatnamahs rus have been executed, do not require to be verified on oath, the responsibility in regard to their being properly and correctly executed resting entirely with the pleaders (8).

2. The recognized agents of parties by whom such as specifical agents, applications and acts may be made or done are—

(3) In re Khoda Bux Khan, L. C (38

⁽I) Spenceba h Roy r Lunbila Chiera, 12 II R, 375 (1865).

⁽²⁾ Hukm Chand, C. P. C. pp. 471-450, in which the following matters are treated—pp. 471-473. General occi derations, pp. 473-475. Pleaders antibenty, how far rachiasve of his chem, pp. 475, 440. Admissions by pleader hading on his client, pp. 477-450. Stipulations and compromises by pleaders and counsel. See also the at pp. 9, 10, 0 hincally a Cir. Pr. Code, Commentary to s. 2 and 375.

^{(1999),} and see R. r. Karuppa Udavan, 20 M. 57 (1999), which, however was a criminal asse.

⁽⁴⁾ Vada Mal r Atma Ram 15 * P R. No. 39, cited in Hukm Chand C P C 4 vo. (a) Nam Narasa von h r Raghn Nath 10

C. 673 (15%)
(6) In re Pleaders of Hi in Court is B. 106
132 (1553).

⁽⁷⁾ Ram Lall r Moona Liber, 6 C 79 (1889). See also Anonymous cas reported in 4 M. H. C. R. App. ilin.

⁽a) Maharajah of Burdwan, 7 W R, 475 (1807).

(a) persons holding powers-of-attorney, authorizing them to make and do such appearances, applications and acts on behalf of such parties,

(b) persons carrying on trade or business for and in the names of parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, application or act is made or done, in matters connected with such trade or business only, where no other agent is expressly authorized to make and do such appearances, applications and acts

Power of attorney -As to stamp, see Act I of 1879, clause 50, and vakalatnamahs notes to last rule A person bolding a power may refuse to act on it (1) A warrant of attorney to an attorney of a defendant to receive a plaint confess action, suffer or consent to a judgment or decree, empowers the attorney to accept service and appear for the defendant (2) The pewer must authorize the person "to make and do such appearances," etc. A mere authority to look after a case does not make the donee of the power a receg nized agent eo as to be able to apply to refer a case te arbitration (3) The authority given must be construed with reference to the special purpose for which the power was granted the principal himself could do They mean that the agent can do all that ie necessary for the presecution of the emt in the ordinary way. He cannot, for instance, enter into an agreement with a pleader to pay him more than a reasonable remuneration, ner could be bring the case to a close in a special manner by joining in a reference to arbitration or by offering to bo bound by the oath of the opposite party given in a particular form (4) The question of special and general power has become immaterial under this rule (5)

"Persons holding powers of attorney "-The terms of this clause in the former Code were different It was himited to persons holding general powers of attorney within certain local limits that is, from parties not resident within the local limit f the jurisdiction The meaning to be attached to the word "reside" has been dealt with in the comments on sect 20 appears to have been introduced into the expression "not resident former section in the Code of 1877, to avoid an agent acting as a recog nized agent during a casual temporary absence of the principal, as he was held to he able to do under the Code of 1859 (6) The section, however, it was held, was to be construed broadly so as not to prevent a creditor from enforcing his claims against his debtors, and serson who went for a few months from his usual place of residence to his native province to get his

⁽¹⁾ See notes to next rule

Saroda (2) Khelut Chandra Ghose t

Soon lery Dasi, Bourke, 214 (1865) (3) Bhugwan Dasa: Vun I Lall, 12 C 1-3,

^{177 (1885)} (I) Salashiv r Maruti 14 B 455 (1890).

citing Keshay Bayuji i Narayan 10 B 18

^{(1836),} Thakur Pershad : Kalka Pershal C N W P Rep 210 (1871)

⁽⁵⁾ Venkatarama t Narasinga Rao 24 M L J 180 (1913)

⁽⁶⁾ Brandas t Lakhmelanl 6 B H

C R 1 C 159 (1509)

sister married was held during his absence to be "not resident" at that place (i) In the case cited, Melville, J., in delivering the judgment of the Court, observed that "it may be supposed that the Legislature intended to give the henefit of this provision to all persons, and especially to traders, whose interests might be seriously compromised, if, during their absence frem home and their place of business, they could leave no one behind who could represent them in Court, as well as conduct their husiness." If the principal was resident within the jurisdiction, then the agent was not a recognized agent within the meaning of clause (a) of the former section. An application for execution was not made "in accordance with law" (2) when made by a general attorney of the decree-holder at a time when the latter himself was resident within the local limits of the jurisdiction of the Court executing the decree (3). The Legislature has considered it unnecessary to preserve the limitations above noted, and has made the sub clause general

Certificated mukhtars —A mukhtar was at one time not considered a recognized agent (4) Clause (b) of the former section expressly recognized mukhtars. This clause has been now omitted as innecessary. It is included in sub clause (a), which is general in its terms.

Clause (b) "Persons carrying on trade"—As to "carrying on husiness," see notes to sect 20, ante Tho words "where no other agent is expressly autherized" were, under the Code of 1859, held to imply that the persons so carrying on husiness for or in the names of the parties were purely gomastalis or agents, and not partners (5) This decision, hewever, was subsequently dissented from (6) These latter cases dealt with the point whether service on one partner for his co partner was a good service, which was the case under the provisions of sect 71 of the Code of 1862, and is so under O XXX r 3 (6) of the present Code, but the question is still open as regards other acts, appearances and applications. This section and O V r 13 are to be construed together, being intended to carry out the same scheme of reclet [7]. It would seem that in order to constitute a recognized agent, the husiness carried on by bim should be continuous, and not occasional or desiltory. So a Bombry

⁽¹⁾ Ram Chandra v Keshav, 6 B 100 (1881), and see Damodar Das t Insyst Husam, 28 \, 135 (1905)

⁽²⁾ Within the meaning of art 179 of the I imitation Act

⁽³⁾ Murari Lal t Umrao Singh, 23 1, 499 (1901), and it has been so held with reference to an application under s. 258 of the last Code hasumri t Bem Prasad, 26 1, 19

⁽⁴⁾ Kristo Chunder Gooj to r Fuzal III, 17 W. R. 359 [1872] As to the history of mulhitars, see In re Khoda Bux Khan, 15 C. 633, 646 (1888), and see s. 11, vet XX. of 1865, as to certificate, Re Muddum Mohun Biswas, 6 W. R. Ref. 29 (1866), Re Gojras ragh, 10 W. R. 37 (1874), Kali Kumar

Roy: Nobin Chunder Chuckerbutty, 5 C.L.R. 662 (1881), 6 C 585 Now see Act. AVIII. of 1879 as amended by Vets IV. of 1884 and XI of 1896. As to the High Courts power to prescribe rules for mukhtars, see Tassaduq Hossan: Girhar Varam 14 C

 <sup>5.6 (1897)
 (5)</sup> Luchmeput Dogarov Sibnarain Mundle,
 1 Hyde, 97 (1862-3)

⁽⁶⁾ Ram Chandra Bower Snead, 7 B. L. R. App. 53 (1871), Austron Yulli 1 Sookeeram, 11 B. L. R. App. 20 (1873), which appears to approve of the former case, but in which it was held that the service should be made at the blace of business.

⁽⁷⁾ Goculdas r Gancshial, 4 fl 416 (1850), sec O \ r 17, no.1

firm simply employed by the owners of a ship visiting Bombay to procure freight for her for a particular voyage, could not, it was held, be regarded under ordinary circumstances as carrying on business in the name of the owners of such ship (1) A gomastah of a firm ceases to be a recognized agent as soon as the firm ceases to exist (2) But it is different where a firm does exist, though not actually carrying on business. The survivor of a firm which has ceased to carry on business, who is engaged in collecting the assets of such firm and otherwise winding up its affairs, is a recognized agent of the owner of such firm (3) A political agent is not, as such, a recognized agent (4)

Objection to agent acting -An agent cannot act under this rule so long as his principal is within the jurisdiction, but if he does, and there has thus been an irregularity, the Appellate Court ought not, on that account, to dismiss the suit, unless the irregularity has affected the merits of the case (5) Similarly, where a recognized agent obtained a decree in appeal without objection, it was held the debtor could not, in execution of it, object to the agent (6)

Punjab, Oudh, Central Provinces -The last clause of sect 37 of the former Code created an exception in the case of these Provinces This has now been omitted as no longer necessary. The former Chief Commissionership of Oudh has been included in the Lieutenant Governorship of the United Provinces See as to former section Notification (7) (Punjab), October 3, 1877, No 3857 Punjab Garctle October 4 1877, Part I p 391, Notification (Oudh) July 18, 1878, No 522A N W P and Oudh Gazette, July 27, 1878 p 1058 In some of the Scheduled Districts there are special statutory provisions as to recognized agents as in Ajmere (see Ajmere Regulation I of 1877 sect 28)

(1) Processes served on the recognized agent of a party shall be as effectual as if the same had Service of process on been served on the party in person, unless the recognized agent Court otherwise directs

(2) The provisions for the service of process on a party to a suit shall apply to the service of process on his recognized agent

Service on agent -The rule is of an enabling character, and does not, of course, bar service of notice on the parties themselves (8) Further, a person to whom a power of attorney has been given may refuse to act upon

⁽¹⁾ Ratansı ı Saunders, S B H C R 1 .3 (1871), see note, 7 B H C R III

⁽²⁾ Mokha Harakraj : Beeswar, 13

W R 311 (1870) (3) Holkar : Pitambardas, 9 B H C R

^{4-7 (1872)} (1) Venkatrav i Madhavrav, II B 53

⁽¹⁵⁵⁶⁾ (*) S 99, ante Bisan las i Laklimichand,

⁶ B H C R 159 (1869) This rule apiles to the whole section Munoo Dessce : Islan

Chunder, 15 W R 245 (1871) (6) Parvatibus Vinajek, 12 B 68 (1587)

⁽⁷⁾ The special authority need not be in writing Mula Mali 1tma Ram, ISB P R

⁽⁸⁾ Ram Lall Choudhry & Surdaree Jah,

^{1864,} W R Mac 21

the power, and may thus refuse to accept service of summons (1) Service upon an attorney's clerk of an order directed to be served on the attorney has been held to be not good (2)

4 (1) The appointment of a pleader to make or do any is application or act for any person shall be in writing, and shall be signed by such person or by his recognized agent or by some other person duly

authorized by power of attorney to act in this behalf

(2) Every such appointment, when accepted by a pleader, shall be filed in Court, and shall be considered to be in force until determined with the leave of the Court, by a writing signed by the elient or the pleader, as the case may be, and filed in Court, or until the client or the pleader dies or until all proceedings in the suit are ended so far as regards the client

(3) No advocate of any High Court established under the Indian High Courts Act, 1561, or of any Chief Court, and no advocate of any other High Court who is a barrister shall be

required to present any document empowering him to act

5. Any process served on the pleader of any party or left is Service of process on at the office or ordinary residence of such pleader, and whether the same is for the personal appearance of the party or not, shall be presumed to be duly communicated and made known to the party whom the pleader represents, and, unless the Court otherwise directs, shall be as effectual for all purposes as if the same had been given to or served on the party in person

Service of process on pleader—Act VIII of 1859, sect 18 A service on the petitioner's attorney on the record is good even when decree his has been obtained in her favour in a divorce suit, and the petitioner has left India for England (3) Service of notice of appeal upon respondents pleader is good service on him (4) So also is service of summons calling on a party to appear and give evidence (5) Personal appearance to give evidence is within the meaning of the words "presonal appearance of the party '(6)

"Left at the office "—These words, it has been held in England, do not mean that a process will be considered served on a pleader, simply if it is pushed under the door of the office or dealt with in some other similar manner,

(3) King e King 6 B 416 (1582)

⁽¹⁾ I uchmee Chund : Bengal Coal Co., S (4) Islur Dutt r Shib Pershad, 15 W B (317, 3.6 (1882) - 0 (1871).

⁽²⁾ Finnilall Salgram c Kidd, 2 Hyle, (a) Shivrudrappa c Kathinath Vishnu, 6 116 (1864) B H C Ren. A. C 141 (186)

⁽⁶⁾ Ih

or even if it is left at the office without being handed to any one, and the provision virtually means that the process must have been left with an adult person at the office (1)

- 6. (1) Besides the recognized agents described in rule?

 Agent to accept serany person residing within the jurisdiction of the Court may be appointed an agent to accept service of process.
 - (2) Such appointment may be special or general and shall Appointment to be inded by an instrument in writing signed by the principal, and such instrument or, if the appointment is general, a certified copy thereof shall be filed in Court.

Agent to receive process.—Service on such agent will be sufficient in any case, as provided for in O V r 12 of the Code (2) This rule corresponds with sects, 50, 51, Act VIII of 1859, and sect 41 of the last Code

ORDER IV.

Institution of Suits.

- 1. (1) Every suit shall be instituted by presenting a plaint suit to be commenced by plaint. to the Court or such officer as it appoints in this behalf.
- (2) Every plaint shall comply with the rules contained in Orders VI and VII, so far as they are applicable.
- 2. The Court shall cause the particulars of every suit to be and earliered in a book to be kept for the purpose and earlied the register of civil suits. Such entries shall be numbered in every year according to the order in which the plaints are admitted.

Plaints.-See sect 26, ante

⁽I) Montgomery r Lacis athai, 1 Q B notes to 0 9, r 4 Hukin Chand, C. P. C 187 (1898)

⁽²⁾ See as to the Pughsh rule, Ann Pr.

ORDER V.

I suc and Service of Summons.

Issue of Summons

I. (1) When a suit has been duly instituted a summons is may be issued to the defendant to appear Summons. and answer the clann on a day to be therein specified.

Provided that no such summons shall be issued when the defendant has appeared at the presentation of the plaint and admitted the plantiff's claim

(2) A defendant to whom a summons has been assued under

sub rule (1) may appear-(a) in person, or

(b) by a pleader duly instructed and able to answer all material questions relating to the suit, or

(c) by a pleader accompanied by some person able to

answer all such questions

(3) Every such summons shall be signed by the Judge or such officer as he appoints, and shall be sealed with the seal of the Court.

Summons -Instead of the words in the former section (sect 64), " When the plaint has been registered and the copies or concise statements required by sect , S have been filed, ' the present section runs " when a suit has been duly instituted ' The first duty of the Court after the filing of the plaint is [provided that the defendant was abve at that date, for if not, the suit cannot proceed (1)] to summon the defendant, whether he be an adult or not (2) Natural justice requires that before an order is passed against a man he should be heard and a decree against one who has never been summoned is not binding upon him (3) A summons, therefore, is the first of the several writs which are incidental to the proceedings in a suit, as being the official notification to a defendant that he has been sued and should appear in Court and answer the claim (4) Generally, and in the absence of any special rule,

⁽¹⁾ Mohun Chunder : Azeem Gazee, 12 W R 45 (1869)

⁽²⁾ Suresh Chunder : Juggat Chunder, 14 C. 204 (1886).

⁽³⁾ Ib, at p 218

⁽⁴⁾ See Hukm Chands (P C, notes to this section, where the subject is minutely discussed

the summons should be in the language of the Court, and addressed to the defendant himself and not to his agent. In the first place, the form of the summons should be such as that it can be served, then it should contain such full particulars of the description of the person summoned as will render it unlikely that the person served should mustake his identity. Secondly, the contexts should be such as to acquaint the defendant as to the nature of the clum made against him The title of the suit and the plaintiff's name should be stated, as also the amount and nature of the claim. The Form requires also s statement of the particulars of the claim. What these particulars are has not been judicially determined, but the question is not of much practical importance, as the summons is in every case to he accompanied by a copy of the plaint or of a concise statement of it Forms of summons are given which are to be used with such variation as the circumstances of each case may require, and are a guide as to what a summions should contain. Thirdly, the day of appearance is to be specified in the summons and, according to Form 180 of the Code of 1881, it should have at its foot a memorandum stating hours of attendance at the other Even where there is no express rule to that effect, the hour fixed for appearance or attendance should also be stated, though, considering the language of sect 96 of the last Code, in which the attendance was required on the day fixed in the summons the mention of the exact hour did not appear to he material (1) The words 'to appear refer to appearance under O IX r b, post (2) It is desirable that a summons should contun all that is required, at the same time, formalism is not favoured at present, and it will be sufficient if the summons substantially fulfils its purpose of giving the defendant notice (3) and a purson by appearing and defending may waire all objections arising from want of service or defect in the service of summons (4) I fresh summons is sometimes required. There are no provisions as to the issue of successive summons though the practice as to their issue is recognized in O 1X r 5, par in application for fresh summons to appear should not, however he made until the first has been returned into Court (5) and should generally he supported by grounds showing that it was not by any default of the applicant that the summons was not served (o)

"Signed" and 'sealed"—As to the meaning of the word "signed," see sect 2, ante (7) The Letters Patent for the High Courts and the Acts (8) for laming to the other Civil Courts provide for the use of seals. The seal is but on element of the proof of authenticity and the better view is that its omision as a matter of form rather than of sub fauce as its omission does not prevent

⁽¹⁾ Hukm Chand, loc cit

⁽²⁾ Hira Dai t Hira Lal, 7 A. 535 (1980)

⁽²⁾ Hira Dai i Hira Lai, 1 A. 558 (1 4

⁽⁴⁾ Suresh Chunder r Jugat Chunder, 14

C. at p. 215 (1856)

⁽a) Laur Chunder v Anshootosh Chatterjee,

¹ Ind Jur. N S 253 (1802)

⁽b) Urquhart r Gilbert, I Ind. Jur. N 224, though in Handon e East India Rail way, I Hyde 137 (1502-63), a new aummons was granted on an objection raised to the

suffi un 3 of service without any petiti 1

⁽⁷⁾ And as to initials R i Janki Prasa? 5 L -93 (1850) Kubra Bibee i Wajid Khan

^{1. -93 (1850)} Kubra Bibee : Wajid Khin 16 L 59 (1894) , Hukm Chand, C P C 000, 607

⁽⁵⁾ Sees. 16 Art MII of 1857 (Bergal), 8.
11, Art ANT of 1869 (Londay), 8.9, Art III.
of 1873 (Madras), 8.13 Art AIII of 1873 (Oudh), 8.8 Art AII of 1873 (Oudh), 8.8 Art AII of 1881 (Punjah), 8.1
11 (d) Art NIII of 1881 (Punjah), 8.19
(1), Art MI of 1880 (Cantral Province).

the writ imparting to the parties, against whom it is issued, information that an action is instituted against them. In the same way, the signature is the official authentication of the seal of which the person signing is the keeper, and the hetter opinion is that an unsigned writ is not void (1) The summons is to be signed either by the Judge or such officer as he appoints, such as the Clerk of the Court or Registrar, where there is one

Proviso -If the defendant voluntarily appears, an appearance which is usually designated gratis, there is no necessity to issue a summons. In case of such appearance, when the defendant admits the claim the Judge, il satisfied of the defendant's identity, is bound to pass a judgment in favour of the plaintiff, and no question of fraudulent appearance can he gone into at the time, but if by the practice of the Court there are specific rules as to the order in which cases are to he called on, it does not appear that a Judge is bound to dispose of a case either when the plaint is filed or at any subsequent time before it is called on in regular course, and the voluntary appearance of the defendant and his willingness to admit the deht do not make any difference in this respect (2)

2. Every summons shall be accompanied by a copy of t the plaint or, if so permitted, by a concise Copy or statement annexed to summons. statement

Concise statement - this should be of the nature of the claim in ide and of the rehef or remedy sought in the suit

- 3 (1) Where the Court sees reason to require the personal (appearance of the defendant, the summons Court may order de-fendant or plaintiff to shall order him to appear in person in Court appear in person on the day therein specified
- (2) Where the Court sees reason to require the personal appearance of the plaintiff on the same day, it shall make an order for such appearance

Personal attendance -Act VIII of 1809, sects 12 and 66 of last Code An order passed for the personal attendance of the plaintiff after his appear ance by a pleader on the day fixed for the settlement of issues and after their settlement, was held not to be an order passed under sect 12 \ t \ III of 1859 or one to which the provisions of seet 117, Act VIII were at pheable although at might have been passed under sects 127 or 166 of that Let I urther looking at the severe penalties attached by the law to the non attendance of parties ordered to attend, great caution and discretion should be used in ordering their personal attendance (3) As to the result of non appearance see O IX r 12, post

⁽¹⁾ Hukm Chand C P € 604-60% (3) Jun riath I rehad c

Buthh S. D. \ W 180, p. 371 (a) Bank of Bergal v Curra 3 B L R 336 403 (1561).

- 4. No party shall be ordered to appear in person unless

 No party to be ordered he resides—
 to appear in person un
 - to appear in person unless resident within cer
 tain limits
 (a) within the local limits of the Court's
 ordinary original jurisdiction, or
 - (b) without such limits but at a place less than fifty or (where there is ialway or steamer communication or other established public conseyance for five-sixths of the distance between the place where he resides and the place where the Court is situate), less than two hundred miles distance from the court-house.

Appearance in person—This is sect 12 of the Code of 18.9 and 67 of last Code with modifications italierzed. In a rent suit to which the provisions of this section were applicable, and in which the plaintiff improperly summoned failed to attend and his suit was struck off, it was held he should apply for revival (1).

5. The Court shall determine, at the time of issuing the summons to be either to settle issues or for ment of issues only, or for the final disposal of the sut; and the summons shall contain a

direction accordingly
Provided that, in every suit heard by a Court of Small
Causes, the summons shall be for the final disposal of the suit

Summons—This is sect 68 of the last Code unaltered. As to this section,(2) see below

6. The day for the appearance of the defendant shall be Fixing day for appearance of defendant.

ness of the Court, the place of residence of the current business of the time necessary for the service of the summons; and the day shall be so fixed as to allow the defendant sufficient time to enable bim to appear and answer on such day.

Sufficient time must be allowed—See sect 15 of Code of 1859 What may be sufficient time in a particular case can only be determined by considering the peculiar erroumstances of the case, and this was so stated in the second clause of the former section, now omitted. The time must be sufficient not only to enable a party to appear, but to answer. The nature of the nghts

⁽¹⁾ Sheikh Golani t Pulton Singh, 3 W R , Act X, 162 (1865) See Act VIII of 1885, g 118 clause (c)

⁽²⁾ So Alberooddeen t Mahomed Abusen,

Marsh 307 (1864), Juljaram Harchand e Sitaram Narayan, 38 B 377 (1913) (in a mortgage suit the first summons should be for settlement of issues)

involved in the suit and the importance of the claim made in it as well is the actual distance of the defendant from the Court, and the facilities for obtuning legal advice, must also be taken into consideration in determining the sufficiency of the time illowed. In the case cited below (1) the claim myolyel a right to landed and other property of the aggregate value of upwards of Re 6000, and was likely to raise questions of Mahomedan law, au I only two days having been allowed from the issue of the summons, it was held that the time allowed was insufficient. In another case (2) the summons was served on the lath April by a copy of it being fixed on the outer door of the defendant a place of husiness at Poons, while the defendant was it Sholapur and it was held that two days were not a sufficient time to enable him to attend for defence at Poons It was held that the Subordinate Judge should have postponed the hearing. If the time is unreasonably short the Appellate Court will interfere (3) In the under mentioned case (4) the Court said "We take this opportunity to cill the special attention of the Courts below to the urnent necessity there is that they should carefully themselves see that due and re isonable time is given in all eases for the service of notices in order that the Courts themselves may not be made the instruments of fraud and injustice by means of those processes the visitint superintendence of the issue in I service of which properly and justly is one of their most important dutics

The summons to appear and answer shall order the defendant to produce all documents in his Summons to order de possession or power upon which he intends fendant to produce docu-ments relied on by him to rely in support of his case

Where the summons is for the final disposal of the suit. On issue of summons for final disposal defen dant to be directed to

it shall also direct the defendant to produce. on the day fixed for his appearance all witnesses upon whose evidence he intends to rely in support of his case

Service of Summons

(1) Where Dehvery or transmission of summons for ser-

produce bis witnesses

the defendant resides within the jurisdic- [tion of the Court in which the suit is instituted. or has an agent resident within that jurisdic-

tion who is empowered to accept the service of the summons, the summons shall, unless the Court otherwise directs, be delivered or sent to the proper officer to be served by him or one of his subordinates

(2) The proper officer may be an officer of a Court other

⁽¹⁾ Khadar Bhi v Rahiman Bhi, 3 M, H C R 167 (1866), Chanbasalla v Mamaba, 7 C R 167 (1566) B IL C R 138 1 C J (1869)

⁽⁻⁾ Chanbasappa t Ma nal : 7 B H C R 1 C 138 (1569)

⁽¹⁾ Lothenath : Sobanath, 5 W R, Act A, 3J (1866)

⁽³⁾ Khadar Bhi e Rahman Bhi 3 M H

than that in which the suit is instituted, and, where he is such an officer, the summons may be sent to him by post or in such other manner as the Court may direct

Issue of summons for service -The awarding of process is a judicial act, but its service is ministerial. In this country a summons can be served only through the Court, and there is a complete code of rules relating to the service of summons in all cases It has therefore been contended that parties cannot contract themselves out of the rules prescribed and the contrary rule has not been recognized by the Courts in any case (1) The object of the summens is to notify to the defendant that he is sued and the particulars in regard thereto And in the under mentioned case it was held that a decree of a Court of competent jurisdiction was not a nullity merely because of an irregularity in service, the parties being shown to be aware of the suit, which is the whole object of service (2) The Code proceeds upon the assumption that overy Court has a jurisdiction within certain limits separate and distinct from overy other Court, and its provisions are applicable only to Courts possessing such a jurisdiction (3) The Court therefore in this case held that it had not the power to execute its own decree or serve its own process out of the local hinits of its jurisdiction. A special bailiff cannot be sent to execute civil process in foreign territory (4) The effect of the words, " of the defendant resides within the jurisdiction," coupled with the corresponding words in sects 85 and 89 of the former Code, was said to he that a summons could he served directly by an officer of the Court on a person residing outside the jurisdiction of the Court oven if he were present, though it might be casually or incidentally, within the jurisdiction, but that it must in such cases he sent where he ausides, even though it he known that at the time he is not there, but else where Whether such a construction would be accepted was, however, doubtful, the question not having been raised or decided. The general rule elsewhere is different, and a summons may always be served on a defendant if he is within the jurisdiction, even if he has just come there at the time of service, provided that he has done so voluntarily, and not induced to do so hy fraud or false protonces of the plaintiff, or only as a witness (5) In cases of any but the shortest stay, the point is likely to be solved by a liberal interpretation for the purposes of this section of the word "resides ' It has been held that the residence under this rule is the place where a person eats, drinks and sleeps or where his family or servants eat, drink and sleep (6) In the Mofussil the Nazn is the proper officer of the Court to whom under this section the summons is delivered for service It is for him to return the summons to the Court as miserved, and this he does by countersigning the bihff's endorsement (7) No officer can serve a summons beyond the local limits of the exercise of his functions,

⁽¹⁾ Hukm Chand, C P C 674, 675 (2) Mackintosh t Kally Doss Mullick, H

⁽²⁾ Mackintosh t Kany Doss Manual B L R 1, 8 (1873)

⁽³⁾ Sagoro Dutt c Ram Chunder Vitter, I Hyde, Los (1863), at p. 133, 1er Wells, J

⁽⁴⁾ Kasin Azin : Kasin Mihomed, 2

B L R 59 (1868), 10 W R 319 (5) Hukm Chand, C. P C 671

⁽⁶⁾ Kumul r Jotindra, 38 C. 394 (1911),

¹³ C. L. J. 221

⁽⁷⁾ Parsotam t Abdul, 13 B 500 (1889)

and it is a general rule that a process can only be served by the officer to whom it is directed or hy his duly appointed deputy (1) The section was first substi tuted by sect 10, Act VII of 1888

10. Service of the summons shall be made by delivering or tendering a copy thereof signed by the Judge or such officer as he appoints in this Mode of service behalf, and sealed with the seal of the Court

Mode of service -A copy summons must be either delivered or tendered, but the mere showing of the summons is not a tendering of it (2) The section corresponds with sect 48 of the Code of 1859 and 73 of the last Code As to service on corporations and companies, see O XXIX r 2 post, and as to Bengal rent suits, sect 148, clause (d), Act VIII of 1885 There are no special provisions as to the service of summons upon infants and therefore the same rules appear to apply as in the case of adults. There should he personal service under O V r 12 or service in some of the ways provided in the following sections, or, failing service in these ways an order under r 20 The provisions appear to apply to suits against minors-at least, until the appointment of a guardian ad litem there being no provision that a summous for a mmor may be served on his guardian ad litem (3) Wherever practicable service inust be in person under this rule and r 12, post Substituted service can only he made where the summons cannot he served in the ordinary way (4)

11. Save as otherwise prescribed, where there are more defendants than one, service of the summons Service on several shall be made on each defendant. detendants

Several defendants -This section corresponds with sect 48 of the Code of 1859 (5) The second paragraph of the corresponding sect 74 of the last Code. now omitted, was taken from English O 9 r 6, now cancelled, and for which O 481 is now substituted. The framers of the rule relied upon its being always the interest of one person who is served to inform others who are jointly hable with him if he is hable (6) Quare whether that section applied when some of the defendants who were interested in the partnership were minors (7) As to suits against partners, see O XXX

⁽¹⁾ Hukm Chand, C. P C. 6,2, citing Litnam Tr Pro § 206.

⁽²⁾ R 1 Karsanlal, 5 B R C 1 _0(1868)

⁽³⁾ Suresh Chunder : Jugut Chunder, 11 C 204, 215 (1680)

⁽⁴⁾ Abraham Pillas : Donald Smith, 29

VL 324 (1906)

⁽⁵⁾ As regards the earlier law, see Luch miput Dogare : Sibnarain Wundle 1 Hyde, 37, and other cases cited in the notes to U Iff r 2, ante

⁽b) Lx pute Young, 13 Ch. D at p. 13 1,

in which also it was queried whether the English rule applied not only to a partier ship existing at the time the plaint is tiled

but also to one dissolved before him, the I laint in respect of a cause of action are. ii ... during its existence

⁽⁷⁾ Joindra Mohan r Srinath Roy, 26 C. -67 (1893), a c. 3 (. 11 \ 261. It must. however, be noted that there is no provision that a summons for a minor may be served on his aurhen ad hi m tured Church r Jugut Chunder, 11 (at p. 21s (1556)

agent

12. Wherever

Service to be on defendant in person when practicable, or on his

it is practicable, service shall be made on the defendant in person, unless he has an agent empowered to accept service, in which case service on such agent shall be sufficient

Service, personal or on an agent - This section corresponds with sect 49 of the Code of 1859 The summons, at a proper and reasonable time and place, should be given directly to the defendant, and not to another person for dehvery to him, after the serving officer has satisfied himself of the identity of the person named in the summons with the person on whom he serves it (1) A person who, being the ammookhtear of the male defendant looked after the affairs of the female defendant, was held not to be an agent empowered to accept service (2) There may be personal service on a minor (3) Sec notes to 1 10 a ite

13. (1) In a sunt relating to any business or work against a person who does not reside within the Service on agent by whom defendant carries local limits of the junisdiction of the Court on business from which the summons is issued, service on any manager or agent, who, at the time of service, personally carries on such business or work for such person within such limits, shall be deemed good service

(2) For the purpose of this rule the master of a ship shall be deemed to be the agent of the owner or charterer

Agent carrying on business -To satisfy the conditions of this rule as to service of summons on in agent there must be a person residing without the local jurisdiction but carrying on business or work within those limits by a manager or agent and sued on account of such work, that is business either actually itself curred on by the inent or manager or forming part of the business in the sense of a connected course of transactions to the miniscement of which he has been fully appointed (1) this rule and O III r 3 clause (b) are to be construed to other and are in touded to carry out the same scheme of relief which rests upon the idea that where in agent has been put forward substitutially to take the place of his principal within a particular purisdiction he should talle the place of such principal (at the option of any person who has dealt with him) in any lead proccedings that may trise out of the business or work in which the ment his been virtually a local principal. The manager or agent contemplated by the Code is one who has in mitritive and independent discretion albeit subject

⁽¹⁾ See Hukin Chand, C P C 677 674. where the points mentione I (te ether with the puestion of service on Covernment or rilary thribite hiertotoff a) r more fully I cussed

⁽⁻⁾ Rais to n lurco e Raico Surut 1 W R 33 (1871) See notes to O 111 r 2 (3) Surceh Chunder : I gut Chui Ir II t t1 -lo(1888) 800 1 r 10

nexter in 110 18 nous of

possibly to principles and general orders prescribed for his guidance. A mere servant employed to carry out orders or to execute a particular commission, or a factor or common agent who is not identified with the firm for which he acts, is not such an agent (1) Upon the principle embodied in the rule, it was held, prior to its enactment, that service of summons on in igent to whom a ship was consigned was good service on the owner in respect of matters connected with the ship (2) Service unduly made under this rule does not become effectual by reason of the fact of such service being subsequently notined to the parties really interested as defendants (3) Semble -Service duly effected under this rule is effectual without reference to the circum stance of its being or not being communicated to the real defendants (4) An opinion has been expressed that it would be anomalous to hold that, though the C sle requires the appointment of a proper person as guardian to act for a minor generally in the conduct of the case, service of summons on a person other than such person may be sufficient service on the minor. The question was not decided, as the Court held that there was no service of summons under the sections corresponding with either in 11 or 13 of O 1, even assuming that these sections applied to a case in which some of the defendants who are interested in the partnership or business are minors (5)

Where in a sunt to obtain rehef respecting, or com- [s 14. pensation for wrong to, immoveable property, Service on agent in charge in suits for imservice cannot be made on the defendant moveable property. in person, and the defendant has no agent empowered to accept the service, it may be made on any agent of the defendant in charge of the property

"Immoveable property"-Act VIII of 1859, sect 61 A suit for foreclosure or sale of immoverble property is within the meaning of these words (6)

Where in any suit the defendant cannot be found and is has no agent empowered to accept service of Where service may be the summons on his behalf, service may be on male member of detendant's tamily. made on any adult male member of the family of the defendant who is residing with him

Explanation -A servant is not a member of the family

within the incaming of this rule.

"Cannot be found "-This section corresponds to sect 53 of the Code of 1859 See notes to r 17

"Agent empowered "-This clause involves an essential condition of

(4) Ib

⁽¹⁾ Goculdas t Ganeshlal, 4 B 416(1880)

⁽²⁾ Rajaram Govindram : Brown, 7 B H

C R 97, O C J (1870) (3) (ocul las : (auc shlal, 4 B #16 (18-0)

⁽⁵⁾ Joundra Mohan t Srmath Roy, 26 C. 267, 273 (1898) (6) Michael: Ameena Bil 1, 9 C 733 (1893)

the service on the adult members of the family, which will not be good unless it is proved that there was no agent empowered to accept the service (1)

"On any adult member," etc.—The person on whom service is made must be both adult and male. The object of this provision is that the copy shall be delivered to some person of the age of discretion who will understand for what purpose such copy is delivered, and will give it to the defendant on his coinning. This is all the more necessary as there is no provision in the Code requiring the officer to inform the person with whom the copy is left of its contents so as to impress upon him the importance of delivering it to the defendant as soon as possible. An adult member will be deemed to reside with the defendant only if the two are bona fide living in commensality, or at least in the same house (2)

16 Where the serving officer delivers of tenders a copy Person served to sign of the summons to the defendant personally, acknowledgment or to an agent or other person on his behalf, he shall require the signature of the person to whom the copy is so delivered or tendered to an acknowledgment of service endorsed on the original summons

Acknowledgment—The serving officer under this section which core sponds to sect 54 of the Code of 1859, must either deliver or tender a copy of the summons and obtain an acknowledgment on the original. The mere showing of a summons is not sufficient (3). If the party refuses the acknowledgment then the serving officer should proceed under the next rule (4). A mere refusal to sign a receipt or a summons is not an offence under sect. 173 or sect. 180 of the Penal Code (5).

Procedure when de tendant or his agent or such other person as aforesard refuses to sign the acknowledgment, or where the serving officer after using service, or cannot be

to accept service of the summons on his behalf, not any other person on whom service can be made, the serving office shall affix a copy of the summons on the outer door or some other conspicuous part of the house in which the defendant ordinarily resides or carries on business or personally norks for gain, and shall then return the original to the Court from which it was lessed, with a report endorsed thereon or amoved thereto stating that he has so affixed the copy, the circumstances under which

⁽¹⁾ Hukm Chand C P C Col [see Cil II C Gen. Rules (9) d]

^{20 (1863)}

⁽⁴⁾ Maruta | Valle 16 B, 11" 119 (1841) () R + Ku lua Col : la 20 (3.8

⁽⁻⁾ Hukm Chan 1 C P (180 (3) Cf R 1 harsanlil 5B H C R Cr 1

⁽¹⁸⁹²⁾

^{(100.}

he did so, and the name and address of the person (if any) by whom the house was identified and in whose presence the copy was affixed.

Refusal to accept service.—This section, which corresponds with sect 55 of the Code of 1859, and sect 80 of the last Code, has been amended in several particulars. If the defendant himself or other person (that is, agent or manager, or adult male member of his family) he found, but the defendant or such person refuses to sign, then the serving officer may at once affix the summons on the dwelling-house

It was not clear from the language of the section as it stood what results should follow when the defendant retained the copy of summons delivered but refused to sign the acknowledgment. Similarly, if the defendant refused to sign the acknowledgment, but did not "ordinarly" reside in any house, as in the case of roving traders and strolling players, no provision appeared to exist. In such a case it was considered that the refusal should operate as service and the following provise was inserted in the draft—"Provided that, where the defendant or his agent or such other person as oforesoil refuses to sign the acknowledgment, and (a) retains the copy of the summons delivered to him, or (b) no house in which the defendant ordinarily resides or carries on business or personally works for goin can be discovered, the Court may direct that the summons shall be deemed to have been duly served. The proposal has, however, not been adopted

"Cannot find "-But if the defendant cannot be found, then the return must show that there is no egent or other person on whom the service could he made before a service on the dwelling house is good. The words "cannot find " constitute a condition of the mode of service provided (1) Thus where the summons was served on the defendant's paternal uncle, who was a member of the same joint family and lived in the same house, it was held that the service was insufficient since there was no proof that defendant could not be found (2) It must be shown that proper efforts to find the defendant were made, as for instance that the serving officer went to the place or places and at the times at which it was reasonable to expect the defendant would be found (3) is true that you may go to a man's house and not find hun, but that is not attempting to find him, you should go to his house, make inquiries and if necessary, follow him You should make inquiries to find out when he is likely to be at home and go to the house at a time when he can be found (4) The summons can be affixed to the dwelling house only if the defendant could not be found after ddigent search and reasonable efforts made to find him (5). Where

⁽¹⁾ Rama Rau : Sridhur, 4 C L R. 397 (1879)

⁽²⁾ Wakhan Das : Wannu Lal, 3.: 4 5.6 (1913)

⁽³⁾ Rajen Ira Nath 1 Hadjie Syed, 2 C. W N 574 (1848) s. c., 20 C. 101, Coben 8 Mursi g Das, 19 C. 201 (1842) Sel rainanna Pillari Subramania Ayyar, 21 M 419 (1848), Sakharian Bhaskar e Padmakar Maha kee, 20 16 23 (1840), kumi 1 e Julim 5, 28 C.

^{319 (1911) 15 (1/1 / 3 /9}

⁽⁴⁾ Per Petheram, C.J. in Cohen e Nursin, Das segra. This case was fill well 19. Inthum, C.J. and Woodroffe, J. in appeal from Order "5 of 1912 (28th No. 1913) where it was hell that the serving of or

must use all reas nable diligence
(a) Khuderrun fall r Chutter iharce fall
21 W R. 242 (1574), and of Jaroda Karl r
Laj Churn, 24 W R. 251 (157)

there was no attempt to find the defendants, and there being only one summons for a number of defendants, it was affixed to the house of one only, it was held not duly served, even on that defendant (1) The rule has been amended to embody these rulings to the effect that the serving officer must use diligence. If, though the defendant is absent, the serving officer is told where he is, service on the house is bid, (2) the Court observing, in the last ented case, that mere temporary absence of the person to be served does not justify the process server affixing the summone to the door. But where the serving officer has information that there is no prospect of his being able to servo the defendant personally within a reasonable time, he is not bound to wait, and will be justified in affixing the summions on the door (3) A defendant will also be held not to be found when it is known that he is in the house, but the serving officer cannot get access to him (4) Whether or not the conditions required by the rule are established to the satisfaction of the Court, must, of course, in each case depend on its own particular circumstances (5) What has to be regarded in all such cases is this, that the object of the ecryice of a summous, in whatever way it may be effected, is that the defendant may be informed of the institution of the enit in due time before the day fixed for the hearing, and when, from the return of the serving officer, it appears that there is no likelihood that the summons will come to the defendant's knowledge in due time, or a probability that it will not so come to his knowledge, it cannot be said that there has been due service (6)

"Outer door" -The words "or some other conspicuous part" have been added, as in this country many houses have nothing which, without a etretch of language, can be described as " outer doors "

"Ordinarily resides"-As to the meaning of the term "resides," see sect 20, ante The intention of the provision is that the defendant ebould be residing in the house in such a manner as to make it probable that a knowledge of the service of cummons will reach him Thus, the service will not be good if the defendant have left the house and the village two years before (7) The rule speaks of the house where the defendant resides Therefore place of business would not ordinarily come within the section, (8) though in some cases, where the defendant both resides and carries on business at the same place, it would be so There must be evidence that the house on which the summons was affixed was that in which the defendant ordinarily resided (9) It has been held that in this rule and rule 9 of this Order a person must be taken to reside where he or his family or ecryants eat, drink and sleep (10)

⁽¹⁾ Shiboo Roy v Kasher Roy, 25 W R 394 (1876) (2) Doolee Chan I 1 Nirl an Sungh, 20 W

R 62 (1873) , Bhomshetti + Umal u, 21 1 223 (1895) , Sakma : Gauri Sahat, 24 \ 302 (1902), Subramama Pillat i Subramanis Ayyar, 21 M 419 (1897)

⁽³⁾ Sankaralinga : Ratnasabhapati, 21 11 124 (1897) Siturum r Kalandi, 17 (W N (1101) 0(4)

⁽⁴⁾ Hukm Chand C P C Csi, ening Carter Y ung 12 Abb Pr 11) (Amer)

⁽⁵⁾ Rajendra Nath : Hadjee Syed, 2 C W N 571 (1898)

⁽⁶⁾ Bhomshetti i Umabai, 21 B 223, 1er

larran CJ

⁽⁷⁾ Anantha Narayana + Periyana Kene, 5 W H C R 101 (18(9)

⁽⁵⁾ Chanlasappa e Mamaba, 7 B H C. B. 1 (138 (1570)

⁽⁹⁾ Gopal Deser Greedhateo Doss, 6 W B 13 (1866)

⁽¹⁰⁾ Kumu I : Ictindra, 39 C, 391 (1911) ,

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"Or carries on business," etc.—These words have been added to bring this rule into closer conformity with seet 20, the principle of which it was considered was equally applicable to the service of process (1)

Return—The return should specify that the copy was affixed to "the outer door (or, now, conspicuous part) of the house in which the defendant ordinarily resides;" and merely to report that it has been affixed to the defendant's house is not su licent, as the defendant may have more than one house (2). In a subsequent case (3) the service was held good, as the serving peon deposed that the defendant was living in the house. But where the return does not say that the copy has been affixed, nor does that appear from the inquiry made under r 19, there is no service (4). So also the return must state that the summons was affixed to the house in which the defendant ordinarily resided at the time of the service, (5) and where the reference to the time lind heen omitted, the return was considered insufficient (6). The summons was tendered to the defendant and returned, and that the defendant refused to receive the stine, whereupon the serving officer informed him what the document was, and acquainted him with the nature and contents thereof (7)

Identification —As the practice of the Courts with regard to identifying persons or houses in connection with the service of process did not appear to lumform, it was considered expedient to provide in the return endorsed on the summons for, at least, one identifier whom the Court or the parties could call as a witness in case of a dispute with respect to the sufficiency of service. The words "if any" were, lowever, inserted hecause it was considered that the Code should not render absolutely illegal the service of process without an identifier, where local experience justified the High Court in issuing no directions for such a safeguard

18. The serving officer shall, in all eases in which the is summons has been served under rule 16, and manner of service endorse or annex, or cause to be endorsed or annexed, on or to the original summons, a return stating the time when and the manner in which the summons was served, and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of the summons.

Return not evidence of service —This section corresponds to sect 56 of the Code of 1859 The return is not legal evidence of the service (8)

Bashnab Charan v Bank of Bengal
 C L J 591 (1914)

¹⁹ C L J 591 (1914) (2) Buddoo t Ram. 1 Hyde. 132 (1862-

⁽³⁾ Ram Coomar t Ram Soondur, 17 W

R 362 (1872)

⁽⁴⁾ Maruti t Vithu, 16 B 117 (1891) (5) Rajnarain Ghose r Abdur Rahim, 2

C. W N claxxviii (1898)

⁽¹⁾ Ram Churn Laha : Ashutosh Dutt 2

C W N claraviii (1898)

⁽⁷⁾ Cal. H. C. Gen. Rules, 8 (o)

⁽⁸⁾ Olhoy Chunder: Erskino A. Co., 3 W. Nie. 11 (1865), Shah Koondun r. Nor Ah, 10 W. R. 3 (1868), Sreenath: Watson A. Co., 4 W. R. Mis. 4 (1865), Johnan Viegh Shah Pershad, 7 C. 31 (1881), and as to report of Nazir, see Vahomed Aldul r. Mutal Karim. 16 C. at p. 171 (1888)

Whonever it is necessary for the Court to satisfy itself that a summons or other process has been duly served, the presiding officer should for that purpose take the evidence of the serving officer Thus, in Raj Kishore v Bydonath Shaha,(1) Bayley, J, observed that "there is simply a return by the Nazir to the effect that the peon swears that such a notice had been served on the defendants; but a bare return like this, without the deposition on oath of the serving peon taken before a competent authority, which the Nazir is not, is wholly insufficient in law to prove the service" The general rules of the Calcutta High Court (2) lay down that the requisite proof may he either by the affidavit or verified statement of the person by whom the service was effected, and of any person who may have accompanied the serving officer for the purpose of identifying the party to whom the process was addressed, or otherwise directing or assisting the serving officer, or, if deemed necessary, by the examination in Court as witnesses of such persons as the Court may think fit to examine As to the added words, see notes to last rulo

Where a summous is returned under rule 17, the Court shall, if the return under that rule has not been Examination of servverified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thunks fit

"Shall either declare"-These words show that the affixing, tiken hy itself, is certainly not effectual complete service. The Court has to see that the conditions precedent to such service have been fulfilled Service is insufficient until confirmed under this rule. If the Court decides against the service, then either a new summons must be issued or substituted service directed (3)

(1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out Substituted service of the way for the purpose of avoiding service, or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the simmons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some eonspicious put of the house (if any) in which the defendant is known to have

^{(1) 12} W R 365 (1809)

⁽²⁾ R 9 (r)

⁽³⁾ Nusur Withouned r Anzbal, 10 B 202 (1881) In to the effect of falme tof Hom

the presisting of this section in a sulse t ent eriminal trial see R + Ninal shuar, 27 A

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last resided or carried on business or personally norked for gain, or in such other manner as the Court thinks fit.

(2) Service substituted by order of the Court shall be as

Effect of substituted effectual as if it had been made on the

service.

(3) Where service is substituted by order of the Court, the
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Court shall fix such time for the appearance
unterly lime for appearance to be fired.

Substituted service -This form of service can only be had in cases in which (if there were no difficulties in the way) personal service could be had This is based on the principle that one cannot do indirectly what cannot be done directly. So the defendant must be a person or a corporation or a firm (1) So, as the Courts have no jurisdiction over a foreign sovereign unless he submits, he cannot be served by substitution (2) If at the time of the issue of summons there could have been at law personal service of it upon the defendant sought to be served, then substituted service may be allowed (3) But if personal service could not at law have been made, then, save as heremafter mentioned substituted service cannot be ordered (1) Assuming that personal service at la e could have been made, the grounds of fact on which service may be ordered are (o) that the defendant is keeping out of the way, or (b) that for any other reason the summons cannot be served in the ordinary way. In cases of substituted service the Courts should take care to be satisfied that the con ditions on which alone it is good exist (5) It has been already stated that, as a general rule, substituted service cannot be ordered where personal service is not legally possible, but under ground (a) it can, it has been held be directed where the defendant was out of the jurisdiction at the time of thousand of the writ if the evidence satisfies the Court that he went out of the jurisdiction to evade service (6) As regards ground (b) the section gives full discretion to the Court So service has been allowed on proof that the defendant could not be found that he had not been heard of for over two years and that his uncle and father did not know where he was (7)

- (1) Sloman t Governor of New Zealand 1 C P D 567, Hillyard 1 Smith, 36 W R (Eng) 7 O Connor t Star Newspaper Co, 30 L. R (Ir) 1 See Annual Practice, notes to O 10
- (2) Mighell 1 Sultan of Johore (1894), 1 Q B 149, and so in the case of a Colonial Government, Sloman 1 Governor of New Zealand, supra
- (3) Trent Cycle Co r Beattre, 15 Times R 176 C A
- (4) Fry: Moore, 23 Q B D 395, C 4, Worcester City, etc., Co: Firbank & Co (1894), 1 Q B 784, Wilding: Bean (1891), 1 O B 100
- (5) See Ramchander: Jageshehunder, 12 B L. R 229 (1873) There observations were made, however, with reference to Reg. V of

1812 which did not contain the words for any other reason, and were cited in Bissio nath: Tara Prosonno 2.7 W R 482 (1874), Rama Rai: Sridhur Perahad 4 C L R 397 (1879), Nusur Vahomed: I kazbai, 10 B 202 (1886), though under the Code the serice will be said if any other reason is proved, it is still necessary for its validity that a rood trason exists.

(6) Re Urquhart, 24 Q B D 73, Jay 8 Budd (1898), I Q B 12, C A, Graves 1 Lebaudy, 39 L J 234, A. P p 61, see obser vations at p 186, 3 Q B D, Watt; Barnett

(7) Raynaram Ghose: Tek Lal, 1 C, W N 104 (1896), in Mirza Ully i Syed Hyder, 2 B 449, 451, the defendant could not be foun 1

Whenever it is necessary for the Court to satisfy itself that a summons or other process has been duly served, the presiding officer should for that purpose take the evidence of the serving officer Thus, in Raj Kisbore i Bydonath Shaha, (1) Bayley, J, observed that "there is simply a return by the Nazir to the effect that the peon swears that such a notice had been served on the defendants, but a bare return hke this, without the deposition on oath of the serving peon taken before a competent authority, which the Nazir is not, is wholly insufficient in law to prove the service" The general rules of the Calcutta High Court (2) lay down that the requisite proof may be either by the affidavit or verified statement of the person by whom the service was effected, and of any person who may have accompanied the serving officer for the purpose of identifying the party to whom the process was addressed, or otherwise directing or assisting the serving officer, or, if deemed necessary, by the examination in Court as witnesses of such persons as the Court may think fit to examine As to the added words, see notes to last rule

Where a summons is returned under rule 17, the Court shall, if the return under that rule has not been Examination of serving officer. verified by the affidavit of the serving officer, and may, if it has been so verified, examine the serving officer on oath, or cause him to be so examined by another Court, touching his proceedings, and may make such further inquiry in the matter as it thinks fit, and shall either declare that the summons has been duly served or order such service as it thinks fit

"Shall either declare"-These words show that the affixing, taken by itself, is certainly not effectual complete service. The Court has to see that the conditions precedent to such service have been fulfilled Service is insufficient until confirmed under this rule. If the Court decides against the service, then either a new summons must be issued or substituted service directed (3)

20. (1) Where the Court is satisfied that there is reason to believe that the defendant is keeping out Substituted service of the way for the purpose of avoiding service or that for any other reason the summons cannot be served in the ordinary way, the Court shall order the summons to be served by affixing a copy thereof in some conspicuous place in the Court-house, and also upon some conspicuous put of the house (if any) in which the defendant is known to have

^{(1) 12} W R 365 (180))

the provisions of this section in a sul or fuer t criminal trial see R . Nu al shwar, 27 A (2) R 9 (1) 4 #1 (190 ;

⁽³⁾ Nusur Michomel : Nazhar, 10 B 202 (188) As to the effect of failure to f Il w

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last resided or carried on business or personally norked for gain, or in such other manner as the Court thinks fit.

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Substituted service -This form of service can only he had in cases in which (if there were no difficulties in the way) personal service could be had This is based on the principle that one cannot do indirectly what cannot be done directly So the defendant must be a person or a corporation or a firm (1) So, as the Courts have no jurisdiction over a foreign sovereign unless he submits, he cannot be served by substitution (2) If at the time of the issue of summons there could have been at law personal service of it upon the defendant sought to be served, then substituted service may be allowed (3) But if personal service could not at law have been made, then, savo as heremafter mentioned, substituted service cannot be ordered (1) Assuming that personal service at law could have been made, the grounds of fact on which service may be ordered are (a) that the defendant is keeping out of the way, or (b) that for any other reason the summons cannot be served in the ordinary way. In cases of substituted service, the Courts should take care to be satisfied that the conditions on which alone it is good exist (5) It has been already stated that, as a general rule, substituted service cannot be ordered where personal service is

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(7) Rajnaram Ghose : Jek Lal, 1 C W N 101 (1896), in Mirza Ally i Syed Hyder, 2 B 449, 451, the defen lant could not be found

23. The Court to which a summons is sent under rule 21 or rule 22 shall, upon receipt thereof, proceed Duty of Court ta which as if it had been issued by such Court and summons sent shall then return the summons to the Court of issue, together with the record (if any) of its proceedings with regard thereto

Court to which process must be sent -See sect 59 of Code of 1859 R 21 shortens the earlier portion of sect 85 of the last Code, the second clause of which is r 23 R 22 is seet 86 The summons, it was ruled, should ordinarily be sent, not to the Judge of the district where it has to be served, but to the Court having jurisdiction at the place where the defendant resides, hy which it can be conveniently served—that is, to the Munsif within whose jurisdiction the defendant resides (1) But the Calcutta High Court summons used to be sent to the District Court for service through the local Court by direction of the District Judge, and the same rule applies in the Panjab Chief Court (2) For forms of process, see Schedule I, Appendix B says to any Court " not being a High Court Should, however, the summons be sent in contravention of this rule, the High Court might either return it or order the proper local Court to effect service. This will, however, not be done for a foreign Court When suits are instituted in England against persons resident in India the assistance of the Courts here is not invoked Court, through the plaintiff's soheitor, sends the writ to a solicitor in India with instructions to serve and to return writ with an affidavit of service the Calcutta High Court refused to serve a summons sent to it by a Court in the Nizam of Hyderabad's territories, advising that it should he sent to a pleader practising in the district where the defendant resided (3) The summons is to be returned together with the record which will include the Nazir's return, affidavits statements, and depositions of the serving officer and of the witnesses relative to the facts of service. As to the necessity of a declaration of sufficiency of service, vide ante

Presumption as to validity of service -According to the opinion of Scott, J, if the return prima facic shows that service his been duly effected, the presumption in favour of the correctness of the proceedings of the Courts will prevail, and the Court sending the summons is not bound in every case to satisfy itself that the law is to service has been strictly followed. The Court serving the summens alone can judge how in any particular case service should be effected, and whether it has been properly effected, and it does not appear to have been intended by the Legislature that the transmitting Court should act as a revising Court as regards the service. In fact, it would only lead to great inconvenience and delay, without effecting any real good for that Court to discuss the discretion of the Court serving the summons as to what

⁽¹⁾ Cal. H C. Cen. Ruks No 8

⁽²⁾ See Hukm Chand, C P C 633, and ib is to service in Baluchistan and as to whether proce a fees and translations should

accompany | roct v

⁽³⁾ In the matter of the Nizam Dewant District Partham, Cd H C, 13th att, 1.00 (tunp.)

facts are sufficient to justify the warver of personal service on the defeudant, and the substitution of an affixing of the summons on his dwelling house, or the adoption of other mode of substituted service For instance, where a Court has returned a summons as duly served, and the return states that the summons has been posted on the defendant's dwelling house, because the defendant has gone elsewhere, it ought to be presumed that this service was justified by the facts, and that the Court duly acted under the provisions of sects 80 and 82 read together (now rr 17, 19) But, at the same time, the presumption in favour of the due execution of acts of a judicial nature only obtains donec probetur in contrarium, and there may now and then occur cases where there is something in the return distinctly negativing that presumption, and showing illegality in the mode of service (1) Probably, however the true rule is that the transmitting Court may accept but is not bound by the return, the section not requiring any declaration touching the sufficiency of the service (2) In this view it devolves upon the transmitting Court to determine upon the sufficiency of the service before trying the suit, raising or not raising the presumption according to the circumstances The practice of the Calcutta High Court has always been to determine for itself whether the service is sufficient having regard to the numerous irregularities which exist in "Mofussil service ' But the Allahabad High Court has held that usually the decision whether such summons has been properly served or not rests with the serving Court not with the issuing Court (3)

24 Where the defendant is confined in a prison, the summons services on detendant shall be delivered or sent by post of otherwise in prison to the officer in charge of the prison for scruce on the defendant

Defendant in jail—A suiter ought obviously not to be deprived of his remedy by the fact that the defendant is in jail (4). The former section (as to which, see sect 15. Let \(\nabla \) of 1869) was originally consider the obviously felt in the last mentioned case. Wilson J is reported to have held that the indorsament under sect S7 of the last Code ranked lagher than a nairs return ind was evidence of the service of summons (5). The intended section contains no provision as regards the return of service, which is dealt with by r. 29 under which the return is evidence of due service.

⁽¹⁾ Ausur Mahomed r Kazbai 10 B 202 (1886), per Scott, J

⁽²⁾ Romanath Burait Gugsodonandan, 2. C. 88J (1890) In Chandherr Ray : Jugat hishore, 15 % at p. 245 (1850) it seems to have been held that it was the duty of the Court making the return to declare whither the summons had been duly served.

⁽³⁾ Duarka: Brij Mohan 33 L 649 (1311). dissenting from Romanath r Guggodonandan,

⁻² C 55J (16JJ)

⁽⁴⁾ Bland r Bland 3 P 3 D 233 as to the present practice in Fighand see Dawson e Le Capelian 21 L J Ex 213. Inn 1r 1303, p. 4" In India a life conset is not crally dead "Sheonarain Singh e Sheo buggun hoor "D N W, 1803, p. 753

⁽a) O hursh a (n I'r Code, a 57, the reference is not given

no agent.

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Service where defendant resides out of British India and has

25. Where the defendant resides out of British India and has no agent in British India empowered to accept service, the summons shall be ad dressed to the defendant at the place where he is residing and sent to him by post, if there

is postal communication between such place and the place where the Court is situate

"Resides out of British India "-In such cases the mode of service is necessarily of a private character, as it is a general rule that a Court has no authority to send its process for execution out of the territorial limits of the State So a builiff cannot be sent to foreign territory to himself serve the summons on the defendant there (1) 1 bis rule, which corresponds with sect 60 of the Code of 1859, must be read with the next

"Sent", "Forwarded"-The section in the last Code required that the aumnions should be "forwarded" to the defendent, which was held to me in that the summons must reach hun (2) This, therefore did not mean merch put into the post (3) and there had to be proof of facts from which the Court might it isomably conclude that the summons had reached the defendant (4) In some court to would amount to a denial of justice to require direct proof of accept or refusal. When proof of posting in due course has been given a presumption may but used mader sects 16 and 111 of the Evidence Act This would appear to be the case now The word "sent has been substituted But there ought to be evalence that he is, or has been recently residing at the place to which the summons has been sent, or that the acknowledgment is in the writing of the defendant (5) In practice the summons is sent under registered cover, both to cusing service as well as to procure good evidence of it (6) If a registered cover is refused, the person so refusing emmot take advantage of his refusal and ple ul ignoranco of its contents (7)

26	Where-

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been established or continued, with power to serve a summons issued by a Court under this Code in any foreign territory in which the defendant resides, or

(b) the Gorrior General in Council has, by notyfication in the Gazette of India, declared that any summons so issued may be served by any Court situate in any such territory and not established or continued in the exercise of any such invisitation as aforesaid.

the summons may be sent to such Political Agent or Court, by post or otherwise, for the purpose of being served upon the defendant; and, if the Political Agent or Court returns the summons with an endorsement signed by such Political Agent or by the Judge or other officer of the Court that the summons has been served on the defendant in manner hereinbefore directed such endorsement shall be deemed to be evidence of service.

Summons outside India.-This section replaces sect '90 of the last Code which was itself substituted for the original by the Amendment Act (VII of 1888), sect 12, and is intended charly for Indian Native States. This section does not apply to British or other territories, not under or connected with the Indian Government - such as Ceylon, the Straits Scittements, and even Great Britain, and, à fortion, not to countries like China and Persia, where there is a British Envoy or Ambassador or Consul, as distinguished from a Political Agent, nor to Afghanistan. The general direction contained in r 25 would apply in all such cases Summonses issued for scryice on persons residing in British possessions out of British India, and in other countries to which this rule does not apply, should be addressed to the defendant at the place where he is residing, and sent by post in accordance with that section (1) The distinction between the cases in which this rule applies and in which it does not apply is to be preserved, as the agency of the post office under r 25 should not be used for the service of a summons except when specially prescribed, for when any other mode for serving a notice is prescribed, a service through the post has not been deemed sufficient, even though actual delivery of the notice by the post peon is proved (2)

Endorsement is evidence — Unlike the ordinary return, the endorseneut under the signature of Political Agent, Judge, or other officer is evidence of the service of the summons, but it is no longer, as under the section prior to its amendment in 1888 conclusive evidence, and the defendant may

⁽¹⁾ See Hukm Chand, C P C 696, caling the Panj Ch. C Instra. and N W P Rules, as to service in Afghanistan, Straits Settle ments, Kashmir, Nepal, Hyderabad, ib., and

at p 697
(2) See Iara Das r Ram Dyal, 2 C
W N 125 (1897)

accordingly prove that notwithstanding the endorsement as to the service, the summons was not served

"Sent."—In the under mentioned case (1) it was held that the Sub ordinate Judge should have sent the summons himself, instead of through the Court of the District Judge

27. Where the defendant is a public officer (not belonging to His Magesty's military or natal forces or officer or on servant of this Magesty's Indian Marine Service), or is always company or local authority or a railway company or local authority, the Court may, if it appears to it

that the summons may be most conveniently so served, send it for service on the defendant to the head of the office m which he is employed, together with a copy to be retained by the defendant.

Service on public officers—The exigencies of public service demand that both civil and mulitary officers should not be summoned without proper notice to their superiors. This concession, however, coupled with the privileges given in connection with attachment, casts upon the Govern ment a corresponding duty to provide commensurate facilities for service. This section, which replaces sect 422, extends its provisions, which had hitherto applied to public officers only, to railway servants or servants of local authorities. Whittary officers are de 'R with in the next section. If the summons is not sent to the head of the office it must be served in the usual way. The Covernment pleader is not the agent of every public officer as he is of Government, to accept service. As to the duty of the Head of the office, service, and return, see r. 29, post

28. Where the defendant is a soldier, the Court shall send the summons for service to his commanding officer together with a copy to be retained by the defendant.

Soldiers—The words "an officer or" formerly occurring in sect 468 of the last Code before the words "a soldier" were repealed by the Cantonments Act (XIII of 1889) Military officers therefore same that let ceased to be governed by act 468, the provisions of which are embodied in this section so far as they relate to soldiers. Owing to the varied conditions of service of military officers, it has been thought expedient to follow the terms of the Cintonment.

Act in leaving the matter to be regulated by Rules

29 (1) Where a summans is delivered or sent to any person [

Duty of person to such person shall be bound to serie it, if such person shall be bound to serie it, if possible, and to return it under his signature, with the written acknowledgment of the defendant, and such signature shall be deemed to be evidence of

defendant, and such signature shall be deemed to be evidence of service

(2) Where from any cause service is impossible, the summons shall be retuined to the Court with a full statement of such cause and of the steps taken to mocaire service, and such statement shall

be deemed to be emdence of non servec

Service—With a general application so much of sect 468 of the last Codo has been retained as compels the officer addressed by the Court to execute tha process (1) Special provision has been made on the lines of sect 72 (2) of the Criminal Procedure Code 1898 for treating a return in such a case as evidence though unsupported by affidavit (2). It has also been considered desirable to declare such a return to be evidence of non service also so as to avoid the necessity for summoning public officers where as not infrequently occurs, an exparte decree has been passed by inadvertence and is assailed by an application under 0.1 \(\text{ } \) 1 \(\text{ } \) 1 \(\text{ } \) 1

30 (1) The Court may notwithstanding anything herein for summons a letter before contained, substitute for a summons a letter signed by the Judge or such officer as is he may appoint in this behalf, where the defendant is, in the opinion of the Court, of a rank entitling him to such mark of consideration

(*) A letter substituted under sub rule (1) shall contain all the particulars required to be stated in a summons, and, subject to the provisions of sub rule (3), shall be treated in all respects

as a summons

(3) A letter so substituted may be sent to the defendant by post or by a special messenger selected by the Court, or in any other manner which the Court thinks fit, and, where the defendant has an agent empowered to accept service, the letter may be is delivered or sent to such agent

⁽¹⁾ See Mahomed Saib : Aggas, 10 M. 319 (2) See Harrison v. Hope, 9 B. L. R. App. (1887) 43 (1872)

or defendant, as the case may be; and, subject thereto, an arement of the performance or occurrence of all conditions precedent necessary for the case of the plaintiff or defendant shall be implied in his pleading.

- 7. No pleading shall, except by way of amendment, russe

 any new ground of claim or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same.
- 8. Where a contract is alleged in any pleading, a bare denial penial of contract of the same by the opposite party shall be constituted only as a denial in fact of the express contract alleged or of the matters of fact from which the same may be implied, and not as a denial of the legality or sufficiency in law of such contract
- 9. Wherever the contents of any document are material, it effect of document shall be sufficient in any pleading to state the coffect thereof as briefly as possible, without setting out the whole or any part thereof, unless the precise words of the document or any part their coff are material
- 10. Wherever at is material to allege malice, fraudulent intertion, knowledge or other condition of the mind of any person, it shall be sufficient to allege the same as a fact without selting out the circumstances from which the same is to be inferred.
- 11. Wherever it is material to allege notice to any person of any fact, matter or thing, it shall be sufficient to allege such notice as a fact, unless the form or the precise terms of such notice, or the circumstances from which such notice is to be inferred, are material
- 12. Whenever any contract or any relation between any implied contract, or persons is to be implied from a series of letters or conversations or otherwise from a number of circumstances, it shall be sufficient to allege such contract or relation as a fact, and to refer generally to such letters, conversations or circumstances villout setting them out in detail. And if in such case the person so pleading desires to rely in the alternative upon more contracts or relations than one as to be implied from such circumstances, he may state the same in the alternative.

13. Neither party need in any pleading allege any matter of fact which the law presumes in his facour or as to which the burden of proof hes upon the other ade unless the same has first been specifically denied, (e.g., consideration for a bill of exchange where the plaintiff suce only on the bill, and not for the consideration as a substantive ground of claim).

Pleadings .- Rules I-13, 16-18 of this Order are new, and rules 2-13 and 10 are taken from the English O 19, rr 1 7, 11, 16, 20 25, 37, respectively Rules 11 and 15 represent sects 51 and 52 of the list Code Rule 17 is taken from O 29, r 1 of the English rules, and would appear to hold the place of roct 53 of the last Code after clause (a) of that section, which is now embodied in O VII r 11 of this Code Hule 18 is taken from O 28, r 7 of the linglish rules and would appear to replace sect 51 (d) of the last Code Other rules from the English O 19 are tu be found in O VIII, port As regards this Order the Special Commutee stated, "In our opinion it is most necessary that hitigants in this country should come tu trial with all assuce clearly defined, and that cases should not be expended or grounds shifted without reference to the true ficts. For this purpose we think that the present system of pleadings in the Mofusul which is notoriously by should be improved. and we have incorporated in the rules an order on pleadings which it is lioped will lead to sounder and furer methods of arriving at the real points in dispute The forms have been revised, and we hope that they will be brought into more general use in the Mofusul. The Committee have added a few rules relating to pleidings based upon the system of pleading introduced by the Judicature Acts in England, which is generally admitted to be the best form of pleading in civil suits. In this country, outside the Presidency towns, the pleadings are seldom artistically drawn They are neither coneiso nor precise, but contain varue and general statements from which it is difficult to ascertain definitely the real question in controversy between the parties. The sole object of pleadings is thus frequently defeated, the issue is enlarged, the trial is delayed and much unnecessary expense incurred by the parties, who are also hable to be taken by surprise. They have further provided that the forms in the Schedule shall, when applicable, he used for ill pleadings, and when they are not applicable, forms of the like character shall be used The rules prescribed will not prevent the pleader from exercising his discretion, for the amount of detail must necessarily vary with the nature of each suit It is, however, made clear that these must be particularly suffi cient to apprise the Court and the other party of the exact nature of the questions to be tried The Committee have also given a party who considers that his opponent's pleading does not give him the information to which he is entitled the right to apply for further particulars so as to enable him to know what case he has to meet at the trial They have, however, endeavoured to modify the rigour of the rules by providing in accordance with sect 55 of the Indian Evidence Act that the Court may, notwithstanding the absence of any specific demal, require any fact to be proved by the party who rehes upon it "

The subject of pleading will be found further discussed in the notes to O VII rr 1-6, but some observations summarized from the English "Annual Practico" may be here made

Rules 2 and 3 —The point of rules 2 and 3 is that pleadings are now mere statements of facts not law, of material facts only, and of facts which are not evidence stated in a summary way after, as nearly as possible, the forms of pleading given in the Schedules The written statement must be as hief as possible, but should contain a full and true narrative (1) framed with care, so as to dispense with undue statements at the settlement of issues,(2) and should be confined to relevant facts, (3) anything in the nature of argument (4) or evidence or conclusions of law to be drawn from the facts pleaded being is admissible (5) The whole object of pleading is that the parties and the Court should know what is the real point to be discussed and decided,(6) and it should be framed with reference to this object

Rules 4 and 5 -Rules 4 and 5 deal with particularity In every pleading a certain amount of detail is necessary to ensure clearness and to prevent the other party from being taken by surprise Pleadings are of no use unless they define clearly the questions at issue between the parties, and for this purpose cach party must state his case with precision, otherwise the issue would be "enlarged," as it is called, and neither party would know for certain what was the real point to be discussed and assured at the trial, and therefore would not be able to properly prepare his evidence for it No precise rule can, however, be laid down as to the decree of particularity which is required As rule 4 directs the statement of particulars, so rule 5 provides a remedy in case the imperative languago of the former rule is overlooked or disobeyed. If the allegations contained in any pleading are too vague, the proper course is to apply by notice and ask for fuller particulars Each party is entitled to obtain a fair outline of his opponent's case, but cannot compel him to disclose the evidence hy which he will attempt to establish that caso Nor will the Court sauction any attempt to deliver interrogatories under the guise of seeking particulars The object of particulars is to enable the party asking for them to know whit case he has to meet at the trial, and so to save unuecessary expense and avoid allowing parties being taken by surprise On such an application the notice or summons should ask that if the particulars ordered be not delivered within the time prescribed, the allegations complained of be struck out, or that the party in fault be precluded from giving any evidence in support of it at the trial Tho words "upon such terms" in the English rule corresponding to rule 5 have been held to authorize an order that if proper particulars he not

⁽¹⁾ Sreenath Mullick r Brojo Loll Pyne, 1 Hyde, 33 (1862-3), if the statement is knowingly false, an offence under s 191 of the Penal Code is committed See R r Mehrban Singh, 6 A. 626 (1884)

⁽²⁾ Anund Chunder e Woomes Chunder, 1 Hyde, 117 (1862-3)

⁽³⁾ Kasublal Dey t Tremearm, 3 B L. R 11p. 12 (1863) As to particulars in patent

cases, 600 Sheen : Johnson, 2 A 363 (1879),

Ledgard t Bull, 9 A 191 (1886)
(1) See Bishen Sahayo t Beer Kislore,
8 W R 296 (1807)

⁽⁵⁾ Seo Williamson : Loud n () W Ry Co, 12 Ch D 787 (a case of reply), at 1 as to evidence, Sped ling : Litzpatrick, J.

⁽h, D 110 (6) Thorp t Holisworth 3 Ch D (3)

delivered within a certain time the action shall stan I dismised or be stayed (I) Leave may be given to amen I or to add to particulars given

Rule 6 -Cases constantly occur in which, although everything has has pened which would at common law prima focie entitle n man to a certain sum of money, or vest in him a certain right of action, there is yet something in ite which must be done, or something more which must happen, in the par ticular case, before he is entitled to sue, either by reason of the provisious of some Statute, or because the parties have expressly so agreed, this some thing m re is called a condition a recedent. It is not of the essence of such n cause of action, but it has been made essential. It is an additional formality superimposed on Common Law. Hence in Lingland the plaintiff could draft n perfectly good statement of claim without making any reference to the con dition i recedent But this till 1875, he was not allowed to do In former days the claimfull was required to set out in his declaration every condition precedent and to aver the due performance of it with all particularity came the Common Law Procedure 1ct, 1852 sect 57 of which provided shall be lawful for the plaintiff or defendant in any action to aver performance of conditions precedent generally, and the opposite party shall not deny such exerment senerally, but shall specify in his pleading the condition or conditions recedent the extformanco of which he intends to contest ' And now (O 19, r 11 of the 1 milesh rules) the plantiff need say nothing about any condition recedent which has been performed. This provision is reproduced in rulo 6 of this Order. A general average of the due performance of all conditions precedent is implied in every pleading, so it need not be alleged. It is for the defendant if he contends that there was a condition precedent and that it has not been duly performed to state specifically what that condition was, and to plead its non performance otherwise its due performance will be presumed and it is not sufficient for him to allege generally that "an express condition" had been agreed to he must state its terms and between whom it was made, ind whether verbally or in writing Nevertheless when n condition precedent is properly pleaded, the burden of proving its due performance or the waiver of its due performance still rests on the plaintiff

But it is to be noted that an allegation which is of the essence of the caust of action is not a condition precedent within the meaning of this rule and must still be pleaded in the plaint. Thus the Law Merchant requires that notice of dishonour be given to every person who is sought to be made hable on a negotiable instriment except the acceptor. Unless such notice was duly given or was warved or excused no action has against the drawer or any indorsee. Hence the plaint must contain either an allegation that notice of dishonour was given to the defendant or a statement of the facts rehed on as excusing the giving of such notice.

Rule 7 —The meaning of rule 7 is that a party s second pleading must not contradict his first. Thus to illustrate from English practice, if a plaintiff claims rent on his writhe cannot claim the same sum in his reply as damages for unlawfully "holding over Or if the statement of claims alleges merely

⁽¹⁾ Davey v Bentinck (1833) 1 Q B 185 C. A.

t negligent breach of trust, the teply must not assert that such breach of trust was fraudulent. Such inconsistent claims should be pleaded if at all, after natively in the statement of claim.

Rule 8—Rule 8 is really a special application of the general principle and down in rule 2 of O VIII, post II the defendant wishes to contend that my contract on which the plaintiff rehes is invalid he must do something more than inerely deny the agreement, he must plead specially by way of confession and avoidance the matters of fact which rendered it invalid A traverse merely denies that the contract was in fact made it leaves unquestioned its sufficiency in law

Rule 9—It may be noted, with reference to rule 9, that in an action of libel the precise words of the document are material. So in some cases the precise words of a will may be material.

Rules 10-12 —Rule 10 and tho two following rules are special applications of the general principle laid down in rule 2 of this Order (which is indeed the fundamental rule of the present English system of pleading), that every pleading shall contain and contain only a statement of the material facts on which the party pleading seles, but not the evidence by which they are to be proved.

- 14. Every pleading shall be signed by the party and his pleading to be signed pleading is, by reason of absence or for other good cause, unable to sign the pleading, it may be signed by any person duly authorized by him 50 sign the same or to sue or defend on his behalf
- Vendeation of plead being in force, every pleading shall be venticed ings at the foot by the party or by one of the parties pleading of the court to be acquainted with the facts of the case

(2) The person verifying shall specify, by reference to the numbered paragraphs of the pleading, what he verifies of his own knowledge and what he verifies upon information received and believed to be true

(3) The verification shall be signed by the person making it and shall state the date on which and the place at which it was signed.

Subscription—These rules deal with all plandings. Seets 51 and 52 of the last Code dealt with plants and sect. 115 with written statements. The object of the signiture to the plant is to prevent as far as possible disjutes as to whether the suit was instituted with the plantiff's knowledge and authority (1) The rule requires that the plant (as well as written statement) should be subscribed by the party and his pleader, if any But this requirement as to subscription is governed by O III r 1. The act of signature cannot be done by the pleader instead of the plaintiff, because the Code requires both sum stores, but it normits acts to be done by a recognized agent. Reading. therefore, this section with O III r 1, a personal subscription is not imperative in all cases, and a plaint which may be presented by an authorized agent may in like manner be subscribed by him, and such a subscription is a compliance with the rule (2) Where the plaintiffs described themselves as lately carrying on business under the name of "C & Co." it was held that there was no irregularity in its being signed "C & Co" (3) It is not possible to set down entegorically what is good cause (i) within meaning of the provise A person holding a general power of attorney containing inter also nowers to sue and defend smts but not containing a special power to sign a plaint, was held to be a person duly authorized within the meaning of the provise of this section in the last Code, in which the words were "duly authorized by him in this hehalf, that is, to sign New the signature may be that of any one authorized either to sign or to suo or defend (5) The signature of a plaint by an ueauthorized agent, who subsequently becomes ompowered to sign, is sufficient (6) Under the last Code if a plaint was not signed and verified as required, it might have been returned for amendment (7) and rotected if not amended (8) Presumably there is nothing to prevent this heing dene new

The mere fact that the plaint in a sint has not been signed by the plaintiff named therein, or by any person duly authorized by him as required by this rule, will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature where it appears that the sum was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and having regard to seet 99, ante, is not a ground for interference in appeal (9)

Verification.—The object of the verification of the plaint is to fix upon the plaintiff the responsibility for the statements which it contains, and to affirm a guarantee of his good faith (10). In other words, if he will not swear that he believes his cause to be just, the law does not care to bother itself with it. But when the adversary comes in, such verification is of no moment. It is not oven evidence. The justice of the cause must then be proved by competent evidence. Like any other formal matter, its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction,

Bascho : John Sundt, 22 \ at p. 61
 Roy Dhunput : Jhoomul, 3 C L R
 Roy Ohnarance Surnomoye : Poohn

Behary, 3 C. L. R 15 (1878)
(3) Lachlan r Abdulla, 5 B L. R App. S.I (1870)

⁽⁴⁾ In re Raph Leclanus 1, 7 W R 168 (1807)

 ⁽⁵⁾ Kastohno r Rustomji, 4 B 468 (1880)
 (e) Maharajah of Rewah r Swami Saran,
 25 L 635 (1903)

⁽⁷⁾ S. 53 (b) (t), let XIV of 1652

^{(5) 5 51,} ib , Basko r Smidt, 22 1. 55, 10(15.09)

⁽⁹⁾ Basdeo r John Smilt, 22 A 55 (1839) (10) Ib., 22 A 61 (1839)

of course mere defects in it cannot (1) It would be difficult to imagine any case in which a defective verification could affect the merits of the case or the jurisdiction of the Court (2) Under the last Code where a plaint was not verified or improperly verified, it was returned for amendment, and, if not amended, rejected The suit should not, it was held, be dismissed (3) (vide ante) There is no rule that a person named as a co plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint (4) As the object of verification is to secure good faith, and its effect to make the statements in the plant the plaintiff's own, the Courts are bound to see that plaints are properly verified (5) The verification may be by some other person if the latter is acquainted with the facts The permission to a person to verify on be half of the plaintiff should be given in each case individually, and not generally (6) When verification by an agent is once expressly allowed, the Court is not competent afterwards to raise an objection to it (7) But the plaintiff may himself be required to subscribe and verify,(8) as where a plaintiff charges fraud on facts known to him (9) It was held that the verifi cation should be by all the plaintiffs, but that the Court night allow one of them to verify, a co plaintiff coming within the meaning of the words "some other person," etc (10) The amended section now provides for verification by one of the plaintiffs or defendants. This rule does not apply to the case of corporations, which is provided for by O XXIX r 1, post (11) As to the Administrator General, see below (12) In case of a person holding a general power of attorney, or of any other recognized agent, the Court will probably not insist on any extreme stringency of proof as to his acquaintance with the facts of the case (13) A fortion will this he so in the case of a co partner or other co plaintiff. It has been said that notice of the application for permission to verify should be given to the

⁽¹⁾ Basdeo t John Smidt, 22 A 55 (1899), citing Vansleet s "Collateral Attack, etc

⁽²⁾ Ib, cting Rapit Ram t Lattast Nath, 18 A 396 (1890) The mere fact that a plant contains a defect in the matter of signature or verification does not make it a void and mai missible plant Maharajah of Rewah v Swami Saria, 25 t 633-627 (1993)

⁽³⁾ Roy Vohun v Bishau Chandra, 1 B L. R 100 (1868) [co plaintiff], Rapit Ram t Katesar Nath, 18 4 3.16 (1896) In Overend 1 Steele, 1 Ind. Jur. N S 39, the Court reproced the plaint from the file

Court removed the plaint from the file
(4) Mohim Mohun r Bungsi Buildan, 17
(* 580 (188J), Chandi Mal z Dewa Singh,

^{1896,} P. R. No. 18
(1) See Keeno Stught: Eshan Chunler, b

⁽i) R 213 (1866)
(ii) In re Mulicsour Buksh, 5 W R Mise

⁽i) In re Mulessur Bulsh, 5 W W and JJ (1866), Nursing Deb r Ram Hobun, Marab, 176 (1861), Maharajah M hessur t Sh charum 6 W R Mise 5) (1866)

⁽⁷⁾ Rajah Sutto v Suroop Chunder, 12 W

R 465 (1869)
(8) Raja of Lomukhi t Braidwood, 9 A
505 (1881), Gokul Chunder t Burreck

Begum, Marsh 344 (1864)

(9) Jardino Skinner v Maharaneo Surau
moyee, 24 W R 215 (1875) and last note
Protap Chun ler v Krishto Kishore, 8 C. 884
(1882)

⁽¹⁰⁾ Chanda Mal : D.wa Singh, 1838, P. R. No. 18. In Ram Chunder v. Choonedal, 12. B. L. R. 35 (1873), it was quirred whi that the I ractice was correct according to with ma sunt brought by a firm, one partner couli, without special leave verify on behalf of its

co jartners
(11) Delhi and Lon lin Bank i Ol ll ai
21 (60, 8 c, 20 l | 1 | 13 l, 112 (18 ll)
(12) lin the goods of Avd ill 26 C | 10 l

⁽¹⁵¹⁾ (13) Kastelmor Rustomp, 1B 163 (1880)

opposite side, but it is not necessary (1) and is certainly not required (2) The substantial portion of the plant consisting of the statement of the claim of the plaintiffs and the prayer, was written upon two slicets of plain paper and verified by the plantiffs Subsequently to the affixing of the plaintiffs' signatures a front sheet, consisting of a piece of stamped paper with the name of the Court and the names and addresses of the parties was added, and the plaint thus composed filed in Court Held, that the verification was defective, but that the suit ought not to have been dismissed. The plaintiffs ought to have been allowed an opportunity of amending the plant by making a proper verification (3) The rule does not require the verification of a plaint to be made in the presence of in other of the Court, but having regard to the necessity of satisfying the Court that the person other than the plaintiff who verifies the plaint is acquainted with the facts of the case, it has in one case been said to be dear able that a verification by such a person should be made in the presence of the Court unless the Court be satisfied that there is sufficient ground for dispensing with his attendance (4) Persons exempted from attendance are not excupted from signature or verification except the Court allows it for good cause and then the party verifying should be one proved to the satisfaction of the Court to I e acquainted with the facts of the case (5) When an application is made for verification by an attornoy it has been said to be desirable though not necessary that notice should be given to the other side (6) If a written statement is admitted on the record without verification the allegations contained in it should be noticed and a sucs framed accordingly (7)

Objections to verification—Objections to verification should be taken before the settlement of issues—after that the case should be disposed of on the merits and not dismissed for insufficient verification (8)

Mode of verification — It was held under the last Code that in all cases whether the plaint is verified by the plaintliff or by some other person the person verifying should state shortly what paragraphs be verifies of his own know ledge, and white paragraphs he believes to be true from the information of others (9). In the first Allahabad case etted a verification in the words "to the limit (or extent) of my knowledge the purport of this is true was hid to be bad, and the Court observed that the verification must be if all the facts are to the knowledge of the deponent a distinct verification that they are to his knowledge true—and that if he has knowledge as to some in I only information and belief as to others the verification should show as to which he speaks from his knowledge and as to which he speaks from his

⁽¹⁾ Finlay : Steele 1 Ind Jur N S 39 (1862)

⁽²⁾ Puddomonee Dassee v Shama Churn 1 Ind, Jur N S 226 (1862)

⁽³⁾ Fatch Chan It Mansab Rat "O A 442

⁽⁴⁾ Kastolino v Rustomji, 4 B 468 (1880) (5) Kinoo S ng v Eshan Chunder 2

Wym, 253 cited in O kinealy
(b) Finlay Campbell & Co : Steele 1 In 1

Jur N S 39 (1866)

⁽⁷⁾ Radha Churn Roy v Moran & (o 13 W R 342 (18 0)

⁽⁸⁾ Shama Soonduree : Rohimoo Ideen 24 W R 71 (1875)

⁽⁹⁾ Upendro Lall Bose, 6 C. 675 (1881)

Girdhari & Kanhaiya Lal 15 A, 59 (1892) Raj & Ram v Katesar Nath, 18 A 3,16 (1856)

Fide to same effect Bibee Solo nan : Abdool

mformation and behef" In the last Allahabad case cited, the ventication was in the following form . "The contents of the petition of plaint are true to the best of my knowledge and behef," and a Full Bench of the Court held that although the verification was not in strict comphance with the Code, it substantially complied with it A failure to distinguish in the pleading between the facts stated on personal knowledge and those stated on information and belief must of necessity defeat to a great extent the object to be attained by verification, unless the person verifying is held to have made every allegation upon personal knowledgo. The rule has now been amended in accordance with these rulings and governs all pleadings. A verification to the effect that the contents of the plaint are substantially true is not sufficient (1) as it con tains a qualification which is a material departure from the requirements of the Code (2) If an attorney, having obtained leave of the Court for that purpose, means to verify the plaint himself, he should sign the verification on his own account, and not as the plaintiff sattorney, but if he means to sign the verification merely as the plaintiff's attorney, the plaintiff himself ought to see the plaint and verification and authorize the attorney to sign the verification for him (3) The General Rules of the North-Western Provinces (4) and Calcutta High Courts (5) provide that all verifications "shall correctly specify the date and place at which they are signed" This rule has now been embodied in the third clause

Course to be taken when verification defective -If the verification of a plaint is discovered to be defective at any time whilst the suit is before the Court of first instance the plaint may be amended by the Court (6) If such defect be not discovered until the suit comes on appeal before an Appellate Court, such Court may, if it thinks fit, return the plaint to the Court of first instance to he amended by it But where the defect is such that it is covered by the provisions of sect 99 ante, there is no necessity for the Appellate Court to take any steps to procure the amendment of the plaint In any event a defect in the verification of a plaint will not of necessity result in the dismissal of the suit (7) or in its being decreed (8)

The Court may at any stage of the proceedings order to plead be struck out or amended any matter in any pleading which may be unnecessary or scandalous ings or which may tend to prejudice, embarrass or delay the fair trial of the suit

Striking out pleadings-This is a general provision, taken from O XIX r 27 of the English Rules, for enforcing the preceding rules Its

⁽¹⁾ Waggoner v Brown, S How Pr 212 (Imer)

⁽²⁾ Hukm Chand, C P C 624

⁽³⁾ Upendro Lall Bose 6 C 075 (1581) (4) Rule 11, cited in Hukm Chand, C P

^{(123} (5) Pule 6

⁽⁶⁾ Under the former Code at was held, having regard to the provisions of sect 13 of

that Code that the erder for amendment coull not be made after the settlement of 183ues Baroda Prosad Bose v Griyanath R) Chowdhury 2 C L, J 11 (1901)

⁽⁷⁾ Rajit Ram + Kitesar Nath 18 1 336

⁽Ib #)

⁽⁸⁾ Rustun Gazi > Lars Ir suma Chowl hum 11 (W N 871 (1 607)

language is wide, but its operation has in England been to some extent limited by the decisions given on it Although the rule expressly states that the order may be made " at any stage of the proceedings." still the application should always be made promptly, and as a rule before the close of the pleadings, or the Court may, in its discretion, decline to exercise its jurisdiction (1) that the Court is not to dictate to parties how they should frame their cases, is one that ought always to be preserved sacred. But that rule is, of course, subject to this modification and limitation, that the parties must not offend against the rules of pleading which have been laid down by the law, and, if a party introduces a pleading which is unnecessary and it tends to prejudice, emharrass, and delay the trial of the action, it then becomes a pleading which is beyond his right "(2) A reasonable latitude must be given (3) Not every pleading which offends against the rules will bo struck out The applicant must show that he is in some way preindiced by the pregularity Still, "the defendant may claim ex debito justifies to have the plaintiff's case presented in an intelligible form, so that be may not be embarrassed in meeting it (4)

"Unnecessary."—The word "unnecessary" was introduced into tha Enghsh Rule in 1883. But the mere fact that an opponent's pleading contains some unnecessary matter is not sufficient ground for an application under this rule. A statement will not be struck out merely because it is unnecessary, so long as it is otherwise harmless [5]. It is no part of the defendant's duty to reform the plaintiff's pleading or to dictate to bim how be shall plead, or time tersa. But if wholly immaterial matter be set out in such a way that the applicant inust plead to it, and so raise irrelevant issues which may involve expense, trouble and delay, then the irrelevant matter will be struck out, as it will prejudice the fact rule of the action.

"Scandalous"—As regards "scandalous matter, the Court has a general purisdetion to expunge it in any record or proceeding (6) and apparently, according to the English practice, any person may make the application (7) Allegations of dishonesty and outrageous conduct, etc, are not however, seemedalous if relevant to the issue (3) "Nothing can be scandalous which is

- (1) Cross v Howe, 62 l. J Ch. 342 Seo Annual Practice, from which following notes are taken, and see the New Hening etc, Co t Kessowji Naik, 9 B 373, 381 (1884)
- (2) Per Bowen, L. I. in Knowles e Roberts, 38 C. D 2"0
- (3) Tomkinson : S E Ry Co. 57 L T
- (4) Per James, L.J., in Davy : Garrett, 7 C. D., p. 486, and see Watson : Rodwell 3 C. D 380
- (5) Per Chitty, J., in Rock : Purssell, 54 L. F. Jo. 45, see the remarks of hav, J., in Tomkinson t. E. Ry Co., 57 L. T., p. 500, and Hocking t. Co. r. Hocking, 3 R. P. C.
- 231, and see as 10 pri haity an lirrick an 1phasaldal Day v. Erm arm., 3 B. L. R. Viph 12 (1950). Acshadpt Nask v. Nasarsan, 1 Ardessp. 10 B. H. C. H. 4. (1873). Small wood v. Parry, 1 Corpton 3 v (1884 5). The New Flemin, 5 pinning, etc. Co. v. Kessowp. Nask. 9 B. 373, at p. 331 (1885). Bookee Single v. Hurubuna Narain Su., h. 7 W. R. 212 (1987).
- (6) Sion 31 Evin in bills of cost, re Miller, 54 L. J. Ch. 205.
 - (7) Cracknell r Janson, H C. D p. 13.
 (5) Frentt r Prythergeh, 12 Sun. 303,
- Rubery v Grant, L. R. 13 L 443.

relevant "(1) "The mere fact that these paragraphs state a scandalous fact does not make them scandalous" (2) But if degrading charges be made which are irrelevant, or if, though the charge be relevant, unnecessary details are given, the pleading becomes scandalous (3) The sole question is whether the matter alleged to be scandalous would be admissible in ovidence to show the truth of any allegation in the pleading which is material with reference to the rehef prayed (4)

"Tend to prejudice, etc."-The Court is "disposed to give a liberal interpretation" to the words "Tend to prejudice, embarrass or delay the fair trial of the suit" (5) At the same time parties must not be too ready to find themselves embarrassed If the defondant does not make it clear how much of the plaint he admits and how much he denies, his pleading is embarrassing (6) If he does not make it clear whether he is traversing the allegations contained in the plaint, or objecting to them on a point of law his defence will be struck out as embarrassing (7) In neither case could the plaintiff safely join issue So a plea of justification is embarrassing if it leaves the plaintiff in doubt what the defendant has justified and what he has not (8) But mere probably is not embarrassing (9) Nor will a statement be struck out as embarrassing meiely because the other party declares that it is untrue (10) The mere fact that ? Statement of Claim embraces several causes of action is not, according to English practice, ombarrassing, if they are distinctly pleaded in the alternative A claim for alternative relicf is not embarrassing (11) So any number of meon sistent defences may now, in England, be pleaded to the saure cause of action, and their inconsistency is not "embarrassing to the pleader (12)

But if a claim against executors personally in their private capacity be improperly joined with a claim against the estate of their testator, it will be struck out (13) So whore several plaintiffs or several defendants are improperly joined in one action, though the causes of action he separate the pleading will he struck out (14) Where a pleading is defective only in the sense that it does

the cases are cited

⁽¹⁾ Per Cotton, L J, 10 Fisher : Owen, 8

C D p 653

⁽²⁾ Per Britt, L.J., in Millington + I oring 6 Q B D p 196

⁽³⁾ Duncan v Vereker (1876) W V 64 Blal o v Albion Assurance Society 45 L J C P 663, Lee t Ashwm, I fime | Rep 291, McGuckin t Ralli, 94 L. P Jo 12, Covle t (uning, 27 W R (Fig) 529

⁽⁴⁾ Selbourne, L.C., in Christie : Christie L. R S Ch. 199, Cushin r Cradock, 3 C. D 176, Whitney r Moignard, 21 Q B D 630

⁽⁵⁾ Berdant Greenwood, J Lx. D , p 256 (b) British Land Association : Poster, 4

limes Rep 571

⁽⁷⁾ Stokes v Grant, 1 C P D 25 (8) Flemmy r Dollan 23 Q B, D 388,

and see Davis e Billing, 8 Times Rep. 58 (1) Weym uth a Rich 1 Times Rep. 609 Heap's Mairis, 2 Q B D 650

⁽¹⁰⁾ Per Bramwell L.J., in Lurquan i

Raron 40 L 2 p 544 (II) Bagot : Liston 7 C D p 8

⁽¹²⁾ Re Worgan 35 C D 492, Berdan t

Greenwool 1 Fx D 251, 255 (13) Whitworth v Darbishur, 11 W R

⁽Lug) 317 (81 1 216 for that Is contrary to O 18 r 53 of the Loghish rules (14) Smath + Ribardson + C P D 112,

Sandes v Wildsmith (1633) 1 Q B 771, Smurthwarte . Hannas (1891), 1 C. 494 . Sadler : to W R3 to t Midland R3 to (18 H) 1 (1.0, Gower : Couldredge (1838), 1 Q B 118, Strond : Lawson (1535), 2 Q B 41 Walters : Green, 2 Ch. 636 (1519). Frankenburg : Gt Horseless Car-

tiago Co (1900) 1 Q B 301, Krnt (al Co s Martin, 16 I imes Rep. 186 and seen fed to Innual Practice () lb ir],], where all

not cont in particulars which it ought to contain, and thus deprives the opponent of information to which he is entitled, it is not "embarassing" in the strict sense of the word (though that epithet is often applied to such a pleading),(1) and application should now be made for "a further and better statement of the nature of the claim or defence" under r 5 and not for an order to strike out the pleading under this rule

17. The Court may at any stage of the Amendment of plead either party to alter or amen such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controlersy between the mutics

18 If a party who has obtained an order for leave to amend to fail to the summer to amend after does not amend accordingly within the time order limited for that purpose by the order, or if no time is thereby limited then within fourteen days from the date of the order, he shall not be permitted to amend after the expiration of such limited time as aforesaid or of such fourteen days as the case may be, unless the time is extended by the Court

Former and present provisions—The present rules are in very much intergeneral terms than sect 53 of the last Code which they replace. Clause (a) of that section delly with rejection of the plaint for want of cruse of action likis provision has now been referred to O VII r 11 Clause (b) dealt with return for amendment under extrain circumstances which are expressly stried (i) (ii) (ii) and (iv) as to which see jost. This return was before the settle ment of issues. Clause (c) dealt with amendment by the Court at any time before judgment. The section also contained the important qualification that no plaint should be amended either by the Court or by the party so as to conveit which of one character made as each of smoother and important character. Before pointing out the extended scope of the present Code, and for the better under stunding off the a detailed examination of the former provisions is given.

Return for amendment by Court of First Instance under former Code—1 pluntift (2) might himself apply at on before attlement of issues that the plant which he had filed be returned to him for amendment if he per coved that it was defective formally or required amendment as regards substance or rehef. An application was generally though not of necessity made on petition (3) supported by an affidavit (4) showing the grounds on which

⁽¹⁾ See Philips v P 4 Q B D p 139 Harris v Jenkins 22 C D 481 Davis v James 26 C D 778

⁽²⁾ See Delhi and London Bank t Miller 7 B L R App 65 (1871) Shib Kristo t Abdool 5 C at p 604 (1873), Modhe t

Dongre 5 B 609 (ISSI)

(3) See Gobind Chandra : Ganga Dye 7

B L. R 333 (1871)

⁽⁴⁾ Della and London Bank r Valler, supra

it was made. It is submitted also that notice should have been given, though it has been held that if a party has notice of the suit but does not appear, the fact that the plaint was under such circumstances amended without notice to hum did not nullify the decree thereafter made (1) A defendant (2) might similarly apply If neither party applied, the Court might, under clause (b), of its own motion in the specific cases therein mentioned, return the plaint to the party to be amended by hin so as to remove the particular objections which might exist to it The party himself then amended his plaint But under clause (b) the plaintiff need not have amended at all after the plaint was returned to hun, but if he did not he incurred the penalty of sect 54 (3) The Original Court could not, unless acting under the orders of an Appellate Court, return a plaint after settlement of issues, for after that period the power to amend was with the Court alone, (4) but if the plaint required amendment and the fact was only discovered after issues had been settled, the Court could amend the plaint at any time before judgment (5) It was apparently not intended by the Legislature that any necessary amendment should take any form other than that of an amendment in writing on the face of the plaint, and the Court was not competent to order an amendment so is to require that a plan should be appended to the plant (6) Straight, J. incidentally expressed an opinion that a plaint after being once returned for amendment and amended accordingly, could not be returned again for amendment (7) In cases in which leave under the Charter had to be obtained prior to the institution of the suit no such amendment could be allowed as would introduce a new cause of action, for the grant of leave must be taken to relate to the suit as put forward in the plaint on which leave is endorsed by the Judge accepting it (8) When a plaint was returned a time had to be fixed within which the amendment must be made (9) Tho Court, however, had a discretion to extend even after the time originally fixed for amendment had expired (10) If the plant was not unended within the time fixed it was reserted under sect 54 (d)

Clause (1) of sect 53 of former Code —A defect in the verification of a plaint did not of necessity result in the dismissal of the suit (11) Before the

⁽¹⁾ Sadho : Golab, 3 C W V 375 (1817)

⁽²⁾ See Damodir Das i Gopal Chind 7 V. 79, at p. 83 (1884). In Mathapper Mutha 27 M. 80, 84 (1903). Sir V. White C. J. houcker, said. The Cede apparantly does not contemplate an application by a party that a plaint be amended and proceedings stayed till the amendment is made.

⁽³⁾ Rupt Ram v Katesar Nath 18 A 396 (1540)

⁽⁴⁾ Bull Nath & Chowaro, 26 A 218 (1903) [misjoinder of causes of action], and see notes post, O VII r II, Rejected (5) Rapit Ram & hatevar Nath, supra

⁽⁵⁾ Rapt Ram c Katesar Nath, supra See Sasi Blin in c Risik, 17 C W N 201 (142)

⁽⁶⁾ Clenbrasa / Rudrapa 14 B '91

⁽⁷⁾ Bade un mac (Multimut 1 2 1 (7)

<sup>(1850)
(8)</sup> Rampurtab + Premsukh, 15 B 13

<sup>(1890)
(9)</sup> See Ismail & Arumuga I V II C R

^{127 (1863),} and the same rule of thes to a memorandum of appeal Shee Partable \$100 Ghelim 2 1 877 (1880)

⁽¹⁰⁾ Blingwand'rs Bagla r Han Abu, 10 B 261 (15 H)

⁽¹¹⁾ Rapt Ram e Kates et Nath 18 A 3 86 (15 86) In Shama Soonduree e R dimesel deen, 21 W R 71 (1875), where a venteati it was false, the suit was held to leve been

settlement of issues the plant should have been returned for amendment, and if the venification was discovered to be defective at any time whilst the suit was before the Court of first instance, the plaint might he amended by the Court Heach defect was not discovered until the aute came in appeal before an Appellate Court, such Court might, if it thought fit return the plaint to the Court of first instance to be arrended by it. But where the defect was such that it was covered by the provisions of sect 578 of that Code, there was no increasity to take any steps to produc the amendment of the plaint (1). The Allahal at High Court has in some cases remanded the case under sect 562 of the firmer Code with an order for the return of the plaint to the plaintiff for duly against and verificial the same (2).

Clause (li) of sect. 53 of former Code—See as regards clause (ii), O MI, it I 6, oth. The general intention and meaning of a plaint should be regarded, and it should not be retuined for want of correctness upon grounds of shight and numerical mustake (i). If a plaint was defective in form or wanting in precision it should be retuined for amendment and not repeated (i). Under the rules of the Pumple Ping Court am attempts should be made to remove analyzation. The Pumple Ping for meandment (f). For an instance of a plaint containing particulars other than those required see the case cited below (6) in which the plaint was argumentative and refused to evidence, and contained a pracer for the cruminal prosecution of the defendant Where the plaint disclosed a cause of action, but not with sufficient fulness, it might be returned for amendment or amended, but if this was not done the plaintiff was at liberty to prove any cause of action not meanissent with the plaint (7).

Clause (iii) of sect 53 of former Code.—See as to non joinder and majoinder. O II is 1-7. The Court might return for amendment, but a pirty was not to be prejudiced because the Court had in its absence mailstriculty admitted a plaint which was multifarious. The defendant hid a right on a motion to take the plaint off the file to raise the question of misjoinder of causes of action before or at the settlement of issues (8). If the cause for suing one defendant was different from that for suing another, the plaint should have been returned for amendment. In the exist of serious

wrongly dismissed the defendant having admitted a considerable portion of the plaintiff's claim and taken no objection to the verification. See also Roy Wohun t

Bulioo Soonduree, 10 W R 145 (1868)

(1) Rajit Ram t Katesar Nall, 18 A 396
(1896), foll, Chandi Mal t Down Single

^{18.6} P P No 48
(2) Fatch Chand v Mansah Rai, 20 A 442
(18.7), and cases therein cited

⁽³⁾ See Museome Bank t Barlow, 9 A 158 (1856), and in examining the correctness of a plaint the allegations, if in the present tense, must be deemed to relate to the date of

verification Prindle 1 Caruthers 15 V 1 425 (Imer.), cited to Hukin Chand C P (

⁽⁴⁾ Pitambur Mookerjee v Hurce Marsin, 1564, W R 50

^{(5) 5 2,} r 1 (1), cited in Hukm Chand,

C P C 631 (b) Bishen Sahaye (Beer Lishore, S W R

^{296 (1667),} and as to prolimity, ib , and notes to O VII or 1-6

⁽⁷⁾ Luckine Prea : Brindabun Dey, 12 W R 313 (1869)

⁽⁸⁾ Ram Dyal : Ram Doolal, 11 W R 273, 275 (1869)

multifarronsness being discovered at the first hearing, the Court might, on the defendant's application before any evidence was recorded, require the plaintiff to elect which cause of action he would proceed to trial upon, and should direct the remainder of the claim to be withdrawn and the plaint amended accordingly (1) Whilst the Court could not return the plaint after settle ment of issues it might amend it at any time. If there were misjoinder of causes of action the plaint might be amended by striking out the part which was not properly joined (2) Where there was imagoinder but the first Court proceeded to trial, not having returned the plaint for amendment or amended it, it should dispose of the case on the merits (3) There was nothing in the Code to warrant the proposition that when a Court of first instance decided a question of misjoinder in favour of the plaintiff there was an end of the matter, and the defendant was precluded from raising the question in appeal (4) Where, however, a suit was not objected to on the score of misjoinder of causes of action at or before the settlement of issues in the Court of first mstance the Court seeing, in second appeal, that the suit had proceeded through three Courts, did not feel justified in dismissing the smt (5) The Appeal Court mucht dispose of the suit in the mode in which the lower Court ought to have disposed of it if it had held as it ought to have done, that there was a misjoinder and might direct that the plant be returned for amendment (6)

Clause (IV) of sect. 53 of former Code.—See notes to O II r 1, ande

Amendment by Court under clause (a) of former Code—This clause did not form part of the Code as enacted in 1887, and together with the words "at or 'in clause (b), was introduced by sect 9 of Act VII of 1888 (7). The words "at any time before judgment mennt substantially the same as the words "at any stage of the proceedings" in the corresponding English rule, O 28, r 1 under which leave to amend was refused after judgment, but an amendment might be made at any time so long as anything remained to be done in an action, though it be only the assessment of damages, and even on an application for a near trial (8). Under clause (c) the Court itself might amend at any time before judgment but not after (9). The plaint still remained on, and was part of the file, although the Court might depute any person selected by it to take the plaint for example, to a pardamashin woman who was plaintiff, or to a person who through illness was unable to ittend Court for the purpose of its order being complied with. Any amendine inder such circumstances would be an amendment by the Court itself. Under

⁽¹⁾ Instructions to Judicial Officers (Panjah Chief Court), s 2, r 1 (m), s 2, r 31, Hukm Chand, C P (432

Hukm Chand, C P (432 (2) Cutts t Brown, 6 C 328, at p 332

⁽¹⁸⁸⁰⁾ (3) Kishna Ram t Rakmini Sewak, 9 A.

<sup>221 (1887)
(4)</sup> Muthappa z Muthu, 27 M. 80, 85 (1903) See now, post

⁽⁵⁾ Sanna : Ganapa, 5 Bonn L. R 185 (1903)

Lingammal v Venkafammal, 6 M 233 (1882). Ramanuja v Devanayka, 8 M. 361 (1885). Sahma Bibe v Sheikh Muhammad, 18 A 131 (1895). Rajjo Kuri v Debi Dial,

 ¹⁸ A. 432 (1896)
 (7) See for the earlier law, Damodar r
 Gopal Chand, 7 A. 79 (1885), Modhe i

Dongre, 5 B 609 (1881) (8) Annual Practice, 1905, p. 256.

⁽⁹⁾ Percival t Collector of Chittageng, 30 C. 516 (1900)

this clause the amendment was mide by order of the Court, and the party had to comply with it Further, if the amendment was one going to the maintenance of the suit and the defect in the ulant was not discovered until the suit not into a sinerior Court on appeal, the Appellate Court could either order the amendment to be made in that Court, or, for example, in a cise in which there had been not only imstounder of parties but mistounder of causes of action the Annellato Court night order the Court of first instance to do what it ought to have done at the proper stage of the suit when the suit was before it, and return the plaint to the parties so that they much make their election as to which of them was to continue the suit, and mucht make the necessary amendments (1)

Amendment by Appeal Court under former Code -It was held under the Code of 1882 that an Appellate Court had power under seet 584 of that Code, read with sect 53, to allow an amendment of the plaint (2) Tho Appellate Court night itself have made the amendment or directed the lower Court to do so There are many cases in which amendments have been allowed on anneal, and suits have been remanded (3) for re-trial on amended plaints (4) The High Court, in special appeal, has also directed the lower Appellato Court to amend the plaint by the insertion of a prayer for declaration

(1) Rant Ram : Katesar Nath. 18 1 396 (1896), in which an amendment under tlauso (c) is distinguished from that under clauso (b)

(2) Rajah Peary Mohan t Narendro hrishna, 5 C W N 273 (1900) [on appeal to Privy Couned, 37 I A 27 (1909), 37 C 2291, whether leave to amend was asked for in the Court below or not . though according to English practice leave is not readily granted in appeal if not asked for in Court of first instance Annual Practice, 1905. n 356 , though this is a matter which in each case must be determined on its own erroum stances see Ecklin 1 Little, 6 Times R 366. post The Appellate Court may similarly amend the memorandum of appeal Percival t Collector of Chittagong, 36 C 516 (1990)

(3) The view expressed by Rampim. J. in Dham Ram v Bhagirath, 22 C at p 714 (1895), that an amendment cannot be made which involves a remand, and that a remand is not justified except in the circumstances mentioned in ss 562 or 566 of the former Code has not been accepted. There are some observations, however, in Bai Shri Manraba t Maganial, 19 B 303 (1894), but these and some others as to the powers of an Appellate Court were not necessary for the decision, the basis of which was that the character of the suit had been changed And

see Langammal : Venkatammal, 6 M. 239. 244 (1882), m which it was said that the Appellate Court should dispose of the suit in the mode in which the lower Court quebt

to have disposed of it

(4) Rajah Peary Mohun e Narendro Krishna, 5 C W N, at p 279, and cases there cited, and Ram Doval 1 Rajah Ojoodhia, 25 W R 425 (1876), Sardarsingu v Gannatsingii, 14 B 395 (1885). Karimbhas v Conservator of Forests, 4 B 222 (1879) . Milkanthappa v Magistrate, etc. 6 B 760 (1880) . Balaram : Magistrate, etc. 6 B 672 (1882), Joseph v Solano, 18 W R 424 (1872) . s. c. 9 B L R 441 , Lingammal t. Venkatammal, 6 VI 230 (1882) This has been done in special appeal. Dahoo v Lawa, 11 W R 223 (186J), Dham Ram v Bhagarath 22 (692 (1895) Ganpati, 5 B 181 (1880), Radhalai t Shamray 8 B 163 (1881), Thakur Raghu nathu e Shah Lal, 19 A 330 (1897), Hari Gopal t Gokaldas, 12 B 158 (1887) . Narasunha t Suryanarayana, 12 M. 481 (1589), Shyam Chand t Land Vortgage Bank, 9 C 695 (1883). Scshamma r Chennappa, 20 M. 467 (1897) . Krishnaji e Sitaram, 5 B 496 (1880) , and oven in the most advanced stage of the suit before the Privy Council Mohummed Zahoor r Rutta Koor, 11 M. I A. 468. 157 (1867)

of the plaintiffs' right and to ie hear the appeal (1) It has, however, been said to be undesirable to allow amendment in second appeal when the plaintiff has in two Courts never contemplated it, and has even gone so far as to persist ently maintain his case as originally brought (2) Amendment has been refused with reference to a state of facts occurring since the decision by the original Court (3) Amendment has also generally been refused where the plaintiff persisted throughout that the suit as framed was maintainable, and permission to amend was not asked for in the lower Court (4) In a case where no amendment was asked for and refused in the Court of first instance, but, on the other hand objection was taken in the lower Court, and the plaintiffs elected to take an issue and to allow the suit to proceed subject to the risk of an edverse decision "It is true that, as a general rule, the plaintiff may be per mitted even, on appeal, to amend the plaint when he had framed it bona fide under a mistake or erroneous advice and the other party could be adequately compensated by an award of costs, but it must be observed that when such amendment might possibly create a necessity for fresh written statements and for fresh issues, and practically amount to a trial de novo from the commeacement, it is much more convenient to leave the plaintiffs to the liberty of meintaining a suit for ejectment, so that the opposite party might in no way be prejudiced in his defence or harassed with a second trial of the same suit " (5) The stage of the proceedings, whether in the original Court or Court of Appeal, at which an application for amendment is made might effect the question whether it should be granted as to which, see post

Proviso to sect 53 of last Code —The object of this proviso was only to prohibit amendments which involved the trial of issues substentially different from those raised by the original pleadings (6) See notes on "Change of character of suit" post

Present provisions as to amendment—R 16 is taken from Fighsh O 16, r 27, and rr 17 and 18 from O 28, rr 1 and 7 The latter rule provides that on failure to amend the order for amendment becomes void R 18 more specifically states what the effect of a failure to amend is From a review of the preceding case law and the provisions of sect 53 of the last Code, it will be seen that the present powers of amendment are given in much wider terms. Amendment may be either by the party or by the Court. No mention is made of return for amendment, but this may take place where the party applies or is directed to make an amendment. No

(1903)

Narasimha i Suryanarayana, 12 M 481
 Seshamma i Chemiappa, 20 M 467
 Seshamma i Chemiappa, 20 M 467

⁽²⁾ Surendra Naram r Bhai Lal 22 C 762, 7 6 (1894), however, m f ekhin r Lattle, 6 Fines R 366, it was held that the C A had power to amend even where the C at 1 ofkered have and the offer v

⁽³⁾ Covm la + Perun (1882) ~

^{588 (1897),} Obhoy Goband v Hurychurn 8 C 277, 278 (1882) In Durga Prosad t Nava zush, 1 A 691 (1878), the Court refus 1 to allow an amendment as the planntif should have offere 1, but the not, to pay the sur which he subsequently offered to do when to

A tray that Shankumi, 15 M 200, 207

Lakel 1 Nagt Red h, 28 M a00

timo is fixed as to when the amountment may be made. It may be "at any stage of the proceedings. As to the meaning of this term, tide ante. Amendment by Court ' Amendment may be by the Court of first instance or uppeal, though the principles man which the Appellate Court will proceed in such cases are in general those stated. As regards missonnder, see now O I r 13, O 11 1 7, and sect 99 As to amendment of applications for execution, see O XXI r 17 An extremely important amendment is the omission of the provise in sect. 53, a matter which is dealt with next as are also the general principles on which amendment will be allowed. It may be broadly stated that in all eases where amendment has bitherto been allowed it will be permitted now, and that in many instances in which it has been refused it would be allowed under the present provisions the object of which is to extend to India the liberal principles which govern English Courts under which all such amendments are made as are necessary for determining the real questions in controversy between the parties subject to certain qualifica tions which are hereinafter stated

Case desired to be made must be raised. In the first place a question not raised by the plant ought not to be decided by the Court (1) The Judicial Committee has held (2) that though it is disposed to give a liberal construction to pleadings in Indian Courts so as to allow every question to he raised and discussed in the suit yet a plaintiff cannot be entitled to rollef upon facts and documents neither stated nor referred to in the plordings. The determination in a cause must be founded upon a case either to be found in the pleadings or involved in or consistent with the case thereby made (3) Even where it was around that the plaintiff had been misled by various representations made by the defendant into framing his suit as it was then framed the Privy Council said that even if that were so it would not empower them to depart from the rule which has always prevailed that a man must recover according to his allegations and his proofs and that it would not enable them to allow an entirely new case to he brought forward which was not set up or hinted at in the plaint (4) I urther it is to be noted that stricter rules as regards pleading are enacted by the present Code

Matters in dispute should be ascertained not only from the plaint and maker, but also at the first hearing of the suit when issues are settled—and any indistinctness in the form of the plaint does not require that a decision come to upon issues fixed in the lower Court between the parties should be

⁽¹⁾ Lahr v Gungaram, 2 B R. C R. A.C J 176 (1864)

⁽²⁾ Mohummud Zahoor t Mussi Thakoor rance, 11 M. I. A 468 (186")

⁽³⁾ Vylapore lyasawmy c Neo Kay 14 C. 801 (1887), 8 c, 14 I A 168, Eshen Chunler : Sharia Churn, 11 M. L. A 7 (1807), Amerro-mssa r Medoomssa, 41

T. A. 100 at 1 10 (18 5) A plaintiff is only entitled to suiceed upon the cause of action alleged by 1 min it is plaint. She Prasade Laht Kuar 18 A 403 (18 40) disc from Chimnan Chimnan 17 B 3 56 (18 42)

from Chimnagi e Sakharam 17 B 3 \$\infty\$ (18 (2))

(4) Gopeo Lall r Musst Sree Chundraolee,
19 W 18, 12 (18 \$\text{L})

cases the Judge will require evidence that the party applying to amend could not with reasonable dibgence have discovered the use facts sconer (I) Where the amendment has become necessary by reason of a variance between the statement of claim and the evidence given at the trial, it should be asked for at the conclusion of the plaintiff's case (2) After all the evidence on both sides has been taken, leave to amend will, as a rule, be refused (3) If the defendant is not present at the bearing, it has been held in England that notice must be given him of the application to amend (4) Unless the pleading is amended, the plaintiff cannot have judgment for more than the amount named in it (5)

After the hearing, and after judgment, the Court has no power to amend After an interlocutory judgment, or a decree in an Admiralty action which determines habitity but leaves the damages to be assessed, the Court still has power to amend the pleadings, (6) and even to add or substitute parties (7) As to amendment in appeal, side ante

General principles on which leave to amend is refused—The following are some of the principal grounds on which the Courts in their discretion may refuse leave to amend (8). Where the amendment desired could not be made without prejudicing the defendant in such a way that he cannot be recouped by costs, (9) and where a right accrued might be prejudiced (10). Thus, though it was under the last Code broadly held that a Court was not piecluded from allowing an amendment by the circumstance that at the time of the amendment a suit for what was added by the amendment would be barred by limitation (11) the general rule was that a plaintiff would not he allowed to amend by setting up fresh claims in respect of causes of action which have, since the institution of the suit, become barred, (12) though peculiar circumstances might take the case out of the ordinary rule, (13) and the Privy Council have actually allowed an amendment on the ground that, if the plaintiff were left to bring a fresh suit, it might be met by a plea of limitation, a defence which, under the circumstances of the case, was considered

⁽¹⁾ Moss : Malings, 33 C D 604

⁽²⁾ Ramy t. Bravo, L. P. 4 P C 287

⁽³⁾ I'derain t Cohen, 43 C D p 190 (C A), Jamest Smith (1801), I Ch 381 389, Shib harsto t blood, 5 C 602 (1870), where Wilson, J, said "When parties have come to trail to determine which of two stories is true, it would be a diagreous precedent to allow the plaintiff to amend by abanda mig inso on story and adopting that of the defendant, and asking relief on that losting But see Chimnaji r Sakharain, 17 B 3-65 (1892), dissarted from in Sheo Prasad i

Laht Kuar, 17 A 103 (1836) (1) Beckett a Beckett (1951), P. 85

⁽¹⁾ Beckett i Bethe Wall (C. 1), In Irmes

Rep. 165 (6) "The Alert, 72 L 1 124,

⁽⁷⁾ Indicate Peto, 10 I mes hep 133

⁽b) "The Duke of Barel uch" (1842), P 201.

⁽a) Annual Practice, 1 05, p. 350

⁽⁹⁾ Ib Steward : North Metropolitan Iranways 16 Q B D 180, 556

⁽¹⁰⁾ Ann Pr loc cit, and see Raph Rughoonundin : Goj al Chand, 20 W R 17 (1873) In Dilhi and London Bank i Miltr 7 B L R App 65, amendment was allowed as it did not appear that propiles would be cased to the defindants

⁽¹¹⁾ Barkat un urses i Muhammad Asad Mi 17 A 288 (1895) Hert Court has also held that an api he air in having oner been admitted the date of a subsequent amount ment would not by a soon of such amounters. become the date of the application Jewal Dula i Kali Charing, 20 A 178, 180 (1856)

⁽¹²⁾ Weldon t Neal, 19 Q B. D 391, Malik gruns r Pullavya, 16 M 313 (1832); Magapa e Velhan, 18 M 33 (1834)

⁽¹³⁾ Sattarpa t Just, 17 M 67 (15 0).

Dhant Rem c. Bha nath, 22 C at p. 712 (1540)

incomtable (I) In a recent case in the Madras Iligh Court it was held that a is fitten for an amendment of a plaint based on no new facts and asking for a further relief (in this instance, recovers of mones) may be allowed if it is out in before exidence has been taken, and if there is no injustice to the defendants. even when it is borred by limitation between it silate and the date of the plaint (2) Trivial and more technical amendments are discouraged (3). The Court will always consuler the materiality of the termosed amendment, and unless material amendment will not be allowed (1) A sheld delay as not a sufficient ground for refusing leave. But if an application which could easily have been made at a much carbor stage of the proceedings be delayed until after exidence eigen, and a mount of law argued, leave may be refused (5). This principle has been applied to the sunt itself. Where the identiff was culty of delay, and that the suit on the last day but one on which the law of lumitation would permit him to file it am pilment was refused (ii). The apidication may also be refused if the Court is not satisfied as to the truth and substantiality of the proposed amendment. and has reason to think that the application is not an honest one (7)

It has also been said by Lord Esher, M.R., to be "the universal practice, except in the most exceptional cases not to allow an amendment for the purpose of adding a plea of fraud where fraud has not been pleaded in the first instance (8) The circumstances referred to are doubtless those where the plaintiff thoroughly satisfies the Court upon the point why the charge was not made before. It is also a well known rule that a charge of fraud must be substantially proved as laid, and that when one kind of fraud is charged. another kind cannot on failure of proof be substituted for it (9). It was field that a plaint which contained general allegations, but no specific instances of fraud could not be use aded in second anneal (10) and where fraud was charged. but the ant was brought in the wrong form, the Court refused to allow the plaint to be amended as to do so in that case would change the character of the suit (11) Peacock CJ said "We think that it would not be the exercise of a sound discretion to allow a party who relies upon a document to set up a fresh case, where an issue as to the execution of such document is found against him and there are good erounds for believing the document to be a forgery '(12)

(1864)

⁽¹⁾ Mohummud Zahoor t Thakoorance Rutta, 11 M 1 A 468 (1867), referred to in Dhant Ram + Bhagirath, 22 C. 712 (1895); Daumlare Purmanandas, 7B atp 161 (1883). Modhe t Dongre, 5 B at pp. 613, 614 (1881)

⁽²⁾ Sevugan Chetty (Krishna Avvangar, 36 M. 378 (1911) See Kaamiras Rupchand v Rachappa Vithoba, 23 B 644 (1909); Suthi Kuttı t. Achutan Nair, 21 M. L. J. 475 (1911)

⁽³⁾ Annual Practice Cf Nagendrabala t Secretary of State, 14 C L J 83 (1911)

^{(5) 1}b ; James v Smith (1891), 1 Ch 384 (6) Girdharlal v Jagannath, 10 B H C R

^{182 (1873).} (7) Annual Practice ; Lawrence : Norreys,

an C D 213 221 235

⁽⁸⁾ Bentley (Black, 9 1 R 580, m Ruling | Hawkins, 14 P D 50, however, Butt, J at the trial, allowed the plaintiff to amend by adding a charge of fraud with particulars after the defendant, upon whom the burden of proof lay, had been crossexamined and his case closed, vide po t

⁽⁹⁾ Abdul Hossem t Turner, 11 B 620 (1887), s c, 14 1 A 111

⁽¹⁰⁾ Krishnaji v Wamnaji, 18 B 144 (1803)

⁽¹¹⁾ Kunhamed t Kutti, 14 M. 167 (1891). (12) Girdhar Manordas v Dayabhai Kalabhat, 8 B 174, 175 (1882), citing Narainco Dossee t Narrohurry Mohonto, Marsh, 70

Amendment of substance of plaint—An amendment may be sought, either in respect of the substance or form of the plaint, or the parties to the substance or form of the plaint is concerned, the matter has already been dealt with. If, for instance, as regards formal matters, the verification is defective, it will be amended (1) It is the duty of the Court to take care that the plaint, when filed is an accurate and sufficient statement of the essential ingredients of the plaintiffs claim (2) The subject of parties and rehef is dealt with in the following paragraphs.

Amendment as to parties -A plaint which may be amended in substance may require, by reason of such amendment, an amendment in respect of parties So a suit for collision, originally filed as an action in personan against the owners of the ship, has been amended also into an action in rem and the ship added as a party defendant (3) But amendment may have reference to parties only, as well as to the substance of the claim. Where a suit was brought hy several nersons on the basis of a right vested in them jointly and severally the plant was amended by the omission of the names of all th pl untiffs except one (4) The plaint will be amended where there is a change of parties, or the parties are wrongly described (5) But where the defendants were dead when the suit was instituted, the Court, on appeal, refused to amend by instituting the legal representatives, as the defendant was likely to be precluded from pleading limitation, (6) and where the wrong parties were such the Court in the under mentioned cases refused amendment (7) Where A and B sued, and it appeared that A alone was entitled, the name of B was ordered to ho struck out and the suit proceeded with (8) But where plaintiffs suing jointly succeeded only in making out the title of one of them to in undivided moicty the suit was dismissed (9)

I manager of temple for fell in whose name

⁽¹⁾ Tatch Chanda Mansab Ru 20 A 442 (1897)

⁽²⁾ Goland Chandra : Gmon Dhye, 7 B L. R at p 334 (1871)

⁽³⁾ Bombay Persia Navigation Co a

Shopherd, 12 B 237 (1887)
(4) Venkatachalv i Euppussum, 11 M 42

<sup>(1887)
(5)</sup> So Delhi and London Bank v Miller,
18 L. R. App 65 (1871), Muhaminad Yu uf
t Hunalaya Bauk, 18 A. 198 (1849), Acdar
nuth Boss i Prodab Chunder, o Code
(1881), Maharajah of Vizannagrao i
Lakshim Challaya, 12 B. L. R. 413 (1872),
Goband Chandra (Canga Dhye, 7 B. L. R.
333 (1871), Ailkanthapa v Magairait, etc.
o B. 1970 (1889), Balavana t Magairait,
etc. o B 672 (1889), Balavana t Magairait,
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sut brought), Seshamma i Chenappi 20 M 407 (1897) [substitution in second appeal of adopted son is plaintiff]. Here G (id e Geladdas, 12 B 178 (1987) [mattes a lad in

second appeals

(b) Mallikarjuma e Pullagga, 16 M 313
(1892), secolas Magajja, Vellian ISM 31
(1893)

⁽⁷⁾ Soth Dunraj : Hanlan, I A H C, P 204 (1869) In different cause of action was and to be substituted, sint originally against Secretary of State, another party introduced], Nulse of Chundr e Stept us of SW R, 531 (1871) [suit against corperate body, not units corpe rate capacity but threugh an agent], Bublia Soon luree Doorganut 2 W R 97 (1871) [the amendment was said to myelice a material variation of the Hontz

⁽b) Sterram Higher Copacam Bates 11 W R 507 (1814)

⁽⁴⁾ Shee Number of Mak (* m., 20 H. I. 364 (1873).

Amendment as to rehef-In suits under the Code, the Court is certainly bound to take into consideration all the rights of the parties to the suit, whether legal or equitable, and by its decree to give effect to those rights as far as possible, but it should confine itself to granting such rebef as is prayed by the plaint (1) It cannot grant rebel of a different kind from that prayed for, such as could not have been properly granted except on an amendment of the plaint, (2) or change the smit so that the question involved in it is irrelevant to the rehef claimed (3) If, however, the specific right and infraction of it are not altered, the Court may give rehef less than that claimed, or a portion of the rehef claimed (4) The Court, however, whether of first instance or of appeal, has no power to make a decree in favour of the plaintiff beyond the amount stated in the plaint. The plaint may, however, be amended before judgment, so as to enable a Court to pass such a decree (5)

As regards amendment, it has been broadly affirmed (6) that "an alteration in the rehef does not alter the character of a suit " It is perhaps more correct to say that an amendment of relief samply does not generally (7) involve such a change in the suit as to make its character inconsistent in the terms of the proviso of the last Code It has also been held that where the object of an amendment of the plaint was merely to seek rehef ancillary to the principal prayer such amendment did not alter the character of the suit (8) So the rehef for declaration is in most cases for recovery of possession claimed is ancillary to the latter, and there can be no inconsistency hetween the two (9)

The amendment may be in respect of matters occurring before or after suit brought. So as regards the first alternative, where the plaintiff in a suit

- (1) Virasvami t Ayyasvami, I M. H C R 471, 477 (1863)
- (2) Ramchandra t Vasudet 10 B 451 (1886), in which case the lower Court was held to have erred in making a decree for partition in a suit to recover possession from the defendants as tenants under a lease
- (3) Rant Singh t Deputy Commissioner Barabanki, 17 C 144 (1889) s c., 17 J A 54 [Oudle Talukdars , claum 14 proprietors , if not, then alternatively that there was subropintory right] In Mulheda t Ram Churn S C 871 (1882) the plaintiff sucd to recover possession of property on the allegation of purchase and the Court gave him a decree for what he had never asked viz a one lourth share as member of a point family, Balmakund : Bhagyandas, 15 Bom. L. R 209 (1912)
- (4) Pulamada & Ravuthu II M. JI, 97 (1887) [claim for ejectment and injunction, decree declaring plaintiff's right, directing removal of embankments and regulating culin ition], and see Ramelian leve Assules 10 B fol (1881), where it was peinted out

- that the Court could not be held to have merely awarded a portion of the rehef prayed for In a suit for confirmation of possession and to set aside deeds, although the confirma tion was refused, the deeds were set aside Ibakoor Deen t Ali Hossem, 13 B I R 427 (1874), s c, l I A 192
- (5) Pererval t Collector of Chittagon, 30 C 516, 519 (1900) [amendment of memo randum (f at peal) Nathooram : Jardnot Skuner I Coryton 118 (1861 5) except iii the case of mesne profits
- (6) Laymath Das t Salasiv Patnail 30 (505, 808 (1893)
- (7) In Aunhamed : Aulh 14 M. 167 (1500) the Court refused amendment as to do so would be to change the character of the aust but the question as to the change being only in the relief alked was not discussed
- (8) Rajah Peary Mohan i Ara.hna o € W \ 273 (1 40).

(i) Lanko r Valnu, o B la P 32) (1 93) in which case a suit for a mere declara tion was amended into one for possess in

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for pre-emption after filmg his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality, and omitted to claim for a small fraction of the share sold, the plaint was allowed to be amended (1) A change in the rehef asked is generally allowed on appeal, especially by the addition of a prayer for consequential relief in a suit for declaration (2) A plaint in a suit for the cancellation of a deed of gift of certain land has been amended so as to make it a suit for possession of that land after the cancellation of the deed (3) As regards events occurring after suit, the general rule is that the rights of parties must be ascertained as at the date of the action brought, and not with reference to events occurring after the institution of the action (1) But this section does not prevent a plaintiff, who has been ousted after suit brought for declaration of title, from amending his plaint hy adding a prayer for possession, the suit as amended not being inconsistent with the suit as originally framed, both being based upon the same title (5) Where the rehefs claimed and the facts on which they are claimed are stated in the original plaint, this can be amended by addition of further relief if it does not involve adding anything to the allegations in the plaint (6) And where a plaintift filed a suit to obtain a declaration that certain property belonged to his judgment debtor, and that the defendants had no light to it, and, pending proceedings, purchased the property, it was held thit he was still entitled to a declaratory decree, for the change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him (7) But where an amendment rests on an event which did not occur until after the suit had been instituted and had been dealt with by the Court of first instauce and also substantially alters the original cause of action it will be disallowed (8) A mortgagee miy relinquish his claim for sale and ask simply for a money decree Such an amend ment does not amount to a conversion of the suit into a suit of another and inconsistent character (9)

Change of character of suit -So far the matter has been dealt with

⁽¹⁾ Barkat un missa : Muhammed, 17 A 285 (1895)

⁽²⁾ Vide aite, p 677 In Sardarsingji i Gampatsurgi, 14 B 395 (1885), the appeal Court allowed the plaintiff to amend by adding a prayer for an injunction In Karımbhai i Conservator of l'orests, 4 B 222 (1879), a partner sued to establish his exclusive title to partnership property, and the High Court on appeal allowed an amend ment converting the suit into one for dis solution and account, and remanded the case, with directions to the lower Court to make the other partners parties. In innapa e Gampati, 5 B 181 (1500), the suit was for The plant was smended so interest only as to make the suit for account and payment of principal and interest. In laditable Shamras, 5 B 165 (1881), an ejectment suit

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changed into a suit for partition (J) Ghulam Husam i Shahbaz Khin, 1888 P R No 161

⁽⁴⁾ Ramanadan : Pulikutti, 21 M 258, at p 230 (1634)

⁽⁵⁾ Bishop Wellus e Vietr Thostolic Wala bar, 2 V 215 (1679)

⁽b) Sovugani Krishii 122 W L.J 130(1311).

⁽⁷⁾ Wamanraov Rustomy, 21 B 701 (1806) (8) Counda t Perunderi, 12 V 130 (1553) [aut for declaration that alterations male by Hindu willow ucto not his hig of | Luntiff as rovers: mary heir , death : lwif w jan ling appeal, hell, planning could a t

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as a matter of discretion. Sect 33 of the list Code was, however mandatory in this, namely, that no amendment could be allowed which converted a suit of one character into a suit of another and inconsistent character. While the power of the Court extended to the client ition of what was amingnous, to the amendment of what was erroneous, and the supplying of what was defective, it did not extend to the conversion of a suit of one character into another inconsistent with and opposed to it, eg a suit for possession with mesne profits into one for resumption (1) or a claim on contract to one in tort (2)

A number of cases will be found reported (not very profitably) on this point, for it must be remembered that each case is only an authority so far as the same set of facts may (which is unlikely) exist in a subsequent case (3) In some decisions a formal application was made to amend. In others a new case was sought to be argued which, however, could only have been done after an application to amend had been made and granted, and the matter was dealt with as in effect an application to amond, since a decree could only be made on alky itions formally raised at the trial. Further, it is to be noted that the application for amendment was made at differing stages of the suit and under different circumstances, and it may be that as already stated, an application which if made before the hearing would be granted. might, if mide after hearing be refused. Whether an incondinent is inconsistent with the suit as originally framed may be tested by in inquiry into the nature of the evidence to be offered in either case (1) Amendment was not allowed, on the ground that the suit had been changed in the following cases -

Claim for rent on contract, claim for use and occupation, (5) claim for hire of cargo boits, claim for agency account in respect of same , (6) claim for dower on written agreement, claim for same on custom . (7) claim based on den mohur right of widow, claim for decree to extent of rights of widow and her son as heirs. (8) claim is adopted son, claim as heir, (9) claim to recover from defendant money paid by him to X on the ground that such payment was unauthorized, claim for damages for negligence in selecting X as agent for plaintiff, (10) claim that a sale had been made to pay immoral debts, claim that the father could only abenate his own share, (11) clum based on gift by will, claim based on inheritance, (12) claim to set aside ahenation on ground of illegitimacy of party making it claim for same on ground that it was without consent of other heirs (10) claim for a pottule on

⁽I) Gobind Mohapattur : Madhub Per sad, 6 W R 211 (1866), and see Hamilton t Land Mortgage Bank, 5 A 450, 459 (1883)

⁽²⁾ Kasmath : badases, 20 C 500, at p 508 (1893)

⁽³⁾ Gonal Dass A arwallah a Buddree

Dass Sureka, 33 C 657-660 (1906) (4) Ibid, at p 661

⁽⁵⁾ Surendra Naram : Bhai Lal, 22 C 752, 755, 756 (1895), Luckhee Kant : Sumer rooddi, 21 W R 208 (1874), Luchmeeput Doss : Shaikh Fract, 22 W R 316 (1874)

⁽⁰⁾ Shib Kristo Sircar t Abdool Hakeum, 5 C 602 (1879), S C, 5 C L R 455

⁽⁷⁾ Khaja Mahomed : Manija Begum, 14 (420 (1887)

⁽⁸⁾ Umbika Churn t Nadir Hossem 11

W R 133 (186J) (J) Gonco Lall : Sitt Chundraolte, 19

W R 12 (1872), s c A 1 Sup Vol 131 (10) Hamilton : Land Mortgage Bank, 5

A 456 (1883)

⁽¹¹⁾ Sheo Naram : Bhugwan Dutt, 11

W R 10 (1869) (12) Jankee : Jhanjoo 2 1 H R C 407

⁽¹³⁾ bree Pershad : Ray Gooroo, 11 W R 356 (1870)

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... _ero an amendment rests on an event which did not occur until after the suit had been instituted and had been dealt with by the Court of first instance, and also substantially alters the original cause of action at will be disallowed (8) A mortgagee may relinquish his claim for sale and ask simply for a money decree Such an amend ment does not amount to a conversion of the suit into a suit of another and inconsistent character (9)

Change of character of suit .- So far the matter has been dealt with

⁽¹⁾ Barkat un mssa v Muhammed, 17 A 288 (1895)

⁽²⁾ Vide ante, p 677 In Sardarsingji t Ganuatsingit, 14 B 395 (1885), the appeal Court allowed the plaintiff to amend by adding a prayer for an injunction Larimbhai i Conservator of Porests, 4 B 222 (1879), a partner sued to establish his exclusive title to partnership property, and the High Court on appeal allowed an amend ment converting the suit into one for dis solution and account, and remanded the case, with directions to the lower Court to make the other partners parties In Annapa : Campati, 5 B 181 (1880), the suit was for interest only The plaint was amended so as to make the suit for account and payment of principal and interest. In Radhabar 2 Shamray, 8 B 168 (1581), an ejectment suit

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^{1888,} P R No 161

⁽⁴⁾ Ramanadan t Pulikutti, 21 M 288, at p 290 (1898)

⁽⁵⁾ Bishop Melius : Vicar Apostolic Mala bar, 2 W 295 (1879)

⁽⁶⁾ Sevugan v Krishna, 22 M L J 139(1911)

⁽⁷⁾ Wamanraov Rustomy, 21 B 701 (1836)

⁽⁸⁾ Govanda v Perumdevi, 12 M. 130 (1888) [suit for declaration that ahenations made by Hindu widow were not binding on plaintiff as roversionary licir, death of widow pending appeal, held, plaintiff could not

amend and clami pos cssion] (9) Sukhdeo z Lachman 24 A 156 (1902)

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⁽I) Gobind Mohapattur r Madhub Persad, 6 W R 211 (1866), and see Hamilton r Land Mortgage Bank 5 A 4-6, 459 (1883)

r Land Mortgage Bank 5 A 456, 459 (1883) (2) Kasmath z Sadasav, 20 C 505 at p 808 (1893)

⁽³⁾ Gopal Dass Agarwallah : Buddree Dass Surcka, 33 C 657-660 (1906)

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⁽⁵⁾ Surendra Naram v Bhai Lal, 22 C 752, 755, 756 (1895), Luckheo Kant i Sumer rooddi, 21 W R 208 (1874), Luchmeeput Doss i Shaikh Enact, 22 W R 346 (1874)

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⁽⁷⁾ Khaja Mahomed e Manya Begum, 11 (420 (1887)

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⁽¹¹⁾ Sheo Naram : Bhugwan Dutt, 11 W R 10 (1869)

⁽¹²⁾ Jankeo e Jhanjoo 2 1 H R C 407

⁽¹³⁾ Since Pershad t Raj Gooroo, 11 W R 356 (1870)

for pre emption after fibing his plaint discovered that the property in suit had been described by mistake as being of a slightly less area than it was in reality, and omitted to claim for a small fraction of the share sold, the plant was allowed to be amended (1) A change in the rehef asked is generally allowed on appeal, especially by the addition of a prayer for consequential relief in a suit for declaration (2) A plaint in a suit for the cancellation of a deed of gift of certain land has been amended so as to make it a suit for possession of that land after the cancellation of the deed (3) As regards events occurring after suit, the general rule is that the rights of parties must be ascertained as at the date of the action brought, and not with reference to events occurring after the institution of the action (1) But this section does not prevent a planntiff, who has been ousted after suit brought for declaration of title, from amending his plaint by adding a prayer for possession, the suit as amended not being inconsistent with the suit as originally framed, both heing based upon the same title (5) Where the reliefs claimed and the facts on which they are claimed are stated in the original plaint, this can be amended by addition of a further robef if it does not involve adding anything to the allegations in the plaint (6) And where a plaintiff filed a suit to obtain a declaration that certain property belonged to his judgment debtor, and that the defendants had no light to it, and, pending proceedings, purchased the property, it was held that he was still entitled to a declaratory decree, for the change of circumstances brought about by the plaintiff himself purchasing the property did not take away the right to sue which had already accrued to him (7) But where an amendment lests on an event which did not occur until after the suit had been instituted and had been dealt with by the Court of first instance, and also substantially alters the original cause of action, it will be disallowed (8) A mortgagee may relinquish his claim for sale and ask simply for a money decree Such an amend ment does not amount to a conversion of the suit into a suit of another and inconsistent character (9)

Change of character of suit —So far the matter has been dealt with

⁽¹⁾ Barkat un missa v Muhammed, 17 A 288 (1895)

⁽²⁾ Vide ante, p 677 In Sardarsmgp v Ganuatsingii, 14 B 395 (1885), the appeal Court allowed the plaintiff to amend by adding a prayer for an injunction In Numbhai v Conservator of Porests, 4 B 222 (1879), a partner sued to establish his exclusive title to partnership property, and the High Court on appeal allowed an amend ment converting the suit into one for dis solution and account, and remanded the case. with directions to the lower Court to make the other partners parties. In Annapa t Ganpati, 5 B 181 (1880), the suit was for interest only The plaint was amended so as to make the suit for account and payment of principal and interest. In Radhabar a Shamray, 8 B 168 (1881), an ejectment suit-

was amended by the insertion of a priver for redemption. In Kn-knaji t. Sitarani 5 B 496 (1880), a suit for possession was changed into a suit for partition.

⁽³⁾ Ghulam Husam : Shahbaz Khan, 1888, P R No 161

⁽⁴⁾ Ramanadan : Puhkutti, 21 M 258, at p 290 (1898)

⁽⁵⁾ Bishop Mellus t Vicar Apostolic Mala bar. 2 V 295 (1879)

bar, 2 V 295 (1879)
(6) Sovuganv Krishna, 22 M L J 139 (1911)

 ⁽⁶⁾ Sovuganv Krishna, 22 M L J 139 (1917)
 (7) Wamanraov Rustompi, 21B 701 (1896)
 (8) Govinda v Perundevi, 12 M, 136 (1888)
 (sunt for declaration that alienations)

made by Hmdu widow were not binding out plaintiff as roversionary heir, death of widow pending appeal, held, plaintiff could not amend and claim possession]

⁽⁹⁾ Sullideo : Lachman, 24 A 156 (1902)

as a matter of discretion. Seet 53 of the last Code was, however, mandatory in this, namely, that no amendment could be allowed which converted a sint of one character into a suit of mother and inconsistent character power of the Court extended to the clueidation of what was ambiguous, to the amendment of what was erroneous, and the supplying of what was defective, it did not extend to the conversion of a smt of one character into another inconsistent with and opposed to it, eg a suit for possession with mesne profits into one for resumntion,(1) or a claim on contract to one in tort (2)

A number of cases will be found reported (not very profitably) on this point, for it must be remembered that each case is only an authority so far as the same set of facts may (which is unblely) exist in a subsequent case (3) In some decisions a formal application was made to amend. In others, a new case was sought to be argued which, however, could only have been done after an application to amend had been made and granted, and the matter was dealt with as, in effect, an application to amend, since a deerce could only be made on allegations formally rused at the trial. Further, it is to be noted that the application for amendment was made at differing stages of the suit and under different circumstances, and it may be that as already stated, an application which, if made before the hearing, would be granted, might, if made after hearing, be refused. Whether an amendment is meonsistent with the suit as originally framed may be tested by an inquiry into the nature of the evidence to be offered in either case (1) Amendment was not allowed, on the ground that the suit bad been changed, in the following cases -

Claim for rent on contract, claim for use and occupation, (5) claim for hire of eargo boats, claim for agency account in respect of same, (6) claim for dower on written agreement, claim for same on custom, (7) claim based on den mohur right of widow, claim for decree to extent of rights of widow and her son as heirs, (8) claim as adopted son, claim as heir, (9) claim to recover from defendant money paid by him to X on the ground that such payment was unauthorized, claim for damages for negligence in selecting X as agent for plaintiff. (10) claim that a sale had been made to pay immoral debts, claim that the father could only abenate his own share, (11) claim based on gift by will, claim based on inheritance, (12) claim to set aside alienation on ground of illegitimacy of party making it, claim for same on ground that it was without consent of other heirs (13) claim for a pottali en

⁽I) Gobind Mohapattur : Madhuh Per sad, 6 W R 211 (1866), and see Hamilton t Land Morthage Bank 5 A 450, 459 (1883)

⁽²⁾ Kasmath t Sadasiv, 20 C 505, at p 808 (1893)

⁽³⁾ Gopal Dass \ \marwallah t Buddreo Dass Sureka, 33 C. 657-660 (1906)

⁽⁴⁾ Ibid. at p 661

⁽⁵⁾ Surendra Naram : Bhat Lal, 22 C 702, 755, 756 (1895), Luckhee hant r Sumer rooddi, 21 W R 208 (1574), Luchmeeput Doss : Shaikh Fnact, 22 W R 316 (1874) (6) Shih kristo Sircar t Ablool Halcom, 5

C 602 (1859), S C. 5 C L R 4.5

⁽⁷⁾ Khaja Valiomed & Vangs Begum, 11 (420 (1887)

⁽⁵⁾ Umbika Churn t Nadir Hossem 11

W R 133 (1863)

⁽³⁾ Gopco Lall t Sree Chun Iraolec 19 W R 12 (1872), s c 1 1 Sup Vol 131 (10) Hamilton : Land Mortgage Bank, 5

A. 456 (1883) (II) Shee Naram : Bhugwan Dutl, II

W R. 10 (186J)

⁽¹²⁾ Jankeo : Jhanjoo 2 1 H R C 407

⁽¹³⁾ See Pershad r Raj Gooroo, 11 W 13 JS6 (\$570)

a special contract against twelve aim a sharers of an estate on the ground that they had taken a kabulyat, claim based on the ground that plaintiffs being occupancy roots, had a right to a pottah at a fair rent. (1) claim based on invibility of a will, claim assuming its validity, but alleging that it did not dispose of whole of test stor's property, (2) claim for declaration that joint property was not hable to be sold in execution on the ground that the decree was for debts incurred for immoral purposes, claim that plaintiffs had superited from their father before the decree was passed against him (3) clum for share of produce of property left undivided at partition, claim for partition of that property , (1) claim for specific performance, claim to cancel contract and return deposit, (5) personal claim, claim against an estate, (b) clum to eject tenant, but failure to prove have, clum to fall back on general title is though no lease had been set up, (7) claim to land as mirasdar, claim to hold as occupancy ryot, (8) claim as heir of N , claim as heir of J C G , (9) clum to remove building erected by defendant on plaintiff's exclune property, claim for demolition on joint property because creeted without to owners' consent, (10) claim for possession with mesne profits, claim for resumption, (11) clum for possession, clum to symbolical possession as lindlord, (12) claim to thus possession of whole property and mesne profits, claim to proprietary right of one fourth of which he is not entitled to Mas possession, (13) claim to establi h right of ownership over land, claim to casement over same, (11) claim to redeem one mortaige, claim to redem another, (15) claim for ejectment, claim for declaration of reversionary right, (16) claim for declaration of title by purchase, same by long posses sion, (17) clum is pre emptor based on vicinize and separate ownership, claim for pre emption as joint owner, (18) claim to set aside _urreslgi, claim for

⁽¹⁾ Uthur Hossem : Ramphil Roy, _0

W h 75 (1873) (2) Damodar Madhowji t Purm mandas 7

^{13 105 (1880)}

⁽³⁾ Varay until 1 Jayherinku, 12 B 131

⁽¹⁵⁵⁷⁾ (4) Curishinkarı Atmirim 18 B (11

⁽¹SJ3)

⁽a) Stone : South J. Ch. D 188, bit if original plea in the alternative, et him, him 1 Kirk 37 Ch D 141

⁽b) Induc Chander (R) lha Ki h re 1) C

οθε (1812), e 19 I \ 90

⁽⁷⁾ Lalshmibit t Hart 9 B H C R 1 (157-)

⁽⁸⁾ Soorjo Koomar t Gunga lhur Rev, 12 W R. v) (1869) in the cases referred to in this report, it was not shown that the alterna tive right had not been pleaded

⁽⁹⁾ Ishan Chun ler e Sharoda, 12 W R 487 (1870) see Doorga Varain e Broje Kishore 23 W R 172 (1575) where amen ! ment was allowed but the lower Court errel m n t allown , the defendant to meet the

fresh allegations. (10) Nobin Chunder : Mohesh Chunder

¹² W R 69 (1569) (11) Cobind Wohapattur : Widhib Piral 6 W R 211 (1506), s. c B L R (F R)

l/c

⁽¹²⁾ Ada Bibeo e Sonat Bibee 21 W 1 122 (1874)

⁽¹³⁾ ha hen Chunder r halcenath Is W R 507 (1872)

the ground of ownership or casement \under \ath Baruri t \bhaya Claran Chattopa lhva 4 C. L. J. 437 (1900) F. ls.

^(1) Governdrav i Rayle, 8 B o43 (1-84) (16) Ramana lan e Pulikutti 21 11 - S

⁽¹⁵⁹⁵⁾ (17) Huro Soon lures t Unnopoorns, 11 11

^{1 5.0 (1509)}

⁽¹⁸⁾ Mehadeo e Zeenutoem se 11 % 1 It i (154 9, Cebn I hom t (urdl arec Sil x _1 # R 3.5 (1570)

declaratory decree : (1) claim as whole owner by purchase from A : claim as here or tout murchaser with him . (2) clum for possession based on Lobala which was in reality a mortgage; claim for repayment of advances, (3) claim by second mortgages for sale, ignoring title of first mortgages, claim reserving rights of prior mortgage e : (1) claim for property as devisee under will claims for same on ground of want of title in testator to devise . (5) claim as mortgages. alleging that she had advanced the money out of her own funds, clause that money came from reputed husband, and that the transaction was by way of gift of provision for her. (6) right to execute mortgage-decree, claus to redeem mortgage (7) claim by co-sharer landlord for proportionate share of rent clum for individual share of plaintiff or full rent (8)

In the following cases amendments were allowed in a suit for a ductivatory decree, an amendment so as to make the suit one claiming consegmential relict. (9) altering a suit from one under Act VIII (B C) of 1869 into an ordinary civil sut. (10) claim to redeem property mortgaged in 1811. claim for redemption on previous mortgage of 1837, in case mortgage of 1841 were not proved (11) In an action on a promissory note, the sint was dismissed on the ground that part of the consuleration was illegal, the plant was allowed to be amended in appeal so as to recover so much of the consideration as was not illegal (12) Where the plaintiff claimed an easement by prescription the claim has been decreed on the presumption of a title arising from a grant (13) A suit for direct nossession has been changed into a suit for possession conditional on the defendant's failure to redeem (14) and a suit for possession into one to redeem (15) It has already been pointed out that a plaintiff may from the

⁽¹⁾ Musst Doolhun t Lall Beharce, 19 W R 32 (1872)

⁽²⁾ Doss Ram : Mohendro Roy, 18 W R 274 (1872)

⁽³⁾ Rajale Saheb Perhlad Sein v Baboo Budhoo, 12 Moo I A 275 (1869), and see

Murngaser t De Soysa, App. Cas. (1891) 69 (4) Salig Rane : Har Charan, 12 A 548 (1890), dist, Wuhammad Niamat : Ghaffar

Muhammad, 21 A 272 (1899) (5) Mylapore Iyasawniy t Yee Kay, 14

C. S01 (1887), a c, 14 I A 168

⁽⁶⁾ Bhowan Doss & Sheikh Mahomed, 13 VL I A. 346, 352 (1871)

⁽⁷⁾ Hari Bavji : Shapurji, 10 B 461 (1886), s c, 13 I A, 66

⁽⁸⁾ Lala Raus : Nem Naram, 6 C W N 326 (1902)

⁽⁹⁾ Lunba e Rama, 13 B 548 (1888), Chonn t Umms, 14 M 46 (1891), Abdul Kadara Mahomed, 15 M 15 (1890) [dist in Narayana a Shankunni, 15 M 255 (1891), which was not a case where the objection was taken for the first time in appeall, Ragho e Vishnu, 5 Bom L. R 329 (1903), Bar Anope.

[·] Mulchand, 9 B 355 (1883) [amendment by ensertion of prayer for an account!

⁽¹⁰⁾ Goland Chunder + Rekuntrath 19 W R 6t (1873)

⁽tt) Parashar v Gang, 5 Bom L R 613

⁽¹⁹⁰³⁾ (12) Joseph + Solano, 18 W R 421 (1872).

s c, 9 B L R 441, ref, Proby t Bell, 20 W R 6 (1873)

⁽¹³⁾ Rajrup Koer v Abul Hossem 6 C 394 (1880). Punia Kuvarit i Bat Kuvar, b B 20 (1881), Koylash Chunder : Sonatun Chung, 7 C 132 (1891)

⁽¹⁴⁾ Rupchand Dagdusa : Davlatvav, 6 B 495 (1882), Kasimunnissa i Nilratna, 81 70 (1881), Adakant Bancry : Suresh Chandra 12 C 414, 422 (1885), s c, 12 I \ 17, Dul labhdas t Lakshmandas, 10 B 88 (1885), the Court, however, has a discretion in the matter exercisable with reference to the particular facts of the case see Murngaser : De Soysa, App. Cas (1891), µ 69

⁽¹⁵⁾ Sankana 1, Virupakshapa, 7 B 140 (1883) . but see Dargopal c. Bolakee, 5 C 249 (1879)

commencement ruse an alternative case. Where he has not done so he may have leave to amend his plaint and to state his case correctly therein if the Court thinks that he has rested his claim upon wrong grounds from misinformation, ignorance of law or fact, mistake or musconstruction of documents (1) Where in a sint for the recovery of a sum due on account, the defendant raised a plea of limit ition leave was granted to amend the plaint by setting out an acknowledge ment signed by the defendant within the period of limitation (2) Where in a suit for rent the plaintiffs described themselves as "executors and trustees of the properties of in endowment" they were allowed to describe themselves as "de facto managers and persons interested in the endowment" (3) Where it was argued that an amendment allowing an alternative case to be raised con verted the suntanto one of another and meansistent character, it was held that the alternative claim which aroso out of, and was immediately connected with, the same transaction was not inconsistent, (4) the Court, however, adding that the proviso to this section in the last Code must be read with sects 42 and 45 of that Code and was not intended to interfere with them. Sed guare as to whether this was not stited too broadly. It does not follow that because a plant might have originally been brought in a particular form, but was not, that therefore it must be amended into that form If so the object of the pro vision might in some cases be defeated

As already pointed out the section has been now unended. In all cases the Court has a discretion (5) In exercising that discretion, it will, following the English practice, in general refuse an amendment which changes the action into one of a substantially different character which would more conveniently be the subject of a fresh action The question thus becomes one of discretion and not subject to a rigid rule Whether amendment should be allowed must depend on the circumstances of each case Mere technical arguments showing a conversion of character will not be given effect to There are such cases of conversion where amendment may be properly allowed On the other hand any substantial change in the claim made, making it more convenient that they should be tle subject of a fresh action will be refused

Costs-In England the amendment may be allowed ' on such terms as may be just' (6) And the Courts may therefore there impose terms as to other matters than costs (7) In this country the Courts could formerly by the terms of the former section impose terms only in regard to costs. As to these they are entirely in the discretion of the Court and they are sometimes (particular larly when the application is made before trial) reserved (8) The section has, however now been amended in conformity with the English rule

⁽¹⁾ Lal shmibar: Hart 9 B H CR 1(1872)

⁽²⁾ Gunnap : Makanji 34 B 250 (1909)

⁽³⁾ Dhannat : Juarmul 13 C I J 28)

⁽¹⁹¹⁰⁾

⁽⁴⁾ Saral Chan l : Mohun Bibi, 25 C 371 189 390 (1898) s c 2 C W N 201 [smt to

enforce mortgage, plea of infancy amen led claim that defendant was not by reason of fran I entitled to rely on this defence]

⁽⁵⁾ O 28 r I

⁽⁶⁾ Gunnaji t Makanji 34 B 250 (1909) (7) See Lug 1 Cooke, I Ch D 57

Dham Rum + Bhumath, 22 (et p. 713 (199)

ORDER VII.

Plaint.

- 1. The plaint shall contain the following particulars:—

 Particulars to be contained in plaint:

 (a) the name of the Court in which the suit is brought:
- (b) the name, description and place of residence of the plantiff.
 - (c) the name, description and place of residence of the defendant, so far as they can be ascertained:

(d) where the plaintiff or the defendant is a minor or a person

- of unsound mind, a statement to that effect;

 (e) the facts constituting the cause of action and when it arose:
- (f) the facts showing that the Court has jurisdiction;

(q) the relief which the plaintiff claims;
(h) where the plaintiff has allowed a set-off or relinguished

- a portion of his claim, the amount so allowed or relinquished, and

 (i) a statement of the ratic of the subject-motter of the suit
- (i) a statement of the value of the subject-motter of the suit for the purposes of jurisdiction and of court-fies, so far as the case admits.
- 2. Where the plaintiff seeks the recovery of money, the plaint shall state the precise amount claimed:

 But ukere the plaintiff sus for mesne profits, or for an amount which will be found due to him on taking unsettled accounts between him and the defendant the oppoint shall state approximately the amount sued for
- 3. Where the subject matter of the sun is ammoreable property where the subject party, the plant shall contain a description of matter of the sun is the property sufficient to identify it, and, in circummorable property such property can be identified by boundaries or numbers in a record of settlement or survey, the plant shall specify such boundaries or numbers.

- 4. Where the plaintiff sues in a representative character, when plaintiff sues as representative. the plaint shall show not only that he has an actual existing interest in the subject-matter, but that he has taken the steps (if any) necessary to enable him to institute a suit concerning it.
- 5. The plant shall show that the defendant is or clams to be interested in the subject-matter, and that he is hable to be called upon to answer the plantiff's demand.
- 6. Where the sunt is instituted after the expiration of the Grounds of exemption period prescribed by the law of limitation, the plaint shall show the ground upon which exemption from such law is claimed.

Plaint -The object of a plaint is simply to state the grounds and rehef upon and in respect of which a suitor seeks the assistance of the Court Its essential parts are (1) the title or as it is sometimes called, the caption, (11) the statement, and (111) the relief, the first of which is referred to in clauses (a), (b), (o), and (d) of rule 1, the second in clauses (e) and (h), and the third in The provisions of sect 50 which these rules replace was criticized as not complete. Thus it has been said it is "a general rule, and the section appears to presuppose that the capacity of parties sung or sued should be alleged in the plaint, but it does not provide for such allega tions expressly Similarly, in the case of joinder of causes of action, the circumstances allowing the joinder should be stated, but there is no provision as to that There appears to be no doubt, however, that on the analogy of the practice of other countries all such facts should be stated in the plant notwithstanding the last clause of sect 53, clause (b) (n) which provides for a return of the plaint for amendment if it contains particulars other than those mentioned in this section. It is held in the United States that the fact of partnership should be alleged in the plaint, as partnership demands and habilities being joint, such allegation is necessary to authorize the joinder So also, the value of smt and the locality of its subject matter and of its cause of action, and other circumstances on which the jurisdiction of the Court may depend must be alleged Thus the Bombay High Court Circulars (Chap I r 4) expressly lay down, that in every suit the Court shall require the plaintiff to state clearly in the plaint how the value of the suit has been arrived at, and that in a suit for the price of goods sold retail, the plaint should either set out the account in detail, or should be accompamed by a copy of the account to be served upon the defendant Similarly, if any law authorizes a suit only after the plaintiff has taken some other proceedings, given some notice, or received leave or sanction of some Court or obtained a certificate of some officer, the plaint must state that those proceedings have been taken, notice given, leave or sanction received,

or certificate obtained, as the case may be (1). The amended section adds a statement of the value of the subject matter

'Shall contain'-The word formerly used was "must, and was held to be a strong imperative (2)

Title Rule 1, clauses (a), (b), (c), (d) -The name should be given, if possible, in full and to the extent necessary to fully identify the party. If there be more than one plaintiff, or more than one defendant the name of each must be given. As to cases of agents, assignees, benaumdars, partners, and others, see notes to O I rr 1, 1 And as regards suits by or against Govern ment and public officers (3) shens and foreign native rulers (4) corporations and companies (5) trustees and executors (6) firms (7) minors (8) and military men (9) see also the portions of the Code noted

"If a person such in a representative or efficial capacity the capacity should be indicated in the titl. The same should also be done when he sucs merely as a member of a firm or as secretary or agent of some corporation. or on behalf of a larger numb r of persons. And the capacity is generally in liested by adding to the name of the party a designation denoting the special character or capacity which he sustains. But the designation may be taken as merch descriptio persona unless it is preceded by the word 'as' or some equivi I nt of it (10) And the general rule appears to be that the capacity in which a party sucs or he sued should not only be indicated in the title but stated in the body of the plaint also (11)

To describe the plaintiff as residing in Chitpore Road in the town of Calcutta is not a sufficient description of his place of abode nor is it sufficient under this section to describe the defendant as formerly of Calcutta without alleging that the plaintiff has been unable to ascertain his place of residence more definitely (12) Where it was contended that the plaint was bad as the clum was set out by G W H manager (of a bank) but the words should have been "The Mussoone Bank Limited it was held to be no ground for returning the plaint as the intention and meaning of the plaint was clear that the circum stances set out applied to the bank and the words were not capable of any other meaning (13)

⁽¹⁾ Hukm Chan I C P C 584 It may however be perhaps contended that some of tle matters referred to would come within clause (e) Otler cases might be met by other portions of the Code as eg s 80 which requires a plaint to allege the giving of notice or by other Acts

⁽²⁾ Sheo Prasad : Laht h ar 18 1 103 (1896) د40

⁽³⁾ Ss 9-82 O XXVII

⁽⁴⁾ S₄ 83-8

⁽⁵⁾ O XXIX.

⁽⁶⁾ O XXXI (7) O XXX.

⁽⁸⁾ O XXXII

^{(9) 0 77/111}

⁽¹⁰⁾ Hukm Chan I C P C 58" Il us the words Denuty Sheriff following a person s name were held not to denote that he was a party lo the suit merely as deputy sheriff Greig : Clements 20 Colo 168 (Amer) So also where the plaintiff described himself as B assignce of D & Co it was held that the act on was brought in his individual capacity

Butterfeld : Macomber 22 How Pr 150 (Amer) caled ab

⁽¹¹⁾ Hukm Chan 1 C P C 387 588

⁽¹²⁾ Biber Soloman t Abdool Azir 4 C L. R 366 (18 9)

⁽¹³⁾ Mussoorio Bulk, Ld v Barlow, 9 \ 189 (19 ()

The defendant's name is given in the plaint in the same mauner as the pluntiff s

All those titles by which a party is generally known ought to be given and it is not the true construction of the section "to say that where a man has titles, the claim to which titles cannot rationally be disputed by which he is generally known all that the Code requires is that he should be described in such a way ' as may be sufficient for identification (1) In the case cited an order rejecting the plaint because plaintiff did not amend it, so as to give the full titles to the defendant was held to be correct, their Lord ships of the Privy Council observing that "If a plaintiff, from ammosity, from pique or anything in fact but a bone fide dispute as to the right to a title, obstinately refuses to give his adversary that title by which he is gener ally recognized the Court ought not to permit or sanction that species of meult

Where a practice caisted in the Madris Courts to give as part of the description the age as well as the father's name, and these were not given the High Court refused to interfere with an order rejecting the plaint (2) It is not sufficient to describe the defendant merely as formerly of Colootellah in Calcutta without alleging that the plaintiff has been unable to ascertain his present residence (3) Where a plaint described the defendant as " Mrs S G B of Mussoerie 'and stated that she was excentrix of the deceased B, it was held not to be open to objection as it was clear that the defendant was stated to be executrive of the deceased and the suit was brought against her in that capacity (4)

There is no provision in the Code as to how the defendant is to be sued and named in the plaint when his real name is not known to the plaintiff and cannot be ascertained by reasonable diligence (5) Names are only used to designate persons and as a means of identifying them. The action is not against the name, but against the person designated thereby. If therefore the real defendant has been properly served with a summons in a fictitious name and he does not appear to defend the suit a judgment rendered against him in such name will be as effective against him as if his true name had been given in the proceedings in the action (6)

It is one of the first essentials of a suit that the parties, and specially the defendant must be alive at the time of the institution of the suit If the person named as defendant is found to have been dead at the time of the presentation

⁽I) Maharaja of Vizianagram : Raja Lak shnu Chollaya 12 B L R 443 * c 18 W R 301 (1872) reversing the decision of the High Court in 3 M H C R 31 (1866) In this case the Privy Council though point ing out that the case was distinguishable. a peared to disal | rove of hishen Chand : Meghraj 12 W R 4'0 (1869) in which the Court refused to insist on the insertion of the words Poy Bahadur

⁽²⁾ Somayanth a Suvayan 7 M J J rep 51 (1897)

⁽³⁾ Bibee Soloman : Abdul Aziz 3 C L R

^{366 (1879)} (4) Mussoorie Bank Ld : Barlow 9 1 183 (1886)

⁽⁵⁾ It is stated in Hulm Chand C P C 599 '90 that most of the Codes of the Umte I States allow the defendant to b designate I by a fictitious name amen I no it by substituting the true name wich is covered

⁽t) 1h

of the plaint, the Court will have no jurisdiction over it,(1) and must refuse to proceed further, leaving the plaintiff to begin de roto against any person against whom he may have a right to proceed (2) It has even been held in the United States that if one of the defendants was dead the judgment will be void as against the other defendants also (3) And the principle appears to be of a general application Thus Freeman, in his work on Judgments, (4) observes that "no sort of jurisdiction can be obtained against one who was dead when suit was commenced against him as a defendant, or in his name as plaintiff, and that no indical record can be made which will estop those claiming under him from showing that he died before the action was begun, and that a judg ment for or against him must necessarily be void" It is stated (5) that the Courts in several States of the American Union have held the same even in suits against a corporation, commenced after its being dissolved,(6) though the rulo does not appear to have been there applied with the same strictness in the case of a plaintiff (7) Thus a judgment in a suit instituted in the name of a purty who is dead at the time the suit is brought has been held in some cases to be only voidable (8) And Mr Black in his work on Judgments (9) observes that " if an action is commenced in the name of a person already dead in interest or if one of several joint claimants is dead before action brought it is held that the defendant must take advantage of the fact by plea in abatement at the peril of heing estopped by his silence and the judgment for plaintiff will not be disturbed " (10)

A description of a party as insane in the plaint is not evidence that he was excluded from the inheritance by reason of insanity when the succession opened (11)

The statement Rule 1, clauses (e), (h) —A plaintiff when he files his suit must allege the cause of action in the manner prescribed in this rule, and must prove the necessary allegations in so far as they are not admitted by the defendant (12). The whole object of pleadings is to bring the parties to an issue and thus to scene that both shall know before the cause comes on for

- (1) Volum Chund r : Azeem Cazac, 12 W R 45 (1869)
- (2) Moharance Surno Moyee : Bykunt Chun kr 25 W R 17 (1875)
- (3) West taron 21 South (Mass) Rep. 763 (Amer) cited in Hukin Chan 1 C.P. (
 78), from which this note is tak. n. In it is case a judgment against the jrincipal lebtor and the surety was led voil again title frier also although the latter aline was dead at the line of the institute in Citle sun (4) \$1.04.
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 (Aner)
 - (7) Vinle In elet fonf it bart 1

- Me 5" (Amer)
- (S) W. Millan Hickman 35 W Va 705 (Amer)
 - (9) § 201

100 Int the It is stated has been followed by the Suprime Court of West Arguna Wattr Brokover 3 W A 223 Barannon J observing that the fact that did findant left fine know f 1 + beath can make no difference as to this year.

- (11) Ran Bijar r Jagatpal 18 (111 (1840) 8 c 171 3 173
- (12) Game r Silheswar 4 Born L. P. S. (191) and he must in lade at the cut of p. unlist in who hills suct can be based for a second suit on grounds when he is to lattle true the first was frought wad not head with Procasing of Lam. Character M. L. 482 (1873).

trial whit is the real point to be discussed and decided (1) The two points to be attended to are the form of, and then the contents of, the state ment As to the first, the former section states that the language must be both plan and concise (2) This is a matter now dealt with in O VI r 2 The material parts should be stated in a summary form, clearly and precisely yet briefly and succinctly. While a liberal construction should he given to pleadings, so as to give effect to their meaning to be collected from their whole tenor, they ought to be expressed with sufficient definite ness to enable the apposite party to understand the case he is called upon to meet (3) To word probaty, the pleader should omit every allegation which is immaterial and unnecessity, as also all unnecessary details when alleging parts which are material (1) A certain amount of detail is necessary ' Although pleadings must now be concise, they must also be precise" (5)

The statement of facts must be with specific particularity, and not by way of vague generalizations As observed by Reed J in the opinion of the Supreme Court of Colorado in Robinson v Dolores (6) "the conclusions of the pleader stated is facts broad generalizations sweeping and comprehensive assertions of consputer fried, mismanagement and incompetency, caunot be made, in pleading, to supply the wants of specific facts

Thus it is a settled rule, that in an action for falso and fraudulent misrepresentation the statement of claim should state the details of each alleged nusrepresentation (7) In fact it is a general rule, that where fraud is intended to be charged, its details must be specified, and general allegations, however strong, are insufficient to constitute an averment of it (8) See O V r 4 In the first cited case Lord Selborne observed, that "with regard to fraud, if there be any principle which is perfectly well settled it is that general allegations, however strong may be the words in which they we

- (1) Per Jessel, MR, Thorp : Holdsworth, 3 Ch D 639
- (2) In Bisheshur Pershad : Ram Churun 5 1 H C R 25 (1873), at p 28, Stuart, CJ. I do not desire to apply strict rules of pleading or any unnecessary refinements of legal art in order to work out the require ments of our Code of Procedure, but I must insist upon the allegation of all relevant facts being clearly and coherently stated and it is, in my judgment, no part of the duty of a Court to help higants by suggesting what their meaning is in effect, or by infer ring their right of relief from confused state ments, which at best only suggest but do not distinctly express, the legal claims
- (3) Indur Chunder 1 Radha Lishore, 19 I A 90, 93 (1892), s c, 19 C 507
- (4) Annual Practice, 1905, p 236, and see Hukm Chand, C P C 591 et seg, where the subject is more fully considered, and Odgets The subject of pleading on Plading generally is now dealt with in O VI, ande (5) Per hay, I, In re Parton, 10 W B

- (Eng) 287 (6) 29 Pac Rep 750 (Amer), cited in
- Hukm Chand, C P C 611
- (7) Seligmann t Young, 1984 1 ng W N 93
- (8) Wallingford v Mutual Society, 5 1pp Cas 697, cited in Gunga Varain : Thuck ram 15 C 533, 537 (1888), a c, 15 I 119, Lawrence v Noireys, 15 App Las. 221 The Panjah Chief Court, in its In structions to Judicial Officers (s 2, r 8 (m)) laid down Plaints containing lague and loose statements of a general character alle,ing fraud, collusion, 'deceit,' illegal and fraudulent acts,' and the like, which are never made to take a definito shape and are frequently suspossible to prove, are frequently This should not be allowed Where fraud is alleged, the particular facts showing that it has actually been committe! must be plantly and definitely set forth , the plaint being returned for amendment in this respect when neer sary

stited, are insufficient even to amount to an averment of fraud of which any Court ought to take notice" This was cited with approval in the Privy Council,(1) by Lord Watson, who said: "When fraud is charged against the defendants, it is an acknowledged rule of pleading that the plaintiff must set forth the particulars of the fraud which he alleges. There can be no objection to the use of such general words as 'fraud' or 'collusion,' but they are quite ineffectual to give a fraudulent colour to the particular statements of fact in the plaint, unless these statements, taken by themselves, are such as to imply that a fraud has actually been commutted" Thus a plaint to set aside in award must definitely state some fraud or other malpractice of the opposite party (2) The decision of the Privy Council cited, was acted upon in a case (3) in the Bombay High Court, bulton J, observing that the plaint ought, mumedistely on presentation, to have been rejected or returned for amendment, as it did not disclose a cause of action. A charge of fraud must be substantially proved as laid (1) and it must be so proved at the hearing of the case, and cannot be reserved and proved in the course of taking

Facts must be stated as facts Modern pleadings are merely concise statements of the facts. Internees of law should not be pleaded. Pleadings should not contain mere arguments (6). A plauntiff thus cannot ever that "he is entitled to 'property, for this is a conclusion of mixed fact and law Ho must state the facts which, in his opinion, give him that title. This material facts only should be pleaded. But each party must always state his whole case, and all the facts which are essential to the cause of action, but not the ordenee by which they are to be proved, (7) though "there are many cases in which facts and evidence are so mixed up as to be almost undistinguishable" (8). In other words only operative facts, as distinguished from probative or evidential facts should be pleaded, and of the former, only the ultimate facts.

The plaint should include all the existing points on which the plaintiff or un succeed (9). And a plaintiff is only entitled to succeed upon the cause of action illeged by him in his plaint (10). It is not, however necessary for the plaintiff to state in what form of action he sues (11).

Where the plant discloses all the facts constituting the cruse of action the form of the action is muniforal. Thus, in a suit for mortgage money and interest by the enforcement of the mortgage here even if the hypothecation is not proved a personal decree may be given for the amount claused as damages.

⁽¹⁾ Gunga Naram t Tiluckram, 15 f. A 119, s. c., 15 C 533 (2) Hurchuran Dos t Hajari Vuji, 1 Ind

⁽²⁾ Hurchuran Dos r Hajari Vigli, I Inc Jur., O S. 12 (1864)

⁽³⁾ Arishnaji t Watunaji, 15 B 141 (ts9J)

⁽⁴⁾ Abdul Hossein : Turner, 11 B 620 (1857); and the evidence must be confined to the allegations Arishnaji r Wamnaji 18 R, 144 (1853)

⁽⁵⁾ Advocate General : But Punjabat, 18 L. 5.1 (1833)

⁽⁶⁾ Bishen Sahaye: Beer Lishere, 8 W R 295 (1867)

⁽⁷⁾ Annual Practice () 19, r 4, sec () \1

r 2, ante.
(6) Smith : West, W \ (1570)

⁽⁸⁾ Smith t West, W \ (1870) 55 Roberts t Owen, 6 1 L R. 172.

⁽⁹⁾ Hanner v. Flight, 21 W. R. 316 (Eng.) (10) Premanund v. Ram Chura, 20 W. R. 452 (1673). Denobundhoo v. Kri tomonec, 2 (2, 162 (1976))

⁽¹¹⁾ Shro Prasa I r Laht Kuar, 15 A 403 (1539)

for breach of the contract to give possession of the mortgaged property, (1) the Court observing, in the latter cited case, that it was immaterial whether the domaid was regarded in the light of a suit for compensation in damages for breach of the contract, or for money had and received for the plaintiffs use, or for money lent So also, in a suit for rent on a Labulyat, if the Labulyat is not proved, a decree may be given for rent at the rate proved to be paid before the alleged habulyat if there should be evidence of that, (2) even though that may not have been expressly clumed in the plaint. In the under mentioned case (3) this was not done, as there was no such cyidence, but the Full Bench said "It is in the discretion of the Court to amend the plant or the issues, and to allow it (i.e the alternative claim for rent paid before) to be tried And where the omission to make the claim in the plaint appears to have been from madvertence or hy mistake, it would be proper to do so " Where in a sint for possession of certain land on the basis of a lease granted to plaintiff in 1231, it was alleged that the plaintiff had continued to hold it since then as a lessee from year to year, he was allowed a decree on the ground of the facts proved showing that he had an occupancy right, such alternative title not being inconsistent with the alleged title under the lease (4)

Nortly, as to the contents of the statement A defendant is entitled at the cultest stage of the hearing to obtain the declaration of the Court upon the quostion whether the plaint discloses a cause of action (5)

Among ultimate operative facts the plaintiff's title or right which has been infringed must be first stated The expression "cause of action" has been understood to be used in this section in its broad sense, as including both the infringement and the right infringed, which latter must therefore be set out in the statement of the plaintiff's cause of action. Thus, in a suit for redemp tion of a mortgage, the mortgage must be stated (6) In a suit for a declaration of title to a property which the plaintiff admits was sold to the defendant's ancestors, and to which the plaintiff cannot establish a right without setting aside that sale, the plaintiff should allege the circumstances which he rehes upon for avoiding it (7) And where the plaintiff's right to the thing sued for is derived by assignment the fact of the assignment ought to be stated in the plant (8) A plaintiff sung for possession of land by redemption of the mort gage, must show in his plaint the existing title he intends or hopes to prove, and upon which he rehes as entitling him to the rehef which le isks (9) It is a general principle, that a plaintiff suing for possession must

⁽¹⁾ Mahesh Singh i Chauharja Singh 4 1 245 (1882), Sheo Naram v Jan Gobind. 1 A 281 (1882)

⁽²⁾ Roushan Bibee : Hurray Kristo Nath, S C 926

⁽³⁾ Lukhce Kanto Das v Sumeeruddi, 13 B L R 243 (1874) (4) Surjoo Pershad : Lashce Rawat, 21

W R 12I (1873) (5) Umamoyce i Raj Kristo, 3 C W N

^{2.0 (1889)}

⁽⁷⁾ Azunucha Khan : Zia ul Nisa, 6 B 309 (1882)

⁽⁸⁾ Brooke : Gibbon 31 W R 47 (1873) (9) Paramand v Salub 1h, 11 1 435 (1889) In the case cited, Lalge, CJ, with

whom the other Judges concurred, observed that it would not have been sufficient to state

⁽⁶⁾ Shoo Prasal : Laht Kuit, 18 1 103

show that at the date of the suit he was entitled to that rehef (1) It has thus heen held that the owner of demised land cannot sue to eject even a trespasser so long as the lease is outstanding (3) The Punjab Chief Court, in its functions (3) to Judicial Officers, land down that "it should appear in the plaint that the persons, if more than one, who sue together as plaintiffs, all, either jointly, severally, or in the alternative, claim the right which it is the object of the suit to vindicate"

Where the plaintiff's right alone constitutes the eause of action, it will he sufficient to allege only that right. Thus, in an action for partition, the plaint should state the titles and interests of the co tenants, plaintiff and defendant, but it is neither necessary nor proper to show any deraignment of the plaintiff's title (4) But where the suit has been necessitated by any act done to peopardize the plaintiff's right or evidence of it, that act should also he stated Thus, in a suit for a declaration of right, the plaint should specify not only the title to that right hut also the act of interference with that right (5) and the circumstances which necessitate the application for the declaration (6) Where in a suit hy a relative of a minor against his administrator, the plaint merely stated that the conduct of the defendant was im proper, and that the plaintiff had suspicions that the defendant would waste the property of the nunor, but failed to specify any instance of inalversition or to give any reason, plausible or otherwise for behaving that the defendant would waste the estate, the plaint was rejected (7) Similarly, in a suit to compel one's neighbours to agree to a particular hae of houndary being marked out between plaintiffs lands and theirs it must be stated that they have by some overt act transgressed that boundary (8) In a suit to have a contract cancelled and the plaintiff's deposit returned with damages, the plaint only alleged that the contract was "caused by one of the purios to it heing under a mistake as to a matter of fact and the High Court held that as that would not have made the contract voidable the plaint did not disclose a cause of action and that it should have been returned for amendment on that ground (9)

the groun I that the mortgage debt had been discharged by usufruct which a plant would not show the circumstances constituting, the cau of a tion or when it arose or in fact, that my cause of action of right to sue existed at the commencement of the suit

- (1) Ramanadan i Palikutti 21 M. 288 (1838) (2) Davis i Abdool Hamed 8 W. R. 55
- (2) Davis & Vodool Hand S W R 33 (1807) (3) S 2, r n
- (4) Phill. Code 11 al § 321, cited in Hukm Chan I C P C 605
- Hukm Chan I C P C (0)5
 (5) I ide Muhammadi (Jiwami Is is P R
- \o 42 (0) Synd Khadi ii \h \ \azeer Begum 3 L II C R. 202 (1871)
- (7) Damodarlase Ltamaram 10 B H t la 114 (1573), We trepp, CJ, observed

that the plaint should specify one or more such a ts or should as an some satisfact ry reason for apprehending an injury to the estate of the more by the administral re-

(5) Americonn 553 (kourre Copal Salo) 22 W R 131 (1674)

(9) Dayabhar e Takhunchand i Bidaci (1850). Berdasool Jimithe pilament litt Court adding that it shiull citt e have allogid a metake, common to bith parties as to an even intal matter of fact by which libe agreement between them was ren freed vill, and on the theoryter of which the deposit was claimed or the discovers of which the deposit was claimed of that was ridly the the case; on the ground that his hall been indicate to ender into the agreement by the fraction the deficient.

Where a suit is based on the actual infringement of a right, the infringement and the facts constituting the infringement should also be stated. Thus mas with for damages for injury done, the nature of the injury should be act out (2) And a suit to fix a boundary should show that the boundary has been transgressed (3)

The plaintiff may have his claim on alternative titles which are not meon sistent with each other, (1) as, for example, when a person claims possession of certain land by hereditary queashta right, or, in the alternative, by the right d rived from adverse possession for twelve years, (5) or upon a mortgage and deed of sale (6) And a mortgagor sung for redemption may aver that the mortgage money has been repaid, and that if anything he found to be due, that he will pay it (7) But inconsistent titles, it has been held, should not be allowed to he put forward, as, for example, a claim to hold a hat on the ground of title by prescription, and of proprietary right to the land where the hal is held (8) In the case below, (9) the gist of the plaintiff's charge against the defendant was that she never excented a deed of sale in his favour, and that the document set up by him was a forgery, and it was observed that it was not competent to the plaintiff to combine with that charge as an alternative the wholly inconsistent charge that if the plaintiff executed the document no consideration was received by her, or that fraud had been practised on her The Bombay High Court has held that inconsistent assertions of fact cannot be permitted in the pleadings, but that on the same basis of facts two distinct titl's may be put forth (10) The decision cited of the Madras High Court was dissented from by Allahabad High Court in a case (11) in which the claim was for a declaration that a hand was not executed by the plaintiff, or, at least, that it was null and void for want of actual and valid consideration, and the Court observed that the Code did not anthorize the rejection of a plaint containing prayers for such rehefs, and that it was unable to follow the Madras High Court "in holding that a Court has power to throw out a sint on the ground that, in its opinion, the plaint sets up two inconsistent cases" It, however, stated that if a plaintiff chooses to come into Court on a plaint which contains allegations inconsistent with one another, this circumstance might militate strongly against the planniff succeeding in the suit though it would not justify the Court on this ground alone in dismissing it. In England, the old rule of pleading (12) was that a plaintiff could not plead inconsistent field

(2) Mohesh Chunder v Rundhun Pal, 13 W R 218(1870), Hukm Chand, C P C 605 (3) Amecroomussa Begum a Gopal Sahoo,

22 W R 131 (1874) (I) Woodit Singh & Buldeo Smgh, 21 W R 12 (1873), Mt Gulab Kocr z Badshah Bahadur, I3 C W N 1197 (1909) . Lakshmi

- : Maru Devi, 37 M 29 (1914) (5) Ib

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- (6) Ramgutty & Abdool M., 20 W R 73 (1873)
- (7) Butchanna i Varahalu, 21 M 108 (1901)
- (8) Rigili Bijoy Keshub r Obboy Churn, 16 W R 198 (1871), in which case the Court said the Munsif would have done well to

have refused to receive the plaint on his ble stall In Amecroommssa : Woomarooddeen,

plaintiff should not succeed

(9) Iyappa t Ramalakshamma, 13 M 543 (1890), following Mahomed Baksha Hossenta 15 C 684, 692 (1888), s c, 15 I A 80

(10) Ningappa v Shivappa, 19 B 323, at p 327 (1891) [suit for recovery of possession on allegation of partition, suit for partition]

(11) Jino : Manon, 18 A 125 (1530)

(12) See Rawlings 1 Lambert, I J & H 455, 106, and ensested in band i haston, 7 Ch D 1, 1, 5

But the Judicature Act his cularged the liberty of the plaintiff in claiming relief, and it is held that there is nothing to provent either party from setting up two or more meonsistent sets of material facts and claiming rehef thereunder in the alternative,(I) and ever smee the Judicature Act inconsistent defences, such as never indebted and payment, are duly pleaded. It is to be observed, however, that there are differences between the position of a plain tiff and a defendant. The plaintiff often has a personal knowledge of the facts which the defendant may not have, and while it is open to a plaintiff under certain eireumstances to reservo a ground of claim, a defendant failing to insist on a ground of defence in one action cannot raise it afterwards in another action at the smt of the same party. The defendants may be complete strangers to the transactions and the defences raised may have reference to matters not necessarily or probably within their own knowledge. So a Hindi wrote his will, devising certain ancestral property to his wife, and on the following day he registered it and took the plaintiff in adoption The testator died shortly afterwards It was found that the plaintiff's natural father was aware of the dispositions contained in the will, and that the testator would not have adopted the plaintiff but for the consent of the natural father to those dispositions defendants who claimed under a gift from the wife had demed the adoption in their written statement and on appear raised the further plea that the adoption, if any, was conditional on the provisions of the will being acquiesced in held, that the defendants were not precluded from succeeding on the latter of these inconsistent pleas (2)

Probably having regard to the scope of the Code the rule which should be followed is that inconsistent and alternative claims are allowable it arising out of facts which are not inconsistent, and that a plaintiff should probably not in any case, and certainly not where the facts are presumably within his knowledge, be allowed to plead inconsistent facts but should be called upon to elect so that the defendant may know what case he has to meet, and that a defendant similarly should not he allowed to plead inconsistent defences unless he is a stranger to the transaction and the true state of facts is not within his personal knowledge. Thus it has been held that a Mahomedan plaintiff who first claimed the property in suit as the here of his father, on the ground that his mother had no title to it could not in the same suit contend that his danghter had acquired a good title to it from his mother and that therefore he wis entitled to it (3)

A plaintiff must be hunted to the ease which he puts forward in the plaint but he may put forward therein an alternative ease from the commence ment as the defendant will then know that he has more than one ease to meet, and will not be taken hy surprise (4) The different titles should be set ont in the alternative, for a claimant who has failed to recover property under one title may be barred from hunging a second suct to recover the same property by a

from the commencement.

⁽¹⁾ Annual Practice, 1905, p. 237 It is, however, to be noted that under O 19, r. 27, the Court has power to strike out embarrassing pleadings. This rule is now reproduced in O VI r. 16 of this Code.

⁽²⁾ Narayansami r Ramasami 14 VL 172 (1890)

⁽¹⁸⁹⁰⁾ (3) Abdul : Miakhan, 3. B 297 (1911)

⁽⁴⁾ Lakshmibat t Hari 9 B H C R 1 (1872) as to amendment for jurpose of raising an alternative case, ib , Shib Kristo Sirear v Abdool Hakeem, 5 C 602 (1879) In Bahmakund t Dalu, 25 A 498 (1903), the diternative case was held to have been made.

different title (1) Where in an action of ejectment against a traint holding over, the lease such on wis inidimensible in evidence for want of registration and the plaint was not amended to one containing an alternative claim for partition held that the plaintiff could not be allowed to fall back upon his some il title and obtain a decree for partition (2)

As to the place where a cause of action must be deemed to arise see notes to seets 19 and 20, ante. The date of accrual is a question of substantivo law it should be given as correctly is practicable (3). In the case cited the suit was for possession and it was held that the date of the plantiffs dispossession must be given as icentrately as possible, especially when one of the issues was whether he had been in possession within tickety as to rehnquishment, soo O II r. 2, ante, and as to set off O VIII r. 6 post

Celinical objections, however should not, unless where it is absolutely necessary be allowed to prevail. Thus where it was objected that a plaint had been drawn for rectification of a compromise instead of a decree, it was held that this was a mero technicality since rectification of the decree would follow if the plaint was successful (4). In the under mentioned case, (5) Couch CJ and the plaint in this case is drawn as so many plaints are, in a very improper inamier with reference to the cause of suit but this Court cannot allow a plaintiff to be defeated in his suit on account of the improper form of the plaint if looking at the whole of it we cause, which is the cause of suit. Of comes we are not to allow a plaintiff to succeed upon a cause of action which is not in the plaint but the language of these plaints is not to be read too strictly arily we certainly are not willing to give effect to any technical objections among upon it. This and similar cases were decided many years ago and stricter rules have been now enacted in O. VI. A document referred to in the plaint is not necessarily a part of it (6).

Relief Rule 1, clause (g)—The object of a suit is to obtain some particular remedy or rehef. This is stated in the prayer of the plaint for just as the defendant is entitled to know what facts the plaintiff rehes on and intends to prove in order that he may meet them for the same reason he is cuttiled to know what use the plaintiff intends to make of his alleged facts and the Court should know the nature of the plaintiff is demand which when obtained is embodied in its judgment. In the corresponding provision of the New York Code 'judgment is substituted for rehef in order to exclude from the plaint prayers for provisional remedies which it has been said need not find room in it (7). Mention need not be made in it of that which is machiner; for the grant of the richef prayed for. Thus it has been held that a demand for money will include a prayer for its recovery by the sale of the 1 roperty held in mortgage for it (8) and it is not necessary to mention the sale in the

W R -38 (1863)

⁽¹⁾ Denobundho Cho vdhry v Kristomoneo Dosseo 2 C 152 (1876) [dist Ihakoro Be charn i Ihal ore Pujaji I4 B JI (1889)] Isahdhun v Sinba Nath 8 C, 483 901 (1882)

⁽a) Ramchan Irve Va u lev 10B fol (1886)
(J) Boydo 14th Surmah v Oja i Bibec 11

⁽⁴⁾ Srish Cha idra Pal Cho vdry i Tr gu d Prasad Pal Cho v lry 40 C 541 (1913) (4) Kaleo Narim i Chunder Naran -3

W R 2.8 (1875)

⁽⁶⁾ Ioulton Grytl r 1 Bourke 2 J(1865)

⁽⁸⁾ Ans nath v Sadasiv _0 C 805 (1833)

plant. In a suit for contribution, the amount due from each defendant should be specified; but where this cannot be done, the ascertainment of the amount should form a portion of the relief sought (1) A suit, it was held, is often brought only for accounts, and a subsequent suit for the halance (2) It is preferable and more convenient, bowever, that the suit should be not only for an account, but for an adjustment of accounts and for navment of the balance that may be found due This is the usual practice on the Original Side of the Presidency High Courts, and it is specially desirable in regard to suits against agents in cases in which, as under Bengal Act VIII of 1869. the period of lunitation runs from the date of the termination of the agency. because the a_ent may make delay in giving the accounts, so that the subse quent sout for balance may be barred (3) The charet as to which a rebef is claused should be described with sufficient fulness so that there may be no doubt or difficulty as to its identification Thus, where the chiect of a sint is to prevent the plaintiff's rights over certain lands from heine inferinced upon, the houndaries of the lands should be given in the plaint (4) See the new third rule in this Order and notes to O XX r 9, post But it has been held that a plaintiff's suit did not necessarily fail upon the ground that there were no boundaries given in the plaint when they asked merely for a declaratory decree in respect of their title (5) And the mere onussion from the schedule annexed to a plaint of the boundaries or other specifications of land will not exclude from the operation of the deerce matters which are by name strictly claimed in the plaint, and referred to as such in the decree (6) So, also, in a

difficulty in its identification. And it was held under that Code, that where a small area of land within another area was claimed, the boundaries of the land claimed ought to be civen Mahomed Ismail v Dhundur Kishoro Narain, 25 W R 39 (1875), and that in a suit for a village, the plaintiff should make his laint more precise by filing a survey map of villages Ram Doyal Khan v Atoodhia Ram hhan, 11 C 1 (1876) However where the boundaries of one of the plots were not given, but determined by the Amin in the course of the inquiry, it was held that the suit could not be dismissed for the defect though the plaint might have been returned for amend ment Jonab Ali v Golam Assad 21 W R 187(1874) Where the plaint did not contain a specification of the quantity of land in the defendant a possession, it was held that the plaint might have been amended, but after the defendant had appeared the suit could not be dismissed on that ground Syud Reza Ah : Purnanund, 6 B L. R App 84 (1870), at was also held sufficient so to describe the property as to identify it Meer Atabooddeen v Shumsooddeen, 18 W R 461 (1872) In the North West the fields are numbered and their position is given, 5 D N W (1857),

⁽¹⁾ Rujaput Rai t Mahomed th Khan, 5 N W P H. C. R 215 (1873)

⁽²⁾ Gobind Mohun v Sheriff, 7 C 169

⁽³⁾ Shoshi Bhooshun Pal v Guru Churn, 7 C. 89 (1881)

⁽⁴⁾ Ajoodhia Lall : Gumani Lall 11 C L. R. 134

⁽⁵⁾ Raj Narain Das t Chowdhry Shama, 3

C W N 162 (1899) (6) Shib Narain t Ram Narain, -0 W R

^{142 (1873)} The corresponding section (.6) of the Code of 1859 expressly provided that "when the claim is for land, or lor any interest in land, the nature of the tenure or interest must be specified, and if the claim be for land forming part of a village or other known division or for a house garden or the like, its situation shall be described by the setting forth of boundaries, or in such other manner as may suffice for its i lenti ficat on. It has been pointed out (Hukm Chand, C P C 616) that though it slid not appear why this provision had been omitted in the Code of 1882 it was obviously desirable to have regard to it in the preparation of laints, and to so describe the land to which the buil relates, that there might be no

sunt for obstruction to a private right of way, the plaint ought to show with reasonable precision and exactitude the termin of the right of way and the course which it takes (1)

It has been held that alternative rebefs inconsistent with each other may be demanded, there being nothing in the Code against the junder of such reliefs (2). In the case cited, the plaintiff prayed to be declared the proprietor of the whole village, and, faibing that, to be declared its occupancy to unt, and it was held that the plaint could not be returned for amendment though, if it become necessary to consider whether the second relief could not be granted for wint of jurisdiction in a Civil Court, the suit might have to be dismussed.

It is usual to me it a priyer for such further and other rehef, than the specific rehefel united as the Court mix hold the plantiffentialed to. A plantiff may in such case have rebot according to what he has alleged and proved the private for general rehef will support any rehef consistent with the cis mad in the plant, provided that there is no supprise on the defendants and that they suffer no inconvenience by it (3). So under the general priyer the Court has grunted in injunction (1). But under a priyer for general rehef to plaintiff is not entitled to my rehef which is inconsistent with his plaint (3). It must be considered as limited by the facts alleged and by the prayer for express rehef (6). Under it is not now necessary to all for general rehef.

Relief not founded on the pleadings should not, as a rule, he granted. But where substantial matters which constituted the title of all the parties are touched in the issues and have been fully put in evidence and formed the main subject of discussion and decision in the Courts, the case does not come within the rule, and a declaration of the rights of the parties, though not founded

on the pleadings may be made (7)

Mesne profits —This clause does not apply where mesne profits are claimed only from the date of the suit (8)

Sunt as representative (Rule 4) -Whether the sunt is brought by the plaintiff in his personal or representative capacity must be determined from the statements in the plant and not merely from the words indicative of the capacity in the title. So where the averagents in and the frame of a plant

^{1 12} Some of these cases were discussed and dis mguished in Rajmarain Das v Chowdhury Shama 1 C W N 162 (1899) atte. Notwithstanding the omission of the position in the Code of 1839 effect was still given to it in the prejaration of 1 laints in suits relating to lands, and now clau of luchin Vision Blancdar i Here, Miller and Co. 17 C W N 1098 (1913)

Harris t Jenkins, 22 Ch D 481
 Kabir Khan t Khawam, 1887, P R

⁽³⁾ Waljok : Orford 3 Ves. 402, see also Seriao : Vocl 15 Q B D 049

⁽⁴⁾ Aristo Mohinoy t Kally Prosonno 6t 485 (1880) but see Ningap pat Shirappa 11 B at p 327 (1891)

⁽⁵⁾ Hiralal Wulhek i Vitilal Wulhek B L R 682 (1870) so ni Jugul Kissoro i Kartae Chunder 21 C at p 1.0 (1822) it i as held that the frame of the suit jacquided to I luntiff from cluming j intend in a hef will

⁽i) Debi Day dr Bhan Pictig HC ti

<sup>440 (1903)
(7)</sup> Sri William Gobind Rao : Sita R m

Resho 2 C W N 681 (1898)

⁽⁸⁾ Ramkrishna t Bhimabai Lo B 110 (18.00)

are such as to after to the planniff a representative character, and to show that a cause of action, if any, devolved upon him solely in that character, the omission in the title of the word "as" between the name of the planniff and the words descriptive of his representative expacity, will not be deemed to negative his claiming in that canacity (1)

The plant must show not only in actual existing interest, but also that the plaintiff has taken the stans necessary to enable him to sue. The Indian Succession Act of 1865 (sect 187) provides that no right as executor or legator can be established without probate or letters of administration and (sect 190) no right to an intestate's property can be established without letters As regards, bowever, Hindus and Mahomedans, neither of administration of whom are coverned by this Act, the general rule is that there is no law which obliges a person claiming under a will to obtain probate (2) Nor generally are letters of administration necessary. Upon this general rule, however, are engrafted two special provisions. Seet 187 has since been embodied in the Hindu Wills Act 1870, but it was excluded from the Probate Act. 1881 The result is, that sect 187 upplies to cases governed by the Hindu Wills Let, but does not apply to wills executed by Mahomedans or by those Hindus who are not governed by the Hindu Wills Act. and nn recutor of theirs can sue without taking out probate (3) Further, no Court can pass a decree against a debtor (1) of a deceased person or proceed to execute a decree against such debtor except upon the production of probate. letters of administration, or certificate mentioned in the Succession Certificate Act (5) A certificate may be obtained in respect of particular debts due to

- (1) Huhm Chand, C. P. C. 619, citing Beers t. Shannon, 73 N. Y. 202 (Amer), Beraldeinner: Strauss, 7 Cr. Fro Rep. 225 (Amer), Marsball: Blesler I How Pr. N. S. 217 (Amer), and seco Mussoorie Bank t. Barlow, 9. A. 188 (1887), pol.
- (2) Bhagvansang 1 Bichardas, 6 B 73 (1881), Krishna Kinkur v Ru Mohun 14 C
- (3) Shalk Moosa t Shalk Essa, 8 B 211 (1884) [subject to the provisions of Act XVII of 1860, which then took the place of the Succession Certificate Act, the suit, however, was held not to be for the recovery of a debt!
- (4) In a sut by a person claiming to be entitled to the effects of a deceased person, and for recovery of a debt due to the estate and not otherwise Srimant Raja w Makerla, 20 M. 162 (1897) [right of succeeding trustee to collect], a e, 24 I. \ 73 A curator under \(\text{tx}\) XIX. of 1841, is not a person claiming to be so cuttled Babesab; \(\text{Narappa}\) 20 B 437 (1895), and a plaintiff does not require a critificat o where his claim is for family property by survivorship.

Jagmohandas t Allu Maria, 10 B 338 (1894). Pateshuri t Bhagnati 17 A 578 (1895). Subramanian t Rakku, 20 M. 232 (1807) Further, the suit must be in respect of a debt Subbanna v Munckla, 18 M 457 (1894) [suit for damages for wrongful detention , but see Torregrosa v Pragu, 16 B at p 521 (1892)], Sabiu v Noordin, 22 V 139 (1898) [unliquidated claim not dobt] during lifetime of deceased Ranchordas i Bhagubhar, 18 B 394 (1893) Baid Nath t Shamanand, 22 C 143 (1894) [decree for sale not a decree against debtor for payment of his debt] \ certificate may be granted in respect of a specified debt. In re Indarman 18 4 45 (189a), but not for the collection of part only of a debt Muhammad : Puttan, 19 1 129 (1896)

(5) Act VII. of 1859 hild not to apply to proceedings instituted before the Act Immanua: Gurumurth 10 M. 04 (1892), but see Fatch Chand: Muhammad Baksh, 16 A. 259 (1891), dist this case. The Act applies to auth in a village Munsif's Court Rassbi: Olaga, 21 VI 115 (1897). In application by the representative of a

a deceased person, as distinguished from probate or letters of administration which create a representative title to recover all the effects of such person.(1) It is not necessary for the institution of a suit that the plaintiff should have taken out a certificate under the Succession Certificate Act (2) The 4ct however, enacts that no Court can " pass a decree a gainst a dehter of a deceased person for payment of his debts to a person clausing to he entitled to the effects of the deceased person or to any part thereof" unless he has obtained a certificate under the Act The Courts have construed this provision so as to hold that, unless the certificate is produced, a decree may not be po ed even with the defendant's consent, (3) nor in a suit in which a partner of the deceased has joined the legal representative of the latter, (4) or even when the suit is brought solely he an assignee of the legal representative (3) for the assignee is in no hetter position than the assignor It is quite sufficient however that the certificate is obtained and produced in the Court after the institution of the suit during the course of the proceedings. And this is 50 also in the case of a suit continued hy a legal representative. Administration is not necessary for revival (6) And where a certificate was granted by a Court in a native State, and a true copy of it signed by the Political Agent of the State and stamped with the court fee required by the Court Fees Act, was produced by the plaintiff but there was nothing to show that the Political Agent intended to grant a certificate under the Succession Certificate Act, it was held that though a decree should not have been granted, yet time should have been allowed for the production of a proper certificate (7) It is doubtful whether the Act applies to the case of a person who has been substituted as plaintiff for one who having taken out a certificate, has died pending the suit (8) See also next paragraph

Defendant's liability to be shown (Rule 5) - 1 suit against Mrs S G B, Mussoone, which stated in the body of the plaint that she was executrix of the debtor is a suit against her as executrix (9) Where a defendant is hable as a representative of another, the fact of his hability as a representative should be stated clearly in the plaint as the effect of a sale in execution of a decree is limited to the judgment-dehter's interest, where it does not appear on the face of the proceedings that he was sued in a representative capacity, and it is only in cases where it is manifest that the judgment-debtor mu t have been sued as a representative, that a sale in terms of the interests of the judgment debtor is allowed to convey the interests of other persons (10)

judgment creditor to obtain a certificate under this Act is not a step in aid of exe cution within the meaning of the Limitation let Murcapa Muduvalappa v Basawantrao, 17 B 559 (1913)

- (I) Karuppasamı t Pichu, 15 M. 419 at p 420 (1891)
- (2) Kaminathi i Mangappa, 16 W 454 (1893)
- (3) Santajı : Ranjı 15 B 105 (1891) (1) Ram \arain : Rain Chun ler 18 C 50
- (") Karuppasamı : Pichii 15 M 419(1891)

- (6) Torregrosa : Pragji, 16 B 519 (IS9.) (7) Manasing : Amad Kunhi, 1 M. 14
- (1894)(8) Baid Noth t Shamanan I, 22 C 143
- (1894)(9) Mussoons Bank : Barlow, J A 155
- (10) Augenderchunder Ghose t Kammee Dossoe 11 W I 1 241 (18 7) Baijun Doobey: Brij Bhookun 2 L 4, 2", (18) Dendyal Lal : Jug leep Strain 41 1 247 (1877). Loki Mahto i Aghore 5 C. 141 (3880)

The liability of the legal representative of a deceased debtor to be sued in al solute. and not dependent on the assets having come into his hands, it being sufficient to give a decree against him that there are assets of which he may have become posse sed, though he will be liable under the decree only as a legal representative (f) A decree obtained against a brother and an aunt of the deceased debtor, and proceedings taken in execution against them, will give to the plaintiff no title to the property forming the estate, and if after the sale a person takes letters of administration to the deceased, he will be entitled to the proceeds of the sale in execution held by the Court in preference to the decree holder (2) In Baswantapa v Ranu, (3) it was held that a decree against a person who is not an heir of the deceased and even a sale in execution of such a decree, can give no right to the decree holder, or to the nurchaser at the execution sale to the property which belonged to the deceased or to his real heir or fegal representative. In a suit by a creditor against the estate of a deceased debtor who has died leaving a will, his heirs in intesties do not represent his estate and the suit is had unless the estate is represented (1) If a Hindu sues as representing a joint family he should state it in the plaint (5) And a widow if sued as repre entative of her deceased husband should be so described (6) And this is a general rule where a per-on is sued as a representative as where defendants are sued as representatives of a taruad (7) A decree against a Hindu widow may bind a sen adepted during the hitigation but not brought on the record (8) On the death of one member of a joint Hindu family subject to Vitakshara law, his widow cannot represent him so as to make the joint property hable to his debts (9) As to widow a estate in moveables inherited from her lusband and the limbility of such property for her debts after her death see below (10)

Limitation (Rule 6)-This rule recognizes the principle that a plaintiff must not only show that he has a title, but that he has a sul sisting title, which he has not lost by the prescriptive sections of the Limitation Act (11) It has been said that under this provision a plaintiff cannot take advan tage of any ground of exemption from the law of hmitation which has not been set up in the plaint (12) But it has been recently held that this is not an inflexible

⁽¹⁾ Rayappa Chetti t Ali Salub 2 M H C. R. 336 (1865) Girdharlal v Bai Sliv 8

B 309 (1884) (2) Sukh Sanlan : Rennick 4 L 193

^{(3) 9} B S6 (1885)

⁽⁴⁾ Matangini i Chooneymoney -2 6 903 (5) Can Savant 1 Narayan 7 B 4(7

⁽⁶⁾ See Girdharlal : Bat Sh v 8 B 309

⁽¹⁸⁸⁴⁾ Joki Malto v Aghorce 5 C 144

⁽⁷⁾ Sankaran : Parvathi 12 M 434 at p 437 (1889) but a decree against a manager for a debt due by the family has been held to Imltle rest Harr Vithal : Jairam Vithal

¹⁴ B 597 (1890)

⁽⁸⁾ Hari Saran e Bl ubanesware 16 C 40 (1888) lo I A 195

⁽⁹⁾ Phoolbas Koonwur 1 Lalla J geshur 1 C 226 (18 C) 3 I A 7

⁽¹⁰⁾ Bai Jai ma t Bha Lai kar 10 B 33 $\{1891\}$

⁽¹¹⁾ Secretary f State : Vira Rayan 9 M 175 (1880) It is not sufficient to say the

let does not apply or that the case has been taken out of the Act The facts should be stated See lorsyth a Bristone 8 Exch

C davanam Seshayya 17 M 1 J 281 (1907)

rule If the plant shows the ground of exemption, the requirements of the Cede are satisfied, but the plaintiff is not precluded from taking another and an inconsistent ground to get over the bar of huntation if he behaves that the latter is the true ground (1)

7. Every plant shall state specifically the relief which the plaintiff claims either simply or in the alterna Relief to be specifi cally stated tire, and it shall not be necessary to ask for general or other relief, which may always be given as the Court may think just, to the same extent as if it had been asked for. And the same rule shall apply to any relief claimed by the defendant in his written statement

Relief - This rule is new, and is taken from English O 20, r 6 The plaintiff should always claim in the one action every kind of rehef to which he is entitled be it damages or an injunction, a declaration or a receiver, for he will not be allowed to bring a second suit on the same cause of action to obtain rehef which he might have obtained in the first action (2) A Court in refusing a decree for specific performance may give a decree for the refund of the deposit with interest though the plaintiff had not sought this alternative relief (3) In a suit for the sale of mortgaged property, the Court may (in certain circumstances) pass a decree for redemption (4) As regarde prayer for general rehef, see notes to preceding rules

Where the plaintiff seeks relief in respect of several distinct on claims or causes of action founded upon separate Relief founded separate grounds and distinct grounds, they shall be stated, as far as may be, separately and distinctly

Separate grounds — This rule is new and is the first sentence of English. O 20, r 7

(1) The plaintiff shall endorse on the plaint, or annex thereto, a list of the documents (if any) which Procedure on admithe has produced along with it, and, if the ting plaint. plaint is admitted, shall present as many copies on plain paper of the plaint as there are defendants, unless the Court by reason of the length of the plaint or the number of the defendants, or for any other sufficient reason, permits him to present a like number of coneise statements

of the nature of the elam made, or of the Concise statements. iehef claimed in the suit, in which case he shall present such statements

C W > 100 (1912) 1) Hingu: Heramba 13 C L J 139(1310)

⁽⁴⁾ Balkisen Lal r Papesur, 17 C W (2) See Ann. Pr , notes on this rule

⁽³⁾ Raghu Nath : Chardra Protap 17 219 (1911)

- (2) Where the plaintiff sucs, or the defendant or any of the defendants is sucd, in a representative capacity, such statements shall show in what capacity the plaintiff or defendant snes or is sucd.
- (3) The plantiff may, by leave of the Court, amend such statements so as to make them correspond with the plant.
- (1) The cluef ministerial officer of the Court shall sign such list and copies or statements if, on examination, he finds them to be correct.
- "Concise statementa,"—Act VIII of 1859, s.et 38 For forms of concise statements and Register of eval suits, s.e Scheduk IV of the Code of 1882. As to separate registers for units between landlords and tenauts, see sect 146, Act VIII of 1885 (B ngal Tenancy) and sect 66, Act IX of 1883 (Central Provinces Tenancy)
 - 10. (1) The plant shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted.
- (2) On returning a plaint the Judge shall endorse thereon Procedure on return- the date of its presentation and return, the Inspirate. name of the party presenting it, and a brief statement of the reasons for returning it.

When plaint may be returned—The words of the rule are imperative (1) The section which this rule replaces did not, however, state at what stage of the suit the order could be made. The section itself was differently construed as applicable to any stage of the suit, and as referring interly to the time of presentation. The Calcutta High Court held that its provisions night be put in force at any stage of the hearing, and that it is not limited to the time of presentation, or before the defendant has been called on to state his ease, for the objection, if to valuation, would not appear upon the face of the plaint itself, but would naturally come from the defendant. Therefore, a Court was held to have erred which, after hearing the evidence on both addes, found that the suit had been undervalued, but instead of returning the plaint should be returned and the suit for dismissed after evidence in the first Court, (3) and after trial in the first Appellite Court or even in the High

Bhadeshwar t Gaurikant, 8 C. 834
 Muttirulandi t Kottayan 10 M. 211
 S71

⁽²⁾ Bhadeshwar v Gaurikant, S C 834 (1882) The contrary was held in an early case under the Code of 1859 it being deter

mined that the suit should have been dis missed. Shaikh Muzhur t. Musst. Basoo, 8 W.R. 46 (1867).

⁽³⁾ Ram Gutty v Goonomonee, 11 W. R 177 (1869). hartick Nath v Roy Nunde put, 23 W B 263 (1875)

Court itself (1) The same views were entertained by the Madras High Court (2). The Bombay (3) and Allahabad (1) High Courts held, that while the section, corresponding to this rule, only contemplates the return of a plaint, should error be patent when it is first presented, yet there was nothing in the Code which forbade the return of a plaint at a later stage after the plaint has been admitted and the trial begin, or oven concluded, it being a general principle that a Court, on finding, whenever that may be, that it has not jurisdetion, should decline to proceed further in a cause placed before it. The shape, however, in which a suit is originally instituted is the test of jurisdiction, and a Court, after exercising jurisdiction by amending the plaint, cannot afterwards are result of jurisdiction with regard to the plaint so amended (5). The words "at any stage of the hearing," have now been inserted and remove all doubt on the question is assed in the cases sited.

The former section was held, however, not to apply to High Courts in the exercise of their original jurisdiction. The practice on the Original Side of the High Court at Bombay has been to return a plaint when further proceedings in a suit have been stopped for want of jurisdiction, and a plant is not returned except when, on presentation, the Judge is of opinion that it discloses no cause of action, or, it appears to him, that the suit ought to be brought in another Court (6). A similar practice prevails in the Calcutta High Court

It was held, prior to the Limitation Act, that the date of a suit must be taken to be that on which the plaint was originally filed, and not that on which it was filed in another Court as a plaint returned to be filed in that Court (?) It has been held that where a Court returns a plaint under this rule the Court on which the plaint is afterwards presented is bound to give credit for the ke levied in the first instance (8) When a plaint has been returned the suit when

- (1) Musst Edoo t Shukh Hefazut, 13 W R 938 (1870), Prosad Does Mullich C 157 (1881), Joynath Roy t Lilli Bahadur, 8 C 120 (1881) [it is, however, to be noted that in this case the lower Court both dismissed the suit and returned the plunt] s c, 10 C L R 146, Moshingan t Mozam Sajad, 13 C 271 (1885) [which dealt also with the question of costs] In Ledgard t Bull, 9 A 191 (1880), the Pray Connell stated that the Court should have given the plaintiff the alternative of having his suit dismissed or of willdrawing with leave to bring a new action
- (2) Khimpi C Phrushotnin, 7 M 171 (1883), Kandu i Konda, 8 M 62 (1881), Chandu i Kombi, 9 M 208 (1885), Najamna Subba, 11 M 197 (1887), oven if the proper Court of presentation is a Revenue Court Muthrulandi C Kottayan, 10 M 211 1887)
 - (i) Prabicakarbhat / Vishwambhar Pandil.

- 8 B 313, F B (1884) forcruling Jognians Magdam, 7 B 457 (1889)]. Babyis Lakdi mibai, 9 B 200 (1884). Bai Yakhor i Bulakhi Chiku, 1 B 58 (1874). Vasuder Narayin, 4 B 642 n (1875). In Bai Aimi - Hanbhai, 8 B 380, is use held talk the first mentioned ruling did not govern the case where decrees had been pas ed un tho plant
- (4) Abdul Samud t Rajendro Kielor, 2 \ 357 (1870), see khooshui e Palmer, 1 Agro. 289 (1864). In Nalin Lali Wahar Hossain 7 \ at p. 245 (1861), it was pointed out that the words "on or before the first la rings" are not un this action.
- (5) Motabhar i Surat Municipality, 20 B.
- 675 (1895) (6) Bai Amert + Hambhai, 8 B 380 (1884)
- (7) Khellat Chunder (Nusseebunns a 16 W R 47 (1871), see a 14 of the Limitation
 - Act (1911) (8) Vision with a Nair, 95 M 767 (1911)

presented to the proper Court is a new suit and not a continuation of the former proceeding (1)

"Should have been instituted."—In the Code of 1882 specific cases were mentioned in which the Court might return a plaint Where, however, a lower Court rejected a suit, but refused to return a plaint on the ground that the case did not fall within the provisions of this section, it was held, on appeal, that the circumstances of the case cime within clauses (o) and (e) of the corresponding section of the Codo of 1882, but even were it not so, in overy case where the Court has no jurisdiction to try the suit the proper procedure was to return the plaint (2) This is now midd clear, the second set of italicized words in the first clause being substituted in lieu of the specific clauses (o), (b) (e) of the last Code

Appeal —An appeal lies under O XLIII r 1 (o) Under the circumstances of the case cited, (3) a party was held estopped from appealing against an order returning the plaint

11. The plaint shall be rejected in the following cases —

Rejection of plaint.

(a) where it does not disclose a cause of

(b) uhere the relief claimed is undervalued, and the plaintif, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so

(c) where the relief claimed is properly valued, but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp paper within a time to be fixed by the Court, fails to do so

(d) where the suit appears from the statement in the plaint to be barred by any law

Applicability of rule—It was held that clauses (b) and (c) did not apply to High Courts in the exercise of their ordinary or extraordinary original civil jurisdiction (i). An opinion was also expressed that they did not apply to the High Courts in their appellate jurisdiction (5). But seet 5823 was, since that decision, added to the Code of 1882 by Act VI of 1892. See now seet 149, ant.

Rejected —Clause (a) is tiken from sect 53 of the last Code TI c

Court must see whether a cause of action in disclosed in the pluint Firstly

as to the mode in which this is to be done Apparently this is to be ascertained

from a reading of the pluint itself. The Code of 1859 provided (6) for rejection

⁽¹⁾ Mohidin Rowthan i Nallajerumai (L. J. 580 Pillai, 21 M. L. J. 1900 (1911) (4) And se

⁽²⁾ La lhap : Hari I Born L. R. 176 (1579)

⁽³⁾ Beni Malhub Davi Totendra Milun Ingine, 11 C. W. N. 765 (1907). e. e. 5

⁽⁴⁾ And see now O XLIX.r 1 post. (5) Balkaran Rai r Goland Nath, 12 A at

Jr. 149 (15 €). (c) ≤ 32 (a).

deficit Court fee he not put in within the time allowed by the Court, the latter ought to reject the plant. But if on the date on which the deficit Court-fee is ultimately put in, the suit is not barred the plaint may be regarded as if it was presented for the first time on that date, and the suit ought to be proceeded with (1)

"Time to be fixed "-The time fixed for making up stamp duty on a plaint may extend heyond the period of limitation for the smt If a plaint improperly stamped is given back to have a proper stamp fixed, the date of the surt is the date on which it was filed (2) and therefore no question of limita tion can arise There is nothing in the Code to render a presentation ineffectual hecause the plaint was insufficiently stamped (3) The view, however, has also been expressed that the presentation of an insufficiently stamped document which if sufficiently stamped could be treated as a plaint, cannot be regarded as the institution of a suit within the meaning of sect 4 of the Limitation Act. or of the Code (4) Therefore, when a Court fixes a time under clauses (b) or (c) of this section, it must be a time within limitation and this section does not _ive a Court power to extend the ordinarily prescribed period of limitation for suit (5) But in a recent case in the Bomhay High Court where a memorandum of appeal insufficiently stamped was filed on the last day allowed by the law of huutation and the Court refused time to pay and rejected the memorandum this order was reversed on appeal and it was held that the Court had a discretion under sect 149, hunted only by clause (c) of this rule (6) Apart from the question of limitation, the Court can extend the period originally granted after the time originally fixed has expired (7) If however the order is not complied with within the time allowed the plaint will be rejected. So a plaint was filed one day before the express of the period of himitation but the Court fees were deficient and the plaintiff was ordered to pay the deficient Court fees within a week This order was complied with one day after the expiry of the time allowed and the plant was registered. Held, that the suit was harred by limitation as the deficient Court fees were not supplied within the appointed time, and that the

60, 70 (1833)

⁽¹⁾ Hara Kumar Pal t Shaikh Safat ullah, J C W N S44, s c 2 C L J 9 0 (1909)

⁽²⁾ Mt Beger Begum t Yussi Ms, 6 1. H C. R. 133 (1874) Skinner t Orde 61 L 1.6 (1879) Mengur e Baboo Huree 23 W R 447 (18"o), Syud Ambur + kah Chand 24 W R -08 (1870) Mots Sahu e Chatri Das 13 (780 (1832), Huri Mohum t Namuddin -0 C. 41 (183.), Chennapi a t Rashunatha 15 M 2J (18J1), Surendra Kumar e Kuma Behars, 27 (814 (1.00), s c, 4 L. W N 51S, Nane Pathumma, ...2 M. 491 (1837) per Subramanis Ajjar, J Dhon I ram : Navadan, 27 B 330 (1 to.), s. c 5 Bom. L. R 135, Rajkishori t Madan M Lan 31 C. To (1 403), diss. from Balkaran 1 at a Cobind Nath, 12 L L-9 (1840)

⁽³⁾ Jhanda Ishan e Bahadur Ale (15.5),

P R No J (I) Jainti Prasad e Bachu Smoh lo 1

⁽o) Ib Ventatramacyar Krishimacya (W 313 (18-2)) Vuhaminad Almadi Mu hummad Sirajuddin 13 1, 423 (1,01) Durga Nughi i Beheshar Dyal 24 1, 218 (1809) But see et ac ettel arie in (-) and in particular, Issan e Pathumma 22 M 40 di (18-77) jer Subramama 1yar J who dis agreed with Ventatramayyar i krishimayya sapra

⁽⁶⁾ Achut I am handra Par c Nagarra Bab Balga 35 B 41 (1313).

⁽⁷⁾ Bhugwandas La₀La r Haji Aba Io B -U3 (1891) see also Raj Kubori r Wadan M han 31 (To at p. 75 (1*3), Amr Hessam r Babu Nanak, 11 (W N 5-2 (1910)

vided the action is not harred, it should be amended. (1) as also where in ut for a Lab il jut the date of the commencement of the Labulyat is not given (2) plant should not be rejected or the suit dismit ed simply because ctly accurate hanguage has not been used in describing the cause of action (3) because co to in respect of a former suit have not been paid (1)

r because the document on which plaintiff sues has not been filed th the | hant , (a) nor if presented to the wrong Court, for in that case it

ould be returned (6)

Appeal from order rejecting plaint -An order rejecting a plaint is decree,(7) and is therefore appealable unless there is any statutory probi tion to the contrary (b) Whether there is such a prohibition depends pon the construction to be placed on sect 12 of the Court less Act (VII of 370), which chiefs that every question relating to valuation' shall be corded by the Court in which a plaint or memorandum of appeal is filed and uch decision shall be final is between the parties to the suit. According o one view which has been taken it was the intention of the framers of the 'ode that whenever a plaint is rejected under this section and in every case illing within it there is an appeal (9) the Court I ces ict not contemplating a case when the Court refuses to hear a suit (10) Therefore when a plaint is rejected under this rule cither because the relief sought is undervolved or because although the relief sought being preperly valued a sufficient Court fee stamp has not been paid there is an appeal (11) This view appears to proceed on the ground that the Code has removed the finality declared by sect 12 of the Court Fees 1ct (12) 'tecording to another view which has been taken the operation of sect 12 of the Court Fees Act is not effected by the Code but in certain cases there is no question relating to valuation within the meaning of that section and there is therefore an appeal under sect 96 of the Code (13) It has thus been held that the Court Pees Act opplies merely to decisions as to the valuation of a suit in a particular class when there is no question of the article in the schedule generaing the case but that an

(1) Rajah Sherraj : Vur Khan 7 A H C. B 354 (1875)

(2) Golam Molamed v Asmut 1lu 10 WR (FB) 14 (1868) sc BIR (FB)

(3) Inglis v Ram Singh W R (b B) 159

(4) Luckeymones v Khetter Coomary 2 Ind Jur N S 117

(5) Fx parte Rayachand 2 B H C R 369 (1865)

(6) Klandu v Shivli B H C R 212 (1868) and this even after the trial has been concluded Prabhakarbhat v Vishwambhar

8 B 313 (1884) (7) S 2 ante

(8) S 96

(9) Muhammad Sadik v Muhammad Jan 11 A 91 (1888)

(10) Omrao : Jones 12 C L R 149 150

(ts82)

(11) Ib tion this i Gunga 6 6 249 (1880) when the Court held that the plaint was insufficiently stamped and there appears to have been no quest on of the article or sel edule un ler which the case came

(12) See last case and M shammad Sad k v Muhammad Jan supra as regards the latter case Edge (J m Balkaran Rai v Gobind Nath 12 A 129 at p 1.4 (1890) state I tlat in so far as it decided that an appeal lay from a decis on which vava d eis on with n the meaning of a 12 of the Court hees Act it was erroneous

(13) See Balkaran Ratt Gobind Nath 12 A 129 (1890) at p 153 where it was po nted out that what the class of cases next referred to decide is that a quest on of category is not a question relating to valuation ' and therefore not one declared to be final

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appeal lies against a decision as to the class to which a suit belongs, and there fore d fortion when a plaint is rejected or a suit dismissed, on this ground sect 96 has operation, there being no prohibition to the contrary (1) The Bomhay High Court, doubting the distinction drawn in the first of the Madrus cases cited, has said that where there really is a valuation to be made by a Judge in order to determine a variable proportional fee, it cannot be said that his reasoned choice amongst the several categories of suits is not as essential an element of his valuation as the subsequent arithmetical computation by which it is completed, and that where the Judge can enter on a valuation at all, the determination of the one factor, as much as of the other, must be a "question relating to valuation," and as such a question closed as between the parties by the Judgo's decision (2) But in some cases under the Court Tees Act a suit is one admitting of valuation by a Judge, in other cases the valuation rests with the plaintiff Again, in some cases the fee is ad valorem, thus admitting an inquiry by the Court, in other eases the feo is fixed The eases therefore where a Judge can enter on a valuation are quite different from those where an inquiry is quite gratuitously entered into, either because the matter rests in the discretion of the plaintiff or hecause the fee is fixed (3) The Bombay High Court has therefore held that on the question whether or not any particular suit was one admitting of valuation by the Judge an appeal has (4) An appeal has also been allowed where the Court of first instance rejected the plaint without giving the plaintiff an oppor tunity of affixing the proper stamp (5) In a suit for taking accounts valued at Rs 130, it was held that the appeal from the order, rejecting the plaint, lay to the District and not the High Court (6) Where excess stamps have been filed in consequence of an overvaluation of the appeal the surplus amount should be refunded (7)

Revision —A decision on valuation was, notwithstanding its declared finality, formerly held subject to revision (8)

12. Where a plaint is rejected the Judge shall record an order to that effect with the reasons for such order.

"Record "-The words " uth his own hand " have been omitted

⁽¹⁾ Gunga Monce v Gopal Chunder, IJ W R 214 (1873), Chunia t Ramdal, I A 300 (1877), Annamila Chetti v Cloeto, 4 401 (1881), Omrao t Jones, 12 C L R 149 (1882), Kanarin t Komappan, I4 W 169 (1890), Studd v Mat Mahto, 28 C 334 (1901). Prokash t Bishambhar, I4 C W N 313 (1900)

⁽²⁾ Vithal t Balkrishna, 10 B 610, 614 (1886), and sceremark in Muhamma 1 Sadik i Muhamma I Jin 11 \ Jl, at p 91 (1889) (3) Vithal t Bill ribna, 8 171 at p

Aagesh, 23 B 486, 490 (18J8), Kashmath v Govinda, 15 B 82 (1890), Balvantrao t Bhimashankar, 13 B 517 (1889), Sar darsing v Ganpatsing, 17 B 50 (1892)

⁽⁵⁾ Bai Anopo t Mulchand, 9 B 353 (1885), seo Thakoor Patuck i Ramsoomrun, 1 A H C R 17 (1809) (6) Vithal t Balkrishna, 10 B 010, 616

⁽⁶⁾ Vithal t Balkrishna, 10 B 610, 616 (1886). Annamalai Chetti e Clocte, 4 M

^{204 (1881)} (7) Bar Amba e Pranja an Irs, 1) B 1/8 (1894)

⁽⁸⁾ In referent, 14 W It 47 (1870)

⁶¹⁷ (4) 1b, at p 615 1

Where rejection of plaint does not preclude presentation of fresh plaint.

The rejection of the plaint on any of the grounds is literembefore mentioned shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action

Effect of rejection —The rule, which corresponds with sect 36 of the Code of 1809, and sect 36 of the 18t Code, says 'efits own force' The claim max, however, of course, become, after rejection, burred by lapse of time (1) It is to be observed that the rule applies to rejection on any of the shounds hereinbel re-mentioned—that is, the grounds in r 11. It has seen it lith the where a junt has been rejected for default of appearance in the Mambatian's Court under sect 13, Bombay Act III of 1876, the rule of respudicies applies (2) Such a rejection is analogous rather to the procedure under 0.18 r 9.

Documents relied on in plaint

14 (1) Where a pluntiff sues upon a document m his is possession or power, he shall produce it in court when the plaint is presented, and shall such a copy thereof to be filed with the plaint.

(2) Where he relies on any other documents (whether in his possession or power or not) as evidence in support of his cluin, he shall enter such

documents in a list to be added or annexed to the plaint

Document sued upon —This is a very wiso provision, its object being to provent the dishonest fabrication of documents (3) and to give the defendant notice of the documents riched on so as to enable burn to reply to the claim (4) All documents sued upon must be produced such as pottah (5) and title deeds (6) A defendant is entitled under the Madras High Court Rules to be furnished with a copy of documents sued on which are deposited with the plaint (7). It was field in an early case (8) that all documents delivered should be received and filled with the plaint, though, if not admissible in evidence they will after wards be rejected and rulemed. All the law is still the same that the mere production or filing of a document does not operate as its admission in evidence and that it will not be put on the record unless it is duly admitted in accordance with the rules prescribed.

(1) Kadumbinco v Unnopoorna 14 W R

289 (1870) (2) Ramchandra v Bhikibai 6 B 477

(2) Ranchandra v Ballidai v Ballidai (1882) ref Rajaram v Gancals 218 91,97 (1895), larushottam v Chatargu, 25 B 82 (1900) dissented from on the ground tlata diamnasal in limine dives not give rise to the plea of res judicals Ramchandra v Aar subhecharya 24 B 251 at pp 253 2.4 (1899)

(3) 1 remsook v Rajkisto 1 Hyde 14. 146

(1863)

(4) Panjab Ch C Instr s 2 r 10

(5) Atta Oollah v Sukecooddeen 1864 W R 271

(6) Lchhraj Roy v Mutty Madhub 14

W R 95 (1870)
(7) Hap Vahomed v Subba Naidu 21 M

490 (1897) see as to Bombay V W P and Panjab Rules Hukm Chand, C P C 654 (8) Roshun Jehan 2 I nayut Hossein

(8) Roshun Jehan 2 I nayut Hossel Warsh 127 (1864) Document relied on.—The rule requires a plaintiff to file with his plant a list of all the documents on which he relies; that is, which he is then in a position to know to be essential to his case, whether in his possession or power, or not (1) These words will therefore [as they now expressly state, and was formerly held (2) under the corresponding sect. 39, clause (1) of the Code of 1859] include all the documents the plaintiff intends to use in evidence, and not only those which are the essence of the claim and on which the suit is based, (3) which are provided for by the first paragraph. They do not include, however, documents tendered merely for comparison of handwriting (1)

Penalty.—The penalty for not producing these documents when called on to do so is not the rejection of the plaint, but that prescribed in r. 18, viz not being able to put them in without the special leave of the Judge (5)

Inspection.—The Bombay High Court has held that it has not been the practice to order the plannin to give inspection of documents other than those relied on in the plannt, and inclinded in the list of documents annexed to the plannt as required by this rule, till after the written statement is filed, that that this is not, however, an inflexible rule in all eases. There may be cases where it would be impractive to order the planntiff to produce and give inspection to the defendant of a document which he may not have mentioned in the plant or onumerated in the list of documents annoved thereto (6)

- .] 15 Where any such document is not in the possession or
 Statement in case of power of the plaintiff, he shall, if possible,
 possession or power.

 state in whose possession or power it is.
 - Suits on lost negotiment, and it is proved that the instrument is lost, and an indemnity is given by the plaintiff, to the satisfaction of the Court, against the claims of any other person upon such instrument, the Court may pass such decree as it would have passed if the plaintiff had produced the instrument in Court when the plaint was presented, and had at the same time delivered a copy of the instrument to be filed with the plaint.

"Negotiable instrument."—Act V. of 1866, sect 14 A suit will lie on the ground that the indorser refused to give a new cheque for one lost, or to refund the mone, paid for it The drawer should be made a party (7)

⁽¹⁾ Mmakshi + Velu, S M. 373, 374 (1885)

⁽²⁾ Premsookh + Rajkisto, 1 Hyde, 145 (1863)

⁽³⁾ As was held under the first Code in hamoenes t Harromoney, Coryton, 151 (1864-5)

 ⁽⁴⁾ Minalshi v Velu, 8 M. 373, 374 (1885)
 (5) Gopal Gundapa v Vishnu Krishna, 22

B 971 (1897)
(6) Khetsidas t Narotum Gordhundas, ⁹
Bom L. R 1084 (1907)

⁽⁷⁾ Baldeo Presid : Grish Chindar, 2 A. 754 (1880)

17 (1) Saic in so far as is otherwise provided by the production of shop- Bankers' Books Evidence Act, 1897, where the document on which the plaintiff suce is an entry in a shop book or other account in his possession or power, the plaintiff shall produce the book or account at the time of filing the plaint, together with a copy of the entry on which he rehes

(2) The Court, or such officer as it appoints in this behalf, onshal entry to be shall forthwith mark the document for the marked and returned purpose of identification, and, after examin ug and companing the copy with the original, shall, if it is found course the copy to be filed

Production—It was held that sett 39 of Act VIII of 1859, which corre sponds with this rule did not require the Court to inspect the document but only that it should be marked for identification and the copy compiled with the original (1). If the book is not produced before the suit is registered but a day is fixed for its production, the Court cranet even on a contumations non production of it reject the plaint the only effect of the non production being that provided in the next rule as to the incidentiability of the book in ovidence it any subsequent stage (2)

- 18 (1) A document which ought to be produced in Court to Inadmissibility of document which ought to be produced in the plant is presented, ment not produced when pistor filed or to be entered in the list to be added or annexed to the plant, and which is not produced or entered accordingly, shall not, without the leave of the suit
- (2) Nothing in this rule applies to documents produced for cross examination of the defendant's witnesses, or in answer to any case set up by the defendant or handed to a witness merely to refresh his memory

Scope of rule —This rule is intended not to prevent a person from commenting, his suit until he has collected all his documentary evidence but merely to place a check upon the fabrication of evidence by oxcluding documents not produced in the first instance unless a good and sufficient reason is given for their non-production at that time—and therefore if a document is not produced or entered in the list the plaint itself cannot be rejected (3)

'Ought to be produced. -beerr 14-17 at te and notes thereto

⁽¹⁾ Mmaram t Amerikand 3 B H C R (3) Expart Layachand - B H C R 22 93 (1866) 4 C 30 (18 J) M wa Lal r bumerji 13 (2) Gopal Gundapa t Vahnu Arahna - 2 C W \ "5" (1 09)

"Shall not "-The words are imperitive,(I) and prohibit a plaintiff from using any document which he ought to have, but did not produce or enter, (2) unless the Court exercises the discretion given to it under this rule (3) But, as already stated, if a document is not produced or entered, the plaint itself cannot be rejected (1)

"Leave."-Where documents were referred to an Ameen to inspect, and were ultimately acted upon by the Court, this was held to be ahundant proof of "sanction," the term used in the Code of 1859 (5) It is a sufficient reason for the grant of leave that the plaintiff was in ignorance of the existence of the document when the plaint was filed , (6) that the document was with the Collector, to whom it had been sent for the purpose of being stamped; (7) or that the Court is satisfied of its bond fide nature and reliableness, (8) or if there is no doubt of the oxistence of the document at the date of snit (9) The question of reception is one of discretion, which will not be interfered with on appeal (10) Where, however, thuse papers which formed the very essence of the oction were not filed or produced, the Court was held to have been justified in rejecting them when subsequently tendered in evidence (11)

"Received in evidence."-Merely giving a decument to a witness to refresh his memory is not recoiving it in evidence, for a document may be se used which is not ovidence in itself (12) Such a document is therefore expressly excluded from the section

Appeal -The reception of ovidence afterwards with leave is not a ground of appeal (13) The odmission is conclusive even when no reasons are given and the Appellate Court cannot refuse to consider the admitted documents as evidence, (14) though of course, the Appeal Court moy attach such weight to the document as it thinks proper, or say whether it ought to be treated as ovidence os ogainst particular parties to the suit (15) But the refusal to receive a document may be a good ground of appeal (16)

⁽¹⁾ Ritchie v Gladstone 1 Ind Jur. O S 125 (1862)

⁽²⁾ Premsook v Rajkristo I Hyde, 145

⁽¹⁸⁶²⁻⁶³⁾ (3) Lopez i Driberg W R , 1864 Act X .

^{67 (1863)} (4) Ex parte Rayachand 2 B H C R,

A. C 369 (1865), Gopal v Vishou, 22 B 971 (1897) (5) Gesam Tota : Raja Rukmınıballab, 3

B L R, P C 34 (1869) s c, I3 M I A 77, 83 The Allahabad High Court Rules 46 (1), require that the leave, together with the reasons, therefore be given by a written order signed by the Judge

⁽b) Ritchie t Gladstone I Ind Jur. 0 5 120 (1862) (7) Ix parle Rayschan I 2 B If (R,

¹ C 363 (1865)

⁽⁸⁾ Itts Oollah & Sukecooddeen, 1561,

W R 271 (1863)

⁽⁹⁾ Devidas v Pujada, 8 B 377 (1884) (19) Atta Oollah v Sukceooddeen, supra

ude post (11) Amur Chand : Ram Ruttun, ISW R

^{515 (1872)}

⁽¹²⁾ Ramji v Rangayya, 1 M H C R 168 (1863)

⁽¹³⁾ Gosam Tota t Raja Rukminiballab, 3 B L R, P C 34 (1869), s c, 13 W I A

⁽¹⁴⁾ Mmalshi i Velu, 8 V 373 (1885)

⁽¹⁵⁾ Abbur Ali v Bhyca Lai, 6 C 606

⁽¹⁰⁾ Wahadevappa v Srimvasa Rau, 4 M Dovidas a Pirja la, 8 B 377 117 (1881) (1884) In Atta Oollah : Sakeroo ldeen 1864, W R 271, the Lower appellate Court received the document and the fligh Court declined to interfere in special appeal

ORDER VIII.

Written Statement and Sct-off.

1. The defendant may, and if so required by the Court, shall is in written statement.

at or before the first hearing or within such is time as the Court may permit, present a written statement of his defence

"The defendant"—The rule has been reconstructed and shortened It formerly commenced "The parties" Ordinanly this was the defendant But a plaintiff may, after he has filed a plaint, but in a written statement, or it may be called for by the Court under r 9, post A Court has no authority to receive a written statement in a suit from one who is not a party, or to permit such a person to appear at the hearing (1) A thid party will not be allowed to file a statement for a plaintiff or defendant who has neglected to do so him self (2) But if the parties are present in person or by pleader, the mere fact that the defendant has not filed a written statement does not warrant the trial of the suit ex parte (3) As to the presumption of authentiety, see below (4) The corresponding section to this in the Code of 1859 was seet 120

"At or before the first hearing"—See notes to r 9, post Under the Code of 1859 the word "before" did not occur, and it was therefore held this admission of written statements on several dates was wrong (5). Written statements may now be received at any time, provided it is before the first hearing or by order of Court under rr 6 and 9. Reasonable time should be given to a defendant to file his written statement (6).

"Present"—The word formerly used was 'tender' The production of the written statement at the trial was held (7) to be the tendering under

⁽¹⁾ Moharanco Surnomoyee v Bylunt Chunder Mustofee, 25 W R 17 (1876) (2) Denomoyee Dossee v Tara Churn Coon

doe, Boarke, 153 (1863) [application by son to file written statement, alleging his interest as reversioner, his father, the plaintiff, having gone away without filing a written statement after he had been ordered to do so]

⁽³⁾ Sivarajadhani e kuppagantulu, 2 M. H C R 311 (1865)

⁽⁴⁾ Scorendronath Roy v Heeromone Bur monee 10 W R P C 35, at p 42 (1805), Radha Prasad Sing v Lal Sahab Ital, 13 A 53, 64 (1850)

⁽⁵⁾ Mr Aukee r Torab Mr, N R (1864).

p. 44

⁽⁶⁾ Lokhenath Thakoor : Sobanath Maser, 5 W R 33 (1800)

⁽⁷⁾ heshan Nack v Nasarvanji Ard sur, 10 B H. C. R 425, 427 (1973)

the Code of 1859 But now it would appear to be the presentation of the written statement, whenever that may be

"Written statement "-It has been said that English rules are to be upplied with discretion in this country, where a strict system of pleading has not hitherto been followed, but here, as everywhere, the first object of pleading is to inform the persons against whom the suit is directed what the chargo is that is laid against them. The principle is equally valid as applied to either party in the cause Amendments have, however, now been intro duced into the Code to secure a stricter and more accurate system of pleading Under O XIV r 3, post, the Court frames the issues according to the illegations in the plaint and written statement (1) As to the nature of a written statement, see notes to O VI r 2 The effect of a written statement may be considered from the point of view of the plaintiff or defendant. As agards the former, he has to prove his case He may, however, he dispensed from doing this in whole or in part by the admi sion of the defendant What is not admitted must be proved (2) An admission may not only operate to reheve the plaintiff in his proof, but it may shift the burden to the defendant (3) It has sometimes been supposed that no portion of a defendant's written statement can be read against him without the whole statement being read The true rule, however is this that if a man makes a qualified statement (4) you cannot use the statement against him apart from the qualification, not that if a man makes a series of independent unqualified statements my particular one of those statements cannot be used against hum (5) A written statement cannot of cour e, he read against any party swo him by whom it has been made or tho e who me bound by his admission (6) In admission by one defendant does not hand the others (7) Looking it the matter from the point of view of the defendant, the written statement is of course not evidence so is to dispense the defendant from proving the fiets stated (5) nor is it evidence in the defendant's favour, so that if a defendant admits one fact, and there by dispenses with proof of it he is not cutified to say that the plantiff has relied on his statement as evidence, and that has the defendant, is in consequence in a position to claim that the whole of it in w be read is evidence in his favour (9) Pleadings

⁽¹⁾ Burjorji Cursetji (Muncherji Ku verji (1 B 113 1)2 153 (1880)

⁽²⁾ See Dury in Curs to ex Mon I (p) Knivery, (b) I 43 (1880) Bivy Jeykish is (c) Bi homoth Dutt (1804) W. Iv. 305-303 (d) See Mandal Balsson Ramias Maria

dir 1 B L R V C 12 (18(8)

⁽⁴⁾ Poolin Behard State MARS A MR 1 W R 1 M (1885) [overruling N been By 1 + Shefatoolith 1 W R 24], 1 villa cl in Chowdlary C Chandar M are Six Law 1 W 1 = 20 (1885) 1 spin Nahman Sanghar Rymano graft 3, 7 W R = 2(189)

⁽i) Barkintl math Kun ar + Clarks W Lau Chow llry, 1 B 1 R | C 133 13"

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⁽¹⁸⁰⁸⁾to) Jugg ~ ir Makerpee t G peckish ii

J R 20 (1801).

⁽S) D) tellah Klan r 1 in Churu tangala 12 W b. 3 (18 b). Wolda K hash ch nier Mitte 7 W R 43 (18 c). English the first M R 43 (18 c). English the first M R 43 (18 c). Stalk high r C (18 c). Stalk high the first M R 43 (18 c). Stalk high r C (18 c). Stalk high r C (18 c). Stalk high r C (18 c). Stalk high r C (18 c). Stalk high r C (18 c). Stalk high r C (18 c).

Kish n 5 W R 50 31 (1856) Slaith Sur f ray: Slaith Dh n so to W R. 57 (1871) (0) Slaith Sl firez r 8 a 15 Dl unoo.

in Indian Courts have not hitherto been construed with the same strictness as pleadings in Linghish Courts,(1) and therefore a mere omission to deny an allega tion has not always been taken as an admission of it so as to dispense the plaintiff from proof of the fact alleged (2) Stricter rules have now been intro duced (see O VIII r 5) As against the party affected his statement primarily operates by way of admission and not estoppel (3) If a party wishes to give evidence of a fact of which he became aware after he has filed his plant or written statement is the case may be he should file a written statement or supplement my written statement before the hearing (4) If have is given to file a further written statement on or before a particular date, it will not, if filed after that date, be ordered to be taken off the file if the opposite party has delayed to make an application until the trial (5) Where an additional written statement sought to be admitted was incon sistent with the original written statement, the Court said that in such cases there was a difference between an application by the plaintiff and hy the defendint. The plaintiff would not be allowed to file such a statement It allowed the filing on payment of all costs, observing, however, that the supplementary written statement would rightly be the subject of strong comment at the hearing (6) The Code, it was held, did not contemplate the filing by a plaintiff of a written statement after seeing the written statement of the defendant and by way of rejoinder thereto (7), but if 6 and 9 refer to written statements in answer to claims of set-off A written statement. whether it be called for by the Court after the first hearing or is filed by the parties under this rule at or before the first hearing need not be stamped (8)

2. The defendant must raise by his pleadings all matters New facts must be which show the suit not to be maintainable, or point of law, and all such grounds of defence as, if not rused, would be likely to take the opposite party by surprise, or would raise ussues of fact not arising out of the plaint, as, for instance, fraud, limitation, release, payment, performance, or jacts showing illegality.

Specially pleaded — 'It often is not enough for a party to deny in illegation in his opponent's pleading, he must go further and dispute its

⁽¹⁾ Nawab Nazim t Omrao Begam 21 W R 59 60 (1873) and case cited in next note (2) Natha Singh t Jodha Singh, 6 A 406

⁽²⁾ Natha Singh t Jodha Singh, 6 A 406 413 (1884)

⁽³⁾ See Abdul Rahım t Vadhavrav Apajı 14 B 78, 82 (1889) Vaharajah Murza Ananda v Pidaparti, 13 I A 32, 42 (1885) Vima konwarı v Juggut Setanı, 10 C 196 (1883) [petition], Madhopersad t Gajadhur 11 C 111 (1884)

⁽⁴⁾ Munchershaw Bezonji t New Dhur

rumses etc (o 4 B 576 (1850)

⁽⁵⁾ The New Heming and Spinning etc. Co t Kessovii Vaik 9 B 373 381 (1885)

⁽⁶⁾ Dasimani Dasi t Srinath Ghose J B L R 1pp 11 (1869) See however, observations of P C in Douglas t Collector of Benaxes 5 M I 1 271 at pp. 289, 290 (1841)

⁽⁷⁾ Jadub Ram Deb v Ram Lochun Muduck 5 W R 56 (1866)

⁽⁸⁾ In re Cherng Alt, 12 C L R 3(7)
(1882) \azut \cknath.5 B 400 (1881)

validity in law, or set up some affirmative case of his own, in answer to it. In the technical language of the old pleaders, it will not serve his turn to merely tracerse the allegation, he must confess and avoid Thus, if the plaintiff sets up a contract which was in fact made, it will be idle for the defendant merely to traverse (a e deny) the making of the contract, he should contess (a e admit) that he made the contract, but arold the effect of that confession by pleading the Statute of Frauds or Lamitations, or setting up that the contract has been duly performed or rescinded A defendant, however, is not bound to admit an allegation which he sceles thus to acord, or which he alleges to be bad in law He may at the same time deny its truth, so long as he makes it quite clear how much he is denying He may, indeed, take all three courses at once, the allegation may be traversed in point of fact, and objected to as had in law, and at the same time collateral matter may be pleaded to destroy its effect Any number of defences may now be pleaded together in the same action without leave, although they are obviously inconsistent" (1) A defendant may "raise by his defence, without leave, as many distinct and separate, and therefore inconsistent, defences as he may think proper, subject only to the provision" (2) contained in O VI r 16, as to striking out embarrassing matter. And a defence is not embarrassing merely because it contains inconsistent averments (3) But all these various defences must be clearly and distinctly pleaded and the facts upon which each is grounded should be stated separately As a rule each defence should form a separate The defendant must make it quite clear what line of defence he is adopting Any plea which wears a doubtful aspect will be struck out as embarrassing (4) Above all special defences of this kind must not be mixed up with traverses or insinuated into pleas which deny the facts alleged by the plaintiff (5) "The office of a traverse is to contradict, not to excuse or justify the act complained of , its object is to compel the plaintiff to prove the truth of the allegation traversed, not to dispute its sufficiency in point of law All matter in confession and avoidance, all matter justifying or excusing the act complained of must be specially and separately pleaded, so must all matters which go to show that the contract sucd on is illegal or invalid, or which, if not expressly stated, would be hkely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings And no evidence of such matters can be given at the trial if they be not expressly pleaded This is only fair play " (6)

3. It shall not be sufficient for a defendant in his written statement to deny generally the grounds alleged by the plaintiff, but the defendant must deal specifically with each allegation of fact of which he does not admit the truth, except damages

"It shall not be sufficient."-This is one of the greatest improvements

⁽¹⁾ Annual Practice, notes to O 19, r 15 (4) Ann Pr loc cit , Stokes v Grant, 4 C.

⁽²⁾ Per Ihtsiger, LJ, in Berdsn v P D 25 Greenwood, J Lx D p 255 (5) Belt t Laucs, of L J Q B 35J

⁽³⁾ Re Morgan, 35 C. D 192

⁽⁶⁾ Ann, Pr loc est

introduced by the Judiciture let. Formerly the defendant was allowed to plead what was called "the general assue," to "that he was not guilty," or 'that he never was indehted as alleged," both of which were conclusions of mixed law and fact. Now a defendant may no longer deny generally the facts alleged in the Statement of Claim. He must take each matter which is alleged against him separately, and either admit it, or deny it, or say that he does not admit it "It is not merely demal which is meant, the rule covers non adunation" as well Whether the defendant says I deny or "I do not ident," he is equally bound to deal specifically with each allegation of fact of which he does not adont the truth (1) This is the general principle which now governs every traverse. And in order to make this general principle quite clear, special instances are given in subsequent rules (English) (2) ' In actions for a deht or liquidated demand in money, comprised in O 3, r 6 (English), a more denial of the debt shall be inadmissible" (English O 21, r 1). "In actions upon bills of exchange, promissory notes, or cheques, a defence in demal must deny some matter of fact eq the drawing, making, endorsing, eccepting, presenting or notice of dishonour of the bill or note" (English O 21, r 2) "In actions for goods bargained and sold, or sold and dehvered, the defence must deny the order or contract, the delivery, or the amount claimed, in an action for money had and received it must deny the receipt of the money, or the existence of those facts which are alleged to make such recent by the defendant, a recent to the use of the plaintiff" (English Q 21, r 3)

"Deal specifically '-What is meant by dealing specifically with an allegation of fact? It means that the party pleading must make it perfectly clear how much he adunts and how much of it he denies If he does this the Court will not quarrel with the phrase which he uses Ife must not deny en bloc everything alleged agriast him. A defendant may not now plead "that he domes specifically every allegation contained in the Statement of Claim (or plaint) ' Still, in order to deny specifically it is not necessary to write out every sentence in the Statement of Claim and traverse it in detail It is sufficient when dealing with matters of inducement or any other allegations which do not go to the gist of the action, to plead that "the defendant denies each of the allegations contained in paragraph 8" This will have the same effect as copying out the whole paragraph and constantly inserting "not" But when the pleader comes to those allegations which are of the gist of the action he must be more precise. He must plead. The defendant never agreed as alleged, ' or " never spoke or published any of the said words ' or 'never made any such representation as is alleged in paragraph 2 of the Statement of Claim '(3)

Sometimes, in order to obey the rule and to deal specifically with every allegation of fact of which he does not admit the truth it is necessary for the defendant to place on the record two or more distinct traverses to one and the same allegation. Thus, if he pleads, "The d fendant never broke or entered the pluminf s close" he thereby admits that the close in question belongs to

⁽¹⁾ Per Jussel M.R., in Thorp t Holds (2) Annual Practice, notes to O 19, r 17

worth, 1 C D p 640 (3)

the plaintiff If he intends at the trial to deny that the plaintiff owned or possessed that close, he must say so distinctly and in a separate plea. If he wishes to raise hoth defences—ie to deny the act complained of, and also the plaintiff is title to the land—he must put on the record two separate paragraphs eg. I "The defendant never broke or entered the said close" 2 "The said close is not the close of the pluntiff" Merely to deny an allegation in terms will often be ambiguous and therefore evasive. The pleader must always unswer "the point of substance" alleged against him, otherwise his pleading will be deemed evasive (r. 19, corresponding with next rule). And, if an allegation be made against him, with details of time and place, etc., he must deay the substance of the allegation and not confine himself to denying it along with those incessential details (1)

"Each allegation of fact "—Only allegations of fact should be demed, matter of law should not be traversed. And the defendant should never traverse matter not alleged against him he should be content to answer what is lad against him in the Statement of Claim and not trouble about any other matters which the plaintiff might have, but has not raised (2). Moreover, it is no part of his duty, when drafting his defence, to anticipate what the plaintiff may hereafter allege in his reply (3).

"Except damages "—" No demal or defence shall be necessary as to damages claimed, or their amount, but they shall be deemed to be put in 18500 in all cases, unless expressly admitted "(English O 21, r 4) This rule applies to damage of all kinds whether special or general and whether the alleged damage is part of the cause of action or not (4)

4. Where a defendant denies an allegation of fact in the plant, he must not do so erasticly, but ansurt the point of substance. Thus, if it is alleged that he received a certain sum of money, it shall not be sufficient to deny that he received that particular amount, but he must dry that he received. And if an allegation is made with diverse circumstances, it shall not be sufficient to deny it along with those circumstances.

Evasion—The pleader must deal specifically with every allegation of fact made by his opponent—that is he must either admit it frankly or deal it boldly. Any half admission or half demal is evasive. Thus a defence in these words, "The terms of the arrangement were never definitely agreed upor as alleged," was held evasive. Jessel M.R., said. "The defendant is bound to deny that any agreements or any terms of arrangement were ever come to if that is what he means, if he does not mean that, he should say that the

⁽¹⁾ Annual Practice, notes to O 19, r 17 is a next rule

⁽²⁾ Rassam t Budge (1893), 1 Q B 571

⁽³⁾ inn Pr note O 19, r 18

⁽⁴⁾ Ib , Walby v 1 Iston, S C B 142 (1819), 18 L J C P 320, and see the remarks of Hawkins, J, in Wood v Lart of

Darbam, 21 Q. B D p 508.

were no terms of arrangement come to except the following terms, and then state what the terms were "(1)

"Point of substance"-Again, a traverse often becomes evasive if it follows too closely the precise language of the allegation traversed. Thus, in Tildesley v Harper (2) the Statement of Claim alleged that the defendant offered the plaintiff a brike of £500 The defendant pleaded, following the exact words of the Statement of Claim, that "the defendant had never offered the plaintiff a hribe of £500," which would have been true if he had offered £400 or £499, or any other sum Fry. J. held that the substance was that a hribe had been offered and that that was not fairly or substantially demed The defendant should have pleaded that he never offered "a bribe of £500 or any other sum" Leave to amend was eventually given (3)

"Along with those circumstances"-That is to say, if the plaintiff alleges that he "paid the defendant £500 at 35, Fleet Street, on March 3rd. 1904, in the presence of AB," it is an evasive traverse for the defendant to plead "The plaintiff did not pay the defendant £500 at 35, Eleet Street, on March 3rd, 1901, in the presence of A B " For he might have paid the defendant £500 on another day or in another place, or when A B was not present And these details are only "circumstances", they are not of the essence of the allegation It is sufficient and proper for the defendant to answer the point of substance and to plead "The plaintiff never paid the defendant £500 or any other sum " (1)

5. Every allegation of fact in the plaint, if not denied specufically or by necessary implication, or stated to be not admitted in the pleading of the Specific denial defendant, shall be taken to be admitted except as against a person under disability :

Provided that the Court may in its discretion require any fact

so admitted to be proved otherwise than by such admission.

Answering opponent's pleading-The rules of O VI VIII have defined both the manner in which each party should state his own case, and also prescribe how he should answer his opponent's pleading. The main object of the latter rules (5) is " to secure that each party in turn should fully admit or clearly deny every material allegation made against him so that they may promptly arrive at an issue. With this object three general principles are declared -

1 It is not sufficient to deny generally the matters alleged by the opposite party, but each party must deal specifically with each allegation of fact of which

he does not admit the truth (O VIII r 3)

2 When a party in any pleading denies an allegation of fact in the previous pleading of the opposite party, he must not do so exasticly but answer the point of substance (O VIII r 4)

⁽¹⁾ Ann. Pr., note to O 19, r 19, Thorp 1 Holdsworth, 3 C D p. 641

⁽³⁾ IO C. D 3./3

^{(2) 7} C. D 403.

⁽⁴ Ann. Pr., note to O 19, r 1) (a) Ib., r 13.

3 Every allegation of fact in any pleading shall be taken to be admitted if it is not denied specifically or by necessary impheation, or stated to be not admitted (O VIII r 5)

This rule is taken from Enghsh O 19, r 13, but the Legislature has modified the rigour of the rule by providing, in accordance with sect 58 of the Evidence Act, that the Court may, notwithstanding the absence of any specific demal, require any fact to be proved by the party who relies on it

Admissions —A defendant ought not to deny plain and acknowledged facts which it is neither to his interest not in his power to disprove (I) Where allegations are denied or not admitted, which ought, in the opinion of the Judge, to have been admitted, he may make such order as to any extra costs occasioned thereby as shall be just (English O 21, r 9) The discretion under this proviso indicates that the effect of a failure to deny in a written statement an allegation of fact in a plaint does not necessarily amount to a proof in the plaintiffs favour (2). It is in the discretion of the Court to allow or disallow an application for amendment of a plaint (3). There is no difference in effect between denying and not admitting an allegation (4). The distinction usually observed is that a party denies my matter which, if it has occurred, would have been within his own knowledge, while he refuses to admit matters which are alleged to have happened hohind his back. But whether he demis or does not admit, he must make it perfectly clear how much he disputes and how much he admits (5).

6. (1) Where in a suit for the recovery of money the defendant elaims to set off against the to be given in written plaintiff's demand any ascertaimed sum of money legally recoverable by him from the plaintiff, not exceeding the peeumary limits of the jurisdiction of the Court, and both parties fill the same character as they fill in the plaintiff's suit, the defendant may, at the first hearing of the suit, but not afterwards unless permitted by the Court, present a written statement containing the particulars of the debt sought to be set off

(2) The written statement shall have the same effect as a plant in a cross suit so as to enable the Court to pronounce a final judgment in respect both of the original claim and of the set off but this shall not affect the lien, upon the amount decreed, of any pleader in respect

of the costs payable to him under the decree

⁽¹⁾ Per Malings, V.C., Lee Conservancy Board v. Button, 12 C. D. 383, affirmed 6 App. Cas. 685

App Cas 685
(2) Satyre Chandra Surkar t Monmohim
Dasi 19 C L J 518 (1914), p 523, 1cr
Junkas, (J

⁽³⁾ Ib

⁽⁴⁾ Per Grove J, in Hall : L & N W Ry Co 35 L 7 848

⁽⁵⁾ Thorp : Holdsworth, 3 C D. p 540, Harris : Gamble, 7 C D 877, British Land Association : Poster, 4 11mms Rep 574, Rulter : Fregent, 12 C. D 7 8, and 80 O VIII r 3

LIRST SLRED 0 8, rr 7, 8

(3) The rules relating to a written statement by a defendant apply to a written statement in answer to a claim of set-off.

Mustralione

(a) A bequeaths Rs 2,000 to B and appoints C his executor and residuary legatee B dies and D takes out administration to B's effects C pays Rs 1,000 as surety for D. then D sues C for the legacy C cannot set off the debt of Rs 1.000 against the legacy, for neither C nor D fills the same character with respect to the legacy as they fill with respect to the payment of the Rs 1.000

(b) A dies intestate and in debt to B C takes out administration to As effects and B buys part of the effects from C In a suit for the purchase money by C against B, the latter cannot set off the debt against the price for C fills two different characters, one as the vendor to B. in which he sucs B. and the other as representative to A

(c) A sues B on a bill of exchange Balleges that A has wrongfully neglected to insure B's goods and is hable to him in compensation which he claims to set

off The amount not being ascertained cannot be set off

(d) A sues B on a bill of exchange for Rs 500 B bolds a judgment against A for Rs 1 000 The two claims being both definite pecuniary demands may he set off

(e) A sues B for compensation on account of trespass B holds a promissory note for Rs 1,000 from A and claims to set off that amount against any sum that A may recover in the suit B may do so, for, as soon as A recovers, both sums are definite pecuniary demands

(f) A and B suc C for Rs 1,000 C cannot set off a debt due to him by A alone

(2) A sues B and C for Rs 1 000 B cannot set off a debt due to him alone by A

- (h) A owes the partnership firm of B and C Rs 1,000 B dies, leaving C surviving A sues C for a debt of Rs 1 500 due in his separate character C may set off the debt of Rs 1,000
- Where the defendant relies upon several distinct grounds of defence or set off founded upon suparate set-off and distinct facts, they shall be stated as far on separate founded arounds as man be, separately and distinctly
- Any ground of defence which has arisen after the institution of the suit or the presentation of a written New around of de statement claiming a set off may be raised by the defendant or plaintiff, as the case may be, in his written statement

Set off-This is sect 111 of the former Code with the amendments noted in itahes, and with the onussion of the second paragraph of the former section dealing with inquiry. The huntations in jurisdiction which it contained have been transferred to the first clause, and the rest of the paragraph was probably

considered unnecessary The third clause has been added R 7 is taken from Enghsh O 20, r 7 R 8 is new

This rule deals with the cross claim known as legal set off, and which is a claim or demand which the defendant in an action sets off against the claim of the plaintiff, as being his due, whereby he may extinguish the plaintiffs demand, either in whole or in part, according to the amount of the set off (!) It is to be distinguished from a plea of payment (2). The defence of payment does not admit that the demand sued upon is just, it attacks the plaintiffs claim and urges matter to defeat or at least reduce it on account of some matter connected therewith. But set off arises out of a transaction extrinsic of the plaintiffs cause of action, being a mutual independent claim. Again, while set off is the creation of law, payment is an act of the defendant's consent, express or implied (3)

There is a distinction, also, as regards the mode of pleading. A set off is a cross debt or claim, on which a separate action may be sustained. Pay ment can only he the subject of defence to another's action. Set off may be pleaded or not, at the defendant's pleasure. Fullure to do so will not bit a suit hy him for the amount of the set off, as is the case with the defence of payment. Set off must be specially pleaded, and the facts constituting it proved by the defendant as if he were himself the plaintiff to another action (4). Recoupment, which is the keeping back of something due because there is an equitable reason to withhold it, is also to be distinguished both from payment and set off. It can only extinguish the plaintiff's demand in whole or in part, and can never lead to a decree in the defendant's favour (5).

Common law did not recognize any right of set off A defendant who had any cross claim could not raise it in the plaintiff's action. He had to brigg a cross action. Legal set off is the creation of Statuts, that is, to be allowed a set off it must be shown that there is a statutory right (6) Successive but limited Statutes were enacted to remove the defect and inconvenience arising from this non necognition and consequent circuity of action and the right to plead a set off was first conferred by 2 Geo II c 22. A set off was allowed in certain cases (7) It was a defence proper to the plain tiff's action, defeating or reducing a plaintiff's claim. It was a shield and not a sword (8) It was allowed only in a limited number of cases and when established its effect was to show that the plaintiff could not recover it

⁽¹⁾ Black Diet p 422 See Ishri Gopa Satan 6 A 3-1 355 (1884) as to the general principle of set off which has Lein held applicable in a case not provided for by the Code, and is recognized in other sections vir 216, 221, 246, 247

⁽²⁾ Koonjo Behary t Nilmoney 4 C I R ~96 (1879)

⁽³⁾ Seo Hukm Chand, C P C 751

⁽⁴⁾ Waterman on Set off \$2 Hukin Chan I C P C. 752, Dalo : Sollett, 4 Burr 2133 Dinwiddo : Bailey 6 Ves 142, and as to the diff rence between a right of account and

set off see Ranger t Great Western Ry Co 5 H L Cas 91 A plauntif cannot compel a defendant to set off Randeo v Pokhram, 21 C 419 (1893)

⁽⁵⁾ See the subject fully discussed in Hukm Chand, C P C 51-758

⁽b) Last card etc Ry (o : Caralon R)
Co 18 Times Re; 1

⁽⁷⁾ See the note n Vin Pr 100 11 -32 and -81 on the subject of set off an I counter claims by Mr Blate Odgers K C

⁽⁸⁾ Ier Cockburi CJ, in Stooke 1 last 7 5 Q B D 575

Set off, however, had long been, prior to the enactment of sect 121 of the Code of 1859, recognized A rule of legal set off in India is contained in this rule which is only an amphified version of sect 121 of the Code of 1809, as that section was construed by the Indian Courts It has, however been held that that section and the section in the last Code correspond ing with the present rule only had down a rule of procedure in regard to cases of set off but were not exhaustive of those cases, and that it was not intended to take away any rights of set off, whether legal or equitable, which parties would have independently of it (1) And it is well settled that Indian Courts may allow equitable set off in cases in which Equity Courts in England allow the same, even though such eases do not fall within the language of the present rule (2) Cross claims are thus in this country limited to cases of set of (as distinguished from counterclaum) whether such set off is legal or equitable It is, however, to be observed that under this rule a set off is treated as a plaint in a cross action so that the defendant may get a decree for it, whereas, as already pointed out sot off, prior to the Judicature Act could only reduce or extinguish the plaintiff's claim, and a separate action would have had to be brought to recover the amount of any excess beyond the plaintiff s claini

In pleading a set off the defendant assumes the position of a plaintiff and is required to prove the same facts which he would be required to prove if he had brought an original action on hie demand. The plaintiff cannot, by taking a dismissal of the enit avoid an inquiry into the ments of the set off *Vide post*. In a suit for rent due on a molurari tenure held by the defondant, the defence was that he wise entitled to set off against the plaintiff solum a cortain suin due to hum on a decree passed by the Privy Council between the same parties. It was held that the set off could be entertained and inquired into, the decree of the Privy Council not being under execution and sect 246

of the last Code heing mapplicable to the case (3)

The present rule does not of course, affect the special provisions relating to set off in proceedings in insolvency (4) and in the windows W

Codo a cross claim cannot be set up as a defence, except when it arises out of the very transaction sued upon, and is in the nature of a set off]. Fakir Chandra Dutta: Cisborne, SC W N 174 (1903), where a set off was dis allowed as being based upon a separate trans action. S 128 (c) allows of rules being made in s 216 of the last Code Subramaman Chettiar v lluthuswami Aiyangur, 17 M I J 481 (1907), Kalanand Singh v Sri Procad

481 (1907), Kalanand Singh v Sri Proceeds, 19 C L J 152 (1913)

(2) Brojendra Nath Das t Budgo B

Jute Mill, 20 C 527 (1893), Anaz Gul khan 1 Durga Prasad, 15 A 9 (1893) [fol. havi Ram v Ram Prasad, 27 A 145 (1994)], and 14de post Dobson & Barlow v Bengal Syn nung etc., Co., 21 B 126, 135 (1890), Fakir Chaudra Dutta v Cisborne & Co., 8 C. W. N. 174 (1993)

(3) Bharath Prosad Salu t Ran eshwar Koer 8 C W N 118 (1903), s c 30 C 1006

(4) Seo Insolvent Act 11 & 12 Act c 21, s 39, Maller v Beer, 6 C I B 201 (1880) [det Young t Bank of Bangal, 1 M I A N (1830)], Maller t National Bank I India 91 C 116 (1891)

action. S 128 (c) allows of rules being made (1) Clark R Ruthmas aloo, 2 W H G R 299 (1865), Kistinasamy Pillat i Minnerpal (1868), Kistinasamy Pillat i Minnerpal (1868), Kistinasamy Pillat i Minnerpal Viàvam, 4 B 407 (1879), Rookminy Bullbub i Wik Jamania, 9 C 914, 1918 (1883) Bhaghat v Ra dich 11 C 557 (1885), Pragi Lal i Maxwell, 7\ 254 (1885), Chisholmi Gopal Chinder, 10\C 711 (1889), Goband Parshad i Murree Brewery, 1855, P R \odorsymbol 0 1 his view received statutory recognition by the ad littor in 1889 of the last i vagraph

of limited companies (1) which have been embedied in the Acts governing these procedures in In In. As to the Transfer of Property Act,(2) and the special cross claim (3) provided for by sect 95, see below. As to the decree when set of its allowed, and effect of decree as to sum awarded to defendant, see O. XX. r. 19, p. et.

Equitable set off.-It has already been stated (i) that this rule does not take away any rights of equitable set off (5) which parties would have independent of it. The statutory rule of set-off is absolute in its terms, and where a case is within it a set off is given as of right, but equitable set-off. from its year nature, depends on the equities of each particular case, and therefere on the discretion of the Court It cannot be claimed as of right, and will be all swed only where the Court deems it equitable to allow it in any case,(6) though the Court will be guided in the exercise of its discretion by the decisions of the English Equity Courts, which have been recognized in this country (7) Louisable reist ff exists not only in cases of mutual delets and credits, but also where the cross demands arese out of one and the same transaction, or are so connected in their nature and circumstances as to make it inequitable that the phintiff should recover and the defendant be driven to a cross suit (8). Thus un receptained damages for partial lucach of a contract may be set off in answer to a claim for money due on that contract, so fir as it was fulfilled, as the cross demands in such a case are connected with the same transaction, and arise out of one and the same contract , (9) and m a suit for arrears of salary there has been allowed to be set off the value of goods and property damaged, lost or not accounted for, by the plaintiff (10) Where a defendant set up an agreement to the effect that the rents payable on account of hads held by the plaintiff

- (i) See les VI ef 1882 a 150
- (2) we have there Jaru the gode, 15 M 200 (1891) [waste by mortgagee in possession] (3) Roulet a Triterle, 18 B 717 (1891)
- (4) tide ante p 73%
- (5) As to the merining of see also p 757,
- (6) Dobs u and Barbox e Bengal Spinning, etc. Ca., 21 B 120, at p. 137 (1899), where the proposed set off was disallowed, there being no equitable grounds for admitting it, and there being likely to be great delay in investealing it.
- (7) See Bukan Chand, C.P. C. 778. equatable set off was very early recognized, and ante, p. 733, and tiamagopal: Mallikkar janudu, I.M. H. C.R. 339, where the Courts observed that the question should be dealt with on the principles of Linglish Courts of Piquity
- (8) Clark t Ruthnavaloo, 2 V. II C R 296 (1865), Kalanand Singh v Sri Prosad Das, 19 C L J 152 (1913), l'akir Chandra Dutta t Gisborne & Co., 8 C W N 174

- (1903), where, however, the set off was dasallowed as being based upon a separate transaction, and see Hossena Bibee i Smith 17 B L. R. 440 (1874), where, however the Court, as pointed out (Hukin Chard, C. P. C. 777 n), took a very rectricted with of the equity. As to whether it is in equitable with of course, depend upon the facts of each case. Dobson and Barlow i Bengal yamung etc., Cn., 21 B 126, at p. 135 (1836).
- (9) Kıstınsanır Pullar v Nimorqial Commessioners, Madras, 4 M II C R L.D (1868), Radba Ram Dab v James, "O W R 440 (1873), Gauri Sahai v Itam Sahai (1875), W P II C R 167, Pragi Lait Vas well, 7 A 294 (1885), Gobind Pershad v Nurreo Brewery, 1885, P R No 47, Neaz Gut Khan v Durga Prasad, 15 A 9 (1893), Brojendra Nath Das v Builge Budge Juto Mil, 20 C 57 (1893)

(10) Clasholm : Gopal Chunder, 16 C 711 (188) under the defendant were endited to the plaintiff on account of rent due to him from the defendant, it was held that the plea was one of payment and of account and set-off in a general sense, and not one of set off under sect III of the last Code (now represented by rule 6 of this Order) (1)

"Suit for the recovery of money."-Thus no set-off may be claimed in a suit for property, or for a declaratory decree or injunction, (2) nor is a suit for moveable property one for the recovery of money, even though a money value be assigned in the plaint to the property, and the decree may contain a provision of an alternative character for the payment of the money by the defendant in case of default in the delivery of the property. It has been doubted but not decided, whether a suit for an account can be held to be for recovery of money within the meaning of this section, (3) but a suit for dissolution of partnership, with a prayer that the balance due should be paid, is within the section (1) It is to be observed that there is a difference in the wording of the rule as regards the plaintiff's demand and the defendant's set off Tho latter must be of an ascertained sum. The suit, however, need not be for an ascertained sum, the words "recovery of money" including claims for unliquidated damages and mesne profits. See illustration (c) to the rule (5) Even in the case of a set off not falling within the provisions of this section, the claims must both be for money, as is indicated by the terms, O XX r 19, post

"Claims to set off"-A defendant cannot be permitted to carry on two suits for the same demand at the same time and using a demand in set off is a bar to a subsequent suit for that demand A defendant may, however, it has been submitted, claim a set off of a demand during the pendency of a suit for the same demand (6)

"Ascertained sum "-The word 'debt was used in the Code of 1809 It was held restricted to an ascertained sum and to exclude unliquidated damages and mesne profits as being damages (7) Under the last and present Codo the matter is clear, both from the use of the word ascertained" and the addition of illustration (c) to the section The sum sought to be set off underg

⁽¹⁾ I dward Dalgleish v Ramdin, 14 C W N 170 (1909)

⁽²⁾ Therle's Hotels : Jonas 18 Q B D 459, see Manby : Manby, 14 W R 136

⁽¹⁸⁷⁰⁾ (3) Nankaray : Ho Htaw, 13 (124

⁽¹⁸⁵⁶⁾ s c 13 I A 48 (4) Rampwan Mul : Chand Mal, 10 A 587 (1888)

⁽⁵⁾ Under the Code of 1859 the suit must have been for a debt, and a suit for mesne profits was held not to be such Rotee Rumun

v Greeja Nund, 5 W R 160 (1866) This, however, is not so now [see III (e)] though the result both of the claim and set off must be a preunitry hability. See Abratdabad My mer, etc () 1 Lakshmishanker 30 B

^{173, 193 (1905)} (6) Hukm Chand, C P (783

⁽⁷⁾ Rutee Zummun : Guri Aund, 7 Wym R 218 Bachun v Hamid Hossein 14 M L A 377 at p 366 (1871), Golool C mar : Bhichoool Singh 22 W R I (1874) Scanlan t Herrold, 10 W R 295 (1804) Hossema Bibco v Smith 22 W R 15 (18"4). s c, 13 B L R 440, Ram Dyal v Ram Dhun Dass, 4 Agra 43 (1868), Isalce Coomar v Huro Chunder, 17 W R 177 (1872) [as re gards this case it has been said in O Kincaly C P C that some stress seems to have been

tion] ride post

this rule must be a sum ascertained. that is, liquidated, and not damages undetermined.(1) such as a houndated amount due under a hond.(2) or a debt payable according to an award (3) The sum to be set off must be ascertained before the set off is claimed, and it is not sufficient that it may be ascertained on inquiry (4) The claim is sufficiently certain if it is capable of being reduced to a certainty by simple calculation (5) A sum decreed is ascertained and may be set off (6) No decree by way of set off can be awarded to a defendant for a sum to be ascertained on a settlement of accounts, even though the result of the suit shows that nothing is due to the plaintiff (7). There is nothing in this rule to restrict the set-off to claims in respect of the same matter which forms the subject of the plaintiff's suit. The rule allows a set off of every ascertained sum of money, and no restriction should be placed on that right which is not to be found in the section itself Though the restrictions on equitable set off of unascertained sums are proper, there is no reason, as there is no authority, for grafting them on to the law in regard to ascertained sums (8) While it is a general principle of set off at law that the amount claimed should bo certain and ascertained, and that an unbiquidated demand may not bo set off even if it should arise on the same contract on which the plaintiff's demand is based, this is not so in the case of equitable set off. This may be allowed in the case of unliquidated damages, that is, an amount which can only be ascertained by the decision of the Court (9) where the respective claims of the parties arise out of one and the same transaction (10)

⁽¹⁾ Pragi Lai t Maxwell, 2 A 284 (1885), Raghu Nath Das t Ashraf Husaio 2 A 252 (1879) (this decision was, however, prior to the passing of the Transfer of Property Act, see Shiva Devi v Jaru Haggade, 15 M 290 (1891)], Abul Hasan v Zohra Jan, 5 A 299 301 (1883), Amir Zama t Nathu Mal 8 A 396 (1883)

⁽²⁾ Watson & Co : Brojo boonduree Debia, 16 W R 225 (1871)

⁽³⁾ Gouri Sahara Ram Sahar 7 A. H. C. R. 157 (1875)

⁽⁴⁾ Hukm Chand C P C 788, see Zum mecroomssa v Gayer, 6 W R Civ Ref 26 (1866), the contrary was held in Warburton t Anderson, 1876, P R No 25 mainly on the ground that the amount spent in repairs, though not ascertained at the begin ning of the inquiry, would be so at the time the moury contemplated by the section was finished, and the Court would have to make a decree, the amount being a debt if the tenant could show that he had not spent more than the landlor I was bound to spend. However, if this argument were correct, then it has been pointed out (Hukin Chand, 789) every claim for unliquidated damages might be set off, as after inquiry the amount of

such damages would also be an assertamed

amount (5) See Hukm Chand, C P C 789

⁽⁶⁾ See Ill. (d), Bhagawani Kunwar t Lala Bailtiath Prasad, 2 B L R, A C 84 (1868)

⁽⁷⁾ Huro Soonduree : Bungshee Mohuu,

⁵ W R 32 (1866).

(8) Hukm Chand, C P C 790, whose observations are supported by III (e) to the section where the set off is in respect of a different matter. As pointed out by hum, any observations to a contrary effect in Abul Hasan v Zohra Jan 5 A. 299, 301 (1883), Amir Zama v Antho Mal 8 A 396 (1886), were not necessary. No grounds are given for the decision which was under the old Code, Heera Lal v Bishen Suhaye, I W R 297 (1864), and it does not appear to have ever been followed.

⁽⁹⁾ Kistnasamy Pillai t Municipal Commissioners, Madras, 4 M. H. C. R. 120, 128, 129 (1868)

⁽¹⁰⁾ Kishorchand Champalal t Madhowij Visram, 4 B 407 (1879), but not where the claims are wholly unconnected Clark t Ruthuavaloo Chetti, 2 M. H. C. R 296 (1865), ride units.

"Legally recoverable "-Set off is allowed to prevent cross actions It was not intended to give new rights, except to the extent of giving facilities for the enforcing of rights which are already enforceable in an action, and it has always been accordingly held that a set-off can only be successfully pleaded when an action could have been maintained for the same debt (1) As the sum must be legally recoverable, a demand arising out of a transaction which is legally invalid cannot be the subject of a set-off. A defendant there fore cannot recover in respect of a claim without cause of action, (2) or barred under seet 11, ante (3), or O II r 2, or by the Lumitation Act, (4) or based on a decree me spable of being enforced. (5) or in respect of an infant's debt (6) In a suit for arrears of rent the amount of a new road eess paid by the defendant was held not to have been payable by the plaintiff under the terms of the lease as a prior income tax was, and therefore not recoverable by the defendant from the plaintiff, and thus not liable to be set off (7) In short, the claim sought to be set off must be one upon which a separate action could have been maintained The money set off must be of course recoverable from the plan tiff, not from any one else, and it must be due to the defendant, who cannot set up a right subsisting in a third party Tho defendant's right of set off of a demand against a person is not affected by the circumstance that the suit is brought not by that person but by an assignee of his This is so, even where the assignment is by a sale in execution of a decree against him (8) A cannot set off agruist a claim made by B, in respect of separate dealings between him and A a debt due from a firm consisting of a father and two sons, one of whom is B (9) Neither can a defendant set off against a claim of money any portion of an amount 10 respect of which the defendant, jointly with another, not a party to the suit, can claim contribution from the plaintiff. (10) Where in a suit by s company in liquidation it was argued that the defendant's claim was not legally secoverable as his remedy was only proof in liquidation, where probably he would recover not the whole of the ascertained sum but only a dividend it was held that the words legally recoverable" had no reference to the ability of the debtor to pay the demand in full, and that a sum was legally recoverable though in the result the creditor must be satisfied with a dividend (11)

"The same character"-Mutuality of debts is required not only is

⁽¹⁾ Rawley v Rawley, 1 Q B D 460 at p 166

⁽²⁾ Zumeerunneissa z Gayci, 6 W R Ref 26 (1866), subsisting when the suit was in stituted, Gocool Coomar : Blichook Sinch 22 W R I (1874)

⁽³⁾ See Amir Zania 1 Nathu Mul S A 3.5 (1886), where it was held that the set off was not barred under s 13

⁽⁴⁾ Pragi Lal v Maxwell, 7 A. 284 (1851), Heeralal t Bishen Suhave, 1 W R 290 (1864) And see Bachnan Lal v Banarsı Das, 35 1 238 (1913), 17 C. W N 1243 (a debt burr d by Limitation Act but not by Punjah Act 1 of 1 04 allowed as set off)

⁽⁵⁾ Huro Pershad v Fool Lishore, It W R

^{308 (1871)}

⁽⁶⁾ Rawkyv Raules, I Q B D 460 (7) Surnomoyee Dabee : Purresh Narain

Roy, 1 C 579 (1878), Shumbhu Aath t Hurro Soundarce, 11 C L R 140 (1882)

⁽⁸⁾ Bhagawani Kunwar t Jah Bannath

Prosad, 2 B L R , A C St (1868) (9) Dhunpat Singh : Forbes, 1 Ind Jur

N S 354 (1862) (10) Umanath : Monsurah, 11 C. W N 756

⁽¹¹⁾ Ahmedabad Advance, cto, Co 1 Lakshmishanker, 30 B 173 (1901)

names others disease that bear artestenable of complete The delastall it ale be he to and has the at e perur bal in the cite cape at A party than act in different characters, and has printe willed of a terratife at its brad character. So in a said by a public office in his a red character, the detendant cannot set off a claim against han her mails, and two terms or slarls, a claim which the defendant has manual it's planted individually cannot be set off against a claim due to the still as It atom the har account of the special nature of a trust be tax of classifier due to him in his bally against a claim due by him as trustee (1). An ecount due as manager cannot be set of against a pear al habits (2) A legal representative of a decreed does not till the the e character as regards his own debts and the debts of the deceased. See idustrate is (a) and (!) to rule. An executer or administrator, however, tills the sail of charter as transla del's due to and from the deceased, and so in is at a n and of the terror daline is such the latter may set off all claims and the plant of which he testator or intestate may have set off against him, and which I' med re, that I are been due to the testator or intestate (3) Where in the case of a company in liquidation each hability processing to the himilate n. tho an the amounts were ascertained after it, both parties were hell to fill the experience thatacter (1) A set off was insullound where the elected which was sought to be set of was a decree not against the plaintiffs but us not third pittes beam thus of the plaintiffs (5)

Written statement.—The rule is that a wood, if claimed, must be specified by 1 aded 1 if however, the particulars are sufficiently set out, it is not necessary that it should be specifically stated that they are alleged by way of sets of The written statement contemplated by this section is deemed a plaint for it is sum sought to be set off, and must be stanged accordingly (6). But these cases have been dissented from by Banerjee, J (7). Where the defendant did not raise, an issue as loss toff in the first Court, the Privy Council declined to intertain it (8).

Jurisdiction in cases of set off—the amount claimed to be set off must not exceed the pecuniary limits of the Courts jurisdiction (9). This provises was in the last Code continued in the second participally which is now omitted. It has been transferred to the first claus. The entire amount

⁽¹⁾ Hukin Chand, C. P. C. S21. Bhorned Chunder Boss. I Hafetquessa Mattoon, 2 C. L. R. 411 (1878) [it is assential to the validity of a set off that the debts should be mutual, due from and to the same parties, and in the same right].

⁽²⁾ Abul Hasan 1 Johns Jan, 5 A 299 1083).

⁽³⁾ See Chengappa i Raghunatha, 15 M 29 (1892), Watson & Co v Bryo Scondures Deba, 16 W R 224 (1871), Crish Chunder Lahoory v koomarca Daka, 1 W R Mise 23 (1861)

⁽¹⁾ Ahmedabad Advance, etc., to t

Lakslanckanker, 30 B 173 (1901)

⁽⁵⁾ Iduk Chandra Roy i Jasoda Kumar Roy, 11 C W N 215 (1996)

⁽⁶⁾ Aunr Zaroa t Nathu Mat, 8 A 396 (1889). Bai Shri Magirabat v Narotam Hargovan, 13 B 672 (1883). Chennappa i Ragbunatta, 15 W 29 (1831)

⁽⁷⁾ Falir Chandra Dutta v Gisborno &

Co, 8 C W N 174 (1903)
(8) Nan Karay 1 110 Htaw, 13 I A 48, 50

^{(1880),} a c, 13 C 124
(9) See in Ram Lat v Lancaster, 3 A if.
C R 114 (1871), Brojendra Nath Das v

C R 114 (1871), Brojendra Nath Das Budgo Eudge Jute Mill, 20 C 527 (1893)

claimed to be set off must not exceed the hmits of jurisdiction, the excess of such amount over the plaintiff's claim, for which the defendant may ask a decree in his favour, not being material in the question of juris diction (I) And where a Court has two different pecuniary jurisdictions, the jurisdiction referred to in this rule will be that in which the enit is being taken cognizance of Thus, where a Subordinate Judge, with unhmited pecuniary jurisdiction, was invested with Small Cause Court jurisdiction, and in the exercise of that jurisdiction took eognizance of a suit, it was held that the claim for set-off in it, of an amount exceeding the pecumiary limit of the Small Cause Court jurisdiction, could not be inquired into by him (2) A question might arise whether a Court could entertain a set off, a claim for which, though within its pecuniary jurisdiction, was otherwise not within it. It has been held that the rule does not refer to material jurisdiction in any way, or contemplate a case in which a smt for the amount claimed to be set off is beyond the jurisdiction on account of its nature, as may be the case in some Provinces as regards claims for amounts for rent of agricultural lands (3) It has, however, been also held generally that no Court can entertain a set off if it would not have had jurisdiction to entertain a suit, if one had been brought to recover the mone) sought to he set off (4) And see last paragraph

Effect of set off—The set-off is to have the effect of a plaint (5) in a winch relates colely to the plaintiff's claim. It is not affected by anything which relates colely to the plaintiff's claim. It is not necessary that the plain tiff's demand should actually exist. Thus the defendant may deny the plaintiffs claim, and also plead a cet off and may obtain a decree for it, although no sum may be found due to the plaintiff (6). And if a certain amount is found due to the plaintiff but a greater sum is found due to the defendant, a decree will be mide in favour of the defendant for the recovery of the halance (7). And it has been held that the same rule applies in the case of a set off which is not within the purview of this rule (8).

In appeal will be to the same Court as if the sum had been demanded in a separate suit (9). So long as set-off was deemed a mere defence the plaintiff

(1) Ihakurdas v Nand Lai 1890, P R

(2) Baroto Gaga v Sepoy Pongu 14 B 371 (1889), apparently overruling in effect, Ram pratab v Ganesh Rangnath, 12 B 91 (1887) which, however, was not referred to

(3) Thakurdas v Nand Lal, 1890, P R No 17, and see Hukm Chand, C F C 832, where it is said that the principle of connexity is considered sufficient to confer material jurisd ction in such cases

(4) Beni Madho t Gaya Prasad, 15 A 404 405 (1893)

(5) As to stamp rule ante, Written

(6) Hayatkha i Aldulakha, 6 B II C R. A C IoI (1863), 36 an earlier case it was held that a decree could not be swarded for a sum to be ascertained in a suit for accounts Hurro Soondurce v Bungshee Vohun, 5 W R 32 (1866), but this was because there could be no set off in respect of an unascertained sum

(7) Sec O \\ r 19, post

(8) Pragi Lal t Maxwell, 7 A 284 (1889) per Oldfield, J [contia, Duthoit, J] The point was queried in Brojendra Nath Das r Budge Budge Jute Mill, 20 C 527 (1893) and now see last para of s 210, post

(9) O XX r 19, post, under which appeals from decrees relating to set off he to the Courts to which appeals in respect of the original claim would he See Rain Lal : Lancaster, 7 A H C R H1 (1871), as to stimping of memorandum of a pical, see Chemippin 1 Roghmathi, 15 M 29 (1811).

could it my stage of the suit put in end to it by putting in end to the suit itself. It fell with the action to which it was an adjunct. However, as affirmative relief can now be given on a claim for set off, the plaintiff cannot, by refusing to proceed with the cive, defeat the defendant's right to recover under his set off [1]. As to hen, [2] the rule seems to assume that it is usual for a decree to make costs payable to the pleader instead of to the party [3].

Rules relating to written statements—"I his clause is now, see notes to other rules of same order. Court fees must be paid on set off claimed in written statement (i). Where the case was not strictly one of set off under the former section, so as to make applicable to it the provisions of the third paragraph of that section (corresponding with the second clause of this rule), it was held that the written statement need not be stamped as a plaint (6)

9. No pleading subsequent to the uritten statement of a is.

Subsequent pleadings set off shall be presented except by the leave of the Court and upon such terms as the Court thinks fit, but the Court may at any time require a written statement or additional written statement from any of the parties and fix a time for presenting the same

"No pleading," etc —And to seet 112 of the last Code shortened and remodelled. This rule corresponds to seet 123 of the Code of 1859. By r. 1, ande, written statements must be filed before or at the first hearing, by which is meant that they must be filed before the parties have entered upon their case (6). This is subject to r. 6. Accordingly an application to file a supple mental written statement after the case had begun was refused (7). Where a written statement was improperly admitted, but without prejudice to the opposite party, the Court refused to interfere in appeal (8).

"Court may at any time require".—This may be done at any time In the Code of 1859 occurred the words "before final judgment' and it was accordingly held to mean that written statements could be called for only by the first Court and before judgment (9) The written statement may be called for from either plaintiff or defendant The Court was held justified in calling for a written statement which did not add to or vary the plaintiff s claim, but

⁽¹⁾ See English O 21, r 16

⁽²⁾ See Hukm Chand, C P C 834, Ann Pr, O 65, r 14, the general rule is that the right of set off is not affected by the solicitor a ordinary hen for costs Pringle v Gloog 10 Ch D 676

⁽³⁾ Brijnath Dass v Juggernath Dass, 4 C 742, 743 (1879)

⁽⁴⁾ Guiso v Ananta Itam Rathe 10 C W N 199 (1905)

⁽⁵⁾ Subramanian Chettiar v Muthuswami Anjangar, 17 M L. J. 481 (1907)

⁽⁶⁾ Munchershaw Bezonji v New Dhu rumsey Co 4 B 576, at p 578 (1880)

umsey Co, 4 B 576, at p 578 (1880)

⁽⁸⁾ Lall Mahomed t Dhoolee Ram, 22 W R 377 (1874)

⁽⁹⁾ Juggeshur Wookerjee v Gopee kishen Sem 5 W R 50 (1866)

simply supplied omissions in the plaint (1) In the High Court an order directing the filing of a written statement is generally asked for and granted on the presents tion of the plaint and it was held that this was not such an order of Court as to subject the party to the penalty of contempt for non comphance (2) It was in an early case held that if a party neelects to file a written statement when ordered to do so the Court would examine him as to his grounds of defence and confine him to such statements or adjourn the case at his expense (3) But in other cases the Court refused to hear a party who having been ordered to file written statement omitted to do so (4)

Where any party from whom a written statement is 10 so required fails to present the same within Proceduro when party the time fixed by the Court, the Court may fails to present written statement called for by pronounce judgment against him, or make Court such order in relation to the suit as it

thinks fit

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Default to present written statement—the Count may either pa s a decree against the defaulting purty or make such other order as it thinks Where in a case before Peterson J the defendants after ample opportunity neglected to put in a written statement that learned Judge stated that in future he should put the defendant into the box and examine him as to the grounds of his defence and if on examination it should appear tlat a written statement was desirable the case would be adjourned for that purpose at the exponse of the defaulting party (5) Defendant remained in Calcutta one month after it was ordered that he should put in a written statement and then went on a pilgrimage His son applied for leave to file a written statement and his application was refused as no cause was shown why his father had not filed it before he left Calcutta (6) | This rule corresponds with sect 106 Act \ III It has been held that in Rules 105 and 106 of the Bombay High Court Rules (Orrainal Side) there is nothing to prevent a defendant who has not filed his written statement from defending the suit at the hearing (7)

⁽I) Juhan cer Bulsh t Blecluree Lall 11 W R 71 (1869)

⁽²⁾ Morin in loth is t Gladstone id others Cal II C May 14th 1868 estel in Broughton C P (130

⁽³⁾ Run rutton v Or utal Irland Steam Nivigiti n Co 2 Hyde 59 (1864)

⁽⁴⁾ St mason dure Dosseet Bruid il id ib

Mitter (al II (Aug 10th 1565 Sreenath Doss v Ranco Dossec W R 27 1865 ct dib

⁽⁵⁾ Ran rutton v Or ental Inland Steam Varigation Co 2 Hyde 89 (1804)

⁽⁶⁾ D non oyo Dosseo v Tura lurn Coon

doo 1 Bourke 163 (1868)

⁽⁷⁾ Jayantilal v Nag 1ath La Bom L R 1.6 (191.)

ORDER 1X.

Appearance of Parties and Consequence of Non appearance

1 On the day fixed in the summons for the defendant to [s

Appear and answer, the parties shall be in

Appear on attendance at the Court house on present of

attendance at the Court house in person of defendant to appear and hy their respective pleaders, and the suit shall then be heard unless the hearing is

adjourned to a future day fixed by the Court

"Day fixed '—This refers to the day fixed for the first hearing of the suit (1). An appearance under the Code is not the same thing, as appearance is it used to be in the Supreme Court and is now in the High Court where the English mode of entering appearance by attorney is recognized and according to the practice of the High Court there is poser to order a case to est down at once, in the general case list if the defendant enters appearance by his attorney before the time for appearance fixed in the summons has expired. In any case a Court could by consint and on the application of the defendant issue a new summons altering the day for appearance (2). When however deshing with the question of appearance as that term is used in the Code for the purpose of determining whether the proximons in this Order apply an objection by the defendant before the day like do the hearing to the plantiff's application for attachment before judgment is not an appearance on that date (3).

Application of these provisions—These provisions are from their very nature and language appheable to suits in their initial stage and not to proceedings taken in execution of decrees made in those suits. It was however, at one time erroneously considered that sect 647 of the C de (now 141) apphead to execution proceedings as being proceedings of a inscellaneous character and by virtue of that section these provisions were so fir as was practicable unid applicable to such proceedings. In order to overrule such decisions sect 647 was amended by Act VI of 1892 by the addition of an Explanation declaring that that section did not apply to applications for the execution of decrees which are proceedings in suits. The

⁽¹⁾ Zam ul Abdm t Ahmad Raza 2 1 67 (1871)

[&]quot;O (1850), s. c. 51 1 233 (3) Hura Date Hura Lal, 7 1 235 (185.)

⁽²⁾ Cumming c Creen 4 B L R 111 s ride post 1 pearan c

execution, it was held that there was nothing in the Code as so amended which authorized a Court to apply at the stage of execution any of the procedure enacted in the corresponding Chapter of the last Code (1) But that though this was so the Court might, where necessary, act under the inherent power it possesses to make such just orders as are necessary for the proper disposal of the work given to it (2)

Appearance.-The word "appear" must be interpreted in the same sense in all the following rules as in other parts of this Code in which it occurs such as O XVII 1 2, post,(3) and whether the plaintiff or defendant is spoken of (4) What then is appearance? If there is none, the judgment is ex parte It has been said that in most eases the question whether a decree is ex parte or not is a question of fact (5) It is necessary, however, to ascer tain the law governing those facts O IX r 1 indicates what is meant by appearance, namely, the actual attendance in the Court house of the party in person or by pleader or recognized agent, who, under O III r 1, must be duly appointed to act on his behalf, or by a eo party under O I r 12 Under the terms of O III r 1, an appearance by a recognized agent is equivalent to an appearance in person, unless the Court directs personal appearance Plain tiffs must all be ropresented by the same pleader, or set of pleaders, and cannot he severally represented by different pleaders (6) Defendants can, of course, be severally ropresented, though where such several ropresentation is unnecessary, as where the interests are not in conflict, the Court will not allow more than one set of costs Sect 64 of the last Code, read with Form No 117 of the Fourth Schedule of that Code, explained, it was held, the nature of the defendant's appearance in obedience to the summens to appear and susner He was to appear in person or by a duly authorized pleader, duly in structed and able to answer all material questions, or who shall be accompanied by some other person (which includes a recognized agent) able to ansucr all such questions He was further given notice that in default of his appearance—that 1°, appearance in either of the ways specified—the suit would be determined in his absence, that is, under this Chapter of the last Code Thus, the appear ance mentioned in that Chapter meant attendance in person or hy an authorized co party or by a pleader "duly instructed," etc or by a recognized agent who intended to appear and did in fact appear for the party, whether he was able or not to answer all material questions (7) The test of whether a defendant has or has not "appeared" is whether such of the requirements of the summons as relate to appearance have or have not been complied with (8) On this principle it is held that when a pleader attends who is not duly instructed in

Dhonkal Singh t Phakkar Singh, 15 A
 94 (1893) , Hajrat Akramnissa v Valiul nissa Begam, 18 B 429, 431 (1893) Scenotes

to s 141, post
(2) Dhonkal Sundi a Phakkar Singli,

supra
(3) Soonderld t Goorprasad, 23 B 114,
1.0 (1818), per Struckey, J, whose judgment
is the only reported one dealing systematically with the subject, and is deserving of

careful study

⁽⁴⁾ Ib 421 (5) Cooker Lquitable Coul Co., 8 C. W. 5 621, 624 (1904)

⁽⁶⁾ Jankibai v Atmaram, 8 B H (R 211 (1871)

⁽⁷⁾ Muruga Chetty v Rajasami, 22

M. L. J. 281 (1912)
 (8) I natulla Basuma t. Jibon Mohan Re.).
 19 C. L. J. 535 (1911)

the suit he does not represent the defendant who in such case does not appear (1) Inasmuch as appearance is attendance in the Court house on the day fixed for hearing, it is clear that what is done before the day fixed in the summons and that the mere filing of a valadiumania is not appearing in person or by pleader, (2) nor is an 'appearance," in the technical sense as used on the original side of the Court, by the entry of the name of the atterney on the record, nor was there appearance where the defendant had filed valadiumania and objected to attach ment issuing before judgment, but did not appear as directed by the summons, nor on a further date when the case was decided (3) Nor is merely putting in a written statement, but when the case comes on not attending in person or by pleader an annexance (4)

Nextly, the personal attendance at the day of hearing must be in accordance with law If a person is ordered to attend in person appearance can only be effected in this way, and if be does not, but sends a pleader, he will be considered absent, and there is no appearance See O IX r 12 post (5) If there be no such directions be may appear either in person or by a co-plaintiff or co defendant under O 1 r 12 or by a pleader or recognized agent under They must however represent him and therefore the appearance of an unauthorized pleader is not an appearance by the party (6) There is of course no difficulty when there is no actual attendance by any of these persons nor indeed, where there is attendance except in the cases to which reference will be made. If a party attends in person or by pleader there is appearance, though he may neither have filed a written statement (7) nor made a verbal one (8) If the Court has refused to receive a written state ment but the pleader attends when issues are settled and cross examines witnesses there is an appearance (9) It has even been held that where a decree 19 passed on a solchnamah and the defendant alleges that it is a forgery and that she had no notice of the suit it is not ex parte (10) But this has been dissented from it being held that the defendant is entitled to go behind the decree and to show that it is in fact ex parte and that the firt that the decree appears to be based on a compromise impugned as a forgery does not mile sect 108 (now O IX r 13) post mapplicable (11) The appearance more over is to answer and if an application by a party who attends for leave to be heard is rejected and the defendant is not heard then the judgment is exparte (12) Where both parties appeared and the case was none through in their presence

- (1) Soonderlal : Goerprasa 1 23 B 414 (18.8)
- (2) Hallor Atwaro W. R. 18 (1867) Sheo Churn v. Heera Lall 11 C. L. R. 37 (1882)
- (3) Hira Dai e Hira Lal 7 4 538 (1885) (4) Purus Rain e Juvintee Pershad 1 4
- H C R 154 (1869)

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- (5) And see Arishna Ratt r Cobin? Trasad, S A =0 (1850)
- (t) Raj Kumar t ligal hish re 18 %. 41 (1890)

- (7) Golicklur Bill i ith Marsh 52
- (1864)
 (8) Jankee Ram e Chan trabully "W R
- _95 (1867)
 (9) Raghapa r Parapa 1 B _17 (18 o)
- (10) Remmo Moyee r Watson 14 W L. 299 (1870)
- (II) Bholas Naskar e Alach Naskar 1 (W Nexys (1837)
 - (1.) "yud Mahomed r "haik Muntozul 15
- W R 400 (15°2)

and nothing remained to be done except to hear arguments, the case was held not to be one which could be dealt with as for default of appearance (1)

Contest has mainly arisen where either the party or his pleader or recog mized agent does actually attend in court, but applies for an adjournment, and, when the adjournment is refused, withdraws from court So far as these provisions are concerned, the only question is appearance or non appearance If the party has appeared in either of the ways specified, viz in person or by authorized co party, or hy authorized pleader "duly instructed and able to answer," etc., or by a recognized agent who intends to appear and does in fact appear for the party, then he has appeared, and it is immaterial for what purpose he has appeared or what action he has taken on such appearance If, therefore, a party is present in person and personally applies for an adjournment, be has appeared, the purpose for which he appeared, or the action which he took on appearance, 18 immaterial (2) Appearance, however, by a pleader does not, as in the case of a party, mean mere presence He must also be duly instructed and able to answer all material questions relating to the suit. Where, therefore, the party is absent, and an application for adjournment is made on his behalf by a pleader, who has no other instructions, and whose functions are at an end when the adjournment is refused, in that case the party has not appeared If, therefore, the pleader in such case retires after an unsuccessful application for adjournment the decree passed is ex parte (3) In a recent case, after the plain tiff's case had been closed and the defendant's case part heard, counsel for the defendant applied for an adjournment, mainly on the ground that two of his witnesses had not arrived and this was granted, but he was warned that if

(1) Rai Ghand : Mathura Prasad, 3 A 292 (1880)

(1898) Soonderlal Goorprasad 23 B 414

(3) Sounderlal & Goorprasad, supra Lalta Prasad t Nand Kishore 22 A 66 (1899) (ooko v Equitable Coal Co , 8 C W N 621 (1904), Shankar Dat v Radha Krishna 20 1 195 (1897) [no application for adjournment but pleader stated that he had no instruc tions]. Ramtahal Ram v Rameshwar Ram, 8 A 140 (1886) [the same, it is not sufficient that the pleader be authorized to enter appearance he must have instructions in Bhanacharya v Fakirappa, 4 the causel B H C R 206 (1867) [the presence of a pleader who is not supplied with the means of answering cannot be held to be a repre sentation of the defendant which will give to the suit the character of a defended action foll, in Administrator General " Dyaram Das 6 B L R 688 (1871), which last case was followed in Deval Mistrie t Kupoor Chund, 6 C 318 (1878), and see Buldeo Misser t Synd Ahmed, 15 W. R 143 (1871) . Shiften les t Km 10, 12 C 605 (1689), the

case dealt with was dissented from, Dhan Bhagat v Ramessur Dutt 20 W R 53 (1873)]. Ramchandra Pandurang v Madhav Puru shottam, 16 B 23, 24 (1891) ['If he (pleader) had said that he had received no instructions the Court could no doubt have held that there was no proper appearance] As was pointed out in Soonderlal t Goorprasad, 23 B at P 417 the headnote in Rampertab Mull t Jakeeram Agurwallah, 23 C 991 (1896) quite misleading The Court did not, how ever actually decide the question whetler or not the case fell within a 102 of the last Code but dismissed the application on the Where, however, a pleader has instructions, but says the brief came to him too late to prepare hunself, this may be a good reason for adjournment but is not, it has been said, a default of appearance Chirangi Lal v Kundan Lal 20 1 214 (1898), foll Ramchandra v Madhas, 16 B 27 (1831) and dess from Shibendry v Knoo 12 C 605 (1650) The judgment rears to a case at p 603, but this appears to be A mustake, and the case at p 605 is meant

0 g r 2

they did not appear on the following day any application for a further adjournment must be supported by proper materials. The was present on the following day, but without the two witnesses and his application for a further adjournment was refused on the ground that no proper reasons for it had been made out On this he withdraw, and the case was then decided on its ments. When he afterwards applied to have the decree set used as ex parte it was submitted that at the adjourned hearing he had not appeared but had only as a bed for a further a hourmment (1) and that there fore sect 157 of the last Code (now represented by O XIII r 2) become applicable (2) It was held that the Court had no power to make an order under sect 108 of the last Code (now represented by O IV r 13) combined with sect 157 of the last Code and that his remedy was an appeal against the refusal of his application for further adjournment (3)

Lastly there is the case in which the party being absent the recognized a, ntis present If the latter accompanies a pleader, who applies for an adjourn m nt but who is otherwise uninstructed then it is a question of fact whether the agent is able to answer all material questions in which case the party must be deemed to appear by the pleader. In such a case the require ments of the summons as to appearance are as fully satisfied as if the party had appeared in person and applied for an adjournment and equally in such a case the nurpose of the appearance or the action taken on appearance is immaterial If however the party being absent neither the pleader applying for adjournment nor any person accompanying him whether a recognized a_ont or not is able to answer then apart from O III r 1 there is no appear ance within this rule and the only remaining question is whether the party appears by his recognized agent under the former rule. That is a question of fact. The more presence of the agent is not necessarily an appearance of the party. It must be determined whether he intended to appear and did in fact appear for the party in the exercise of his power under O III r 1 ante (4) Where a defendant did not appear and it was alleged that he was insane and the Judge struct off the case it was held that I e should not have done so but ought to have made the inquiry contemplated in Act XXXV of 1858 (5)

2 If here on the day so fixed it is found that the summons is

Dismissal of where summons served in consequence of plaintiff a failure to pay costs

has not been served upon the defendant in consequence of the fuluie of the plaintiff to pay the court fee or postal charges (if any) chargeable for such service, the Court may

make an order that the suit be dismissed Provided that no such order shall be made although the

(1) Satish Chandra Mukerjee t Mara Prosad Mukerjee 34 C 403 (F B) (1907) and see Venkatarama v Nataraja 24 M L J 235 (1912)

(2) Mariannissa v Rain Kalpa Gorain 34 C 235 (1907) Cooke v 1 q 1 table Coal Co 8 C W 621 (1904)

R V c 7 (1865)

⁽³⁾ kader Khan v Juggeswar 35 C 1023 (1908) distinguished in Enatulla Basunia : Jibon Mohan Roy 19 C L J 333 (1914) (4) Soonderlal : Goorprasad 23 B 414

⁽¹⁶⁹⁸⁾ (5) Musst Moorut v Baboo Dlurm 2 W

summons has not been served upon the defendant, if on the dat fixed for him to appear and answer he attends in person or by agent when he is allowed to appear by agent.

"May make an order that the suit be dismissed."-If the rlambf has omitted to pay the court-fee by accident or the like, the Court may, on his application, direct the issue of a fresh summons. If it does not, there is no other course open but to dismis the suit, or the Court may dismiss the suit it once, leaving the plaintiff to apply under r 4, post. The rule applies not merely where there is a single defendant, but also where one of several defendants has not been served, for the suit is incomplete, and cannot be heard without notice to all the defendants. Where, however, in the latter case no objection was previously taken, the Court declined to entertain it on special appeal (1) The suit may be dismissed whether the summons was that orizinally usued or that reashed on account of non ervice of the original one (2) But in no case should the case he da po ed of before the day fixed for hearing (3) In the under mentioned case the Court was disposed to think though the cale wis dealt with on the merits that an order under the corresponding former ection was not appealable (4). If the court fee for serving the summons on a defendant newly added by the Court is not paid, the suit according to the Bombia High Court should be dismissed altogether even as ignist the original defendant but if it is proceeded with and decreed azamit him and he do s not take that objection on appeal, he cannot raise it for the tirst time on special appeal (5). The Allahabid High Court appears to have taken a different vi w (6) holding that m such a case the suit should be dismi-d guest those defendants only en whom the summons could not be ered but that if the suit is by mustake dismissed as against the original defendants also to word impostice the dismissal against them should be held to have been ordered under this rule

Proviso — The rick contemplate is detendint appearing before errie of the summons. In the under mentioned case (7) the Court stated that it was not necessity to decade whether if a plaintiff were merely to lodge a plantial data no proceedings, up not a zerous a defendant, the latter in such a case would have a right to appear — but that where as in that case, a plaintiff, if it all process of arrest, brought the defendant before the Court, then he had a right to appear at the hearing of the case, although no summer had been served upon him.

3. Where neither party appears when the suit is called a where neither party for hearing, the Court may make an order that appears, suit to be dis the suit be dismiss.

"Called on for hearing "—The parties are bound to attend from the timo the Court opens, and must be in attendance when the case is called on for hearing, and, if absent at that time, they will be treated as not appearing (1). The Court is not bound to writ for any party until it is about to close for the dry, or even till the pleader for the party can find it convenient to attend on account of his engagement in another Court, as, if this were done, Courts would find it difficult to get through their work (2). The subsequent day referred to in sect. 98 of the last Code was that to which the first hearing is adjourned, (3) but the day fixed for hearing after a remand on appeal was held to be within the uncaning of those words (1). The reference to adjournment has now been omitted because this matter is sufficiently covered by the

"Neither party appears"—It does not apply when a pitty is present, but has omitted to serve a person with a notice of sordered by the Court is not a non-pipearance (s.

Shall be dismissed—In cases where the Court does not otherwise direct, dismissed is the only consequence, and the provise relates to the postponing of the case, and not to the making of any final order in it (6). Where neither party appears on the day fixed for the hearing of a sint, an order striking the case off the file is illegal, the only order that can be passed in the circumstances being that of dismissal (7). The rejection of an application of the ic-pondent, asking that security for costs may be taken from the appellant on the non-appearance of both the parties, has been considered, by virtue of the provisions of sect-617 (now 111) a dismissal under the section which this rule replaces (8)

4. Where a suit is dismissed under sule 2 or sule 3, the is plaintiff may subject to the law of limites built or court may tation) bring a fresh suit, or he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his not paying the court-fee and postal charges (if any) required within the time fixed before the issue of the summons, or for his non-appearance, as the case may be, the Court shall make an order setting aside the dismissal and shall appoint a day for proceeding with the suit.

⁽¹⁾ Auttiyalı i Pari Yakrı, 7 M 356 (1884)

⁽²⁾ Raj Natun t Akrooi Chunder, 21 W R 141 (1875) [as to absence of counsel see Lakhmi v Gatto Bai 7 A 542 (1885)] (3) Comalammal t Rungasamy, 4 W H.

C R 56 (1868)
(4) Rughoonath Singh t Ram Coomar, 14

⁽⁴⁾ Rughoonath Singh : Ram Coomar, I. W R SI (1870) See next note

⁽⁵⁾ Haradhun & Piotap Naiain 14 W R 401 (1870)

⁽⁶⁾ Raj Natam t Ananga Mohon 26 (

^{599 601 (1899)} (7) Alwar t Sheshammal, 10 M 270

^{(1887),} and see ib p 290 as to appeal (8) Lakhmi Chand v Gatto Bai, 7 A 542

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"The plaintiff."—These words will include the plaintiff's legal representative, but though the latter may thus apply to have the order of dismissalest aside, the order will be set aside only if he proves a sufficient excuse, such as the plaintiff himself would have been required to prove before the order could be set aside (1) See sect 146

"Fresh suit."—Applying the principle cinbodied in this rule, if a suit redismissed by an order purpoiting to be made under this section before the day fixed for hearing on failure to deposit talabana, this irregularity on the part of the Court does not deprive the plaintiff of his right to bring a new suit under this section (2)

"Satisfies the Court"—Each question of this kind must be dealt with, not according to any hard and fast general rule, but according to all own particular circumstances (3)

"Set aside dismissal"—When a suit has been dismissed for default, the plaintiff has neglected to make an application within thirty days, ther can be ne review of judgment under sect 114, post (1). A Judge, when restorm a suit, has no junisdiction to pass at that time any order as to the general cost of the suit (5). There is no appeal from an order setting aside the dismissl and appenting a day for proceeding with the suit (6). But where such an order has been set aside on appeal, and the last order has been reversed by the High Court, the proceedings of the first Court and the decree passed by it are invalidated on the ground that as an effect of the reversal of the order lestoring the suit, there were no proceedings in Court at the time of the passing of the decree in which such decree could be passed (7).

5. (1) Where, after a summons has been issued to the pismissal of suit defendant, or to one of several defendant,

where plaintiff, after summons returned unserved, fails for a year to apply for fresh summons.

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defendant, or to one of several defendants, and returned unserved, the plaintiff fails for a period of one year from the date of the return made to the Court by the officer ordinarily certifying to the Court returns made by the

serving officers, to apply for the issue of a fresh summons and to satisfy the Court that he has used his best endeavours to discore the residence of the defendant who has not been served, or that such defendant is avoiding service of process, the Court may make an order that the suit be dismissed as against such defendant

⁽¹⁾ Couvin v Bensley, 43 C 2-3 (Amer.), cited in Hukin Chand, C P C 707
(2) Gulab Day J. Jiwan Ram, 2 A 318

⁽²⁾ Gulab Dar z Jiwan Rum, 2 A 318 (1873)

⁽³⁾ Lakhmi Chand i Gatto Bai, 7 A 512 (1885), in Dhunsook Doss i Hurry Baboo, Bourke O C 115 (1865), the cyclenco offered was considered insufficient

⁽¹⁾ horlash Mondol : Nabidwip Chandri,

² C W N 318 (1836), dist in Raj Arrain t Ananga Mohan 26 C 598 (1899)

⁽⁵⁾ Krishna Vithal v Gancal Bhickar - B 201 (1901), s c, 3 B I P 731

⁽⁶⁾ Alwart Stsh mmal, 10 M 270 (1857) Wahid un russa t Kundan Lal, 35 M 4-(1913) (plaintiff can apply for revision)

⁽⁷⁾ Maar : "cshammal, 10 M 270 (155)

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HEATSCHED MIPHARANCE AND NON-APPLARANCE OF PARTILS. 765

(2) In such case the plantiff may (subject to the law of huntation) bring a fresh suit

Object and effect of rule -Ilus rule recomizes the practice of issum t fro. h summons on the return of the ori anal unserved, but was enacted to but an end to the reprehensible practice of instituting a suit, and then holding proceedings in terreton over the defendant for a long period without taking any stems to bring it to a hearing (1) Time runs from the date of the return by the Nazir (2) An addition has, therefore, been made interpreting "return" as that not of the Builiff but of the Nazir A plaintiff cannot, however, by merely applying to the Court within a year of the return, for a fresh summons. word dismisal of the suit. Ho must also satisfy the Court that he used dilicence in the meanwhile. If he fulls to establish either of the two points. his suit must be dismi sed (3) It is to be observed that the excreise of the power conferred as discretional only. The refusal to take a fresh summons ou a defendant, though sufficient to justify the dismissal of the suit against hum, does not operate to release hum from liability (4) As regards the right to bring a fresh suit.(5) see the case cited, in which the section was recently applied

6 (1) Where the plaintiff appears and the defendant is 10 procedure when only does not appear when the suit is called on for plaintiff appears.

(a) if it is proved that the summons was duly served, the

When summons duly served.

(b) if it is not proved that the summons

was duly served, the Court shall
direct a second summons to be

ussued and served ou the defendant.

When summons not duly served.

(c) if it is proved that the summons was served on the defeuwhen summons served, but not in due time dant, but not in sufficient time to enable him to appear and answer

on the day fixed in the summons, the Court shall postpone the hearing of the suit to a future day to be fixed by the Court, and shall direct notice of such day to be given to the defendant

(2) Where it is owing to the plaintiff's default that the

⁽¹⁾ See Gourthum Soor t Peary Lall 15 B L R App 12 (1875) Ramkssen Doss v Luckeynaram, 3 C 312 (1878), Gerender Coomar t Juggadamba Dabee 6 C 129 (1879), which last case deals with the rules of the L C on the subject, Urquhart v Glbert, 1 Ind Jur, N S 224 (1862) As to the Court a discretion to issue a second summons, see three cases years in

⁽²⁾ Parsotam Vithal : Abdul Rehmanbhai

¹³ B 500 (1889)
(3) Byaharmal t Sitya 3 Bom L R 402

⁽³⁾ Byaharmal : Sitja 3 Bom L R 402 (1901)

⁽⁴⁾ Shark, Alli v Mahomed 14 B 267

⁽⁵⁾ Sata Ram Singh t Pokhpal Singh, ...8
A 749 (1906)

summons was not duly served or was not served in sufficient time, the Court shall order the plaintiff to pay the costs occasioned by the postponement.

"Appears"—See notes to r. 1, ante This rule is not limited in it application to defendants residing within British India (1) By sect 74 of the Dekkhan Ryots Act, the Code is only to be applied so far as it is consistent with the Act (2)

"When the suit is called on."—These words appear to have be a inserted so as to limit the rule to the first day of hearing and mark the distinction between these provisions and those of O XVII r 2

Clause (a).-No legal decree can be passed ex parte without there being proof of the due service of the summons (3) Where the summons has been served through another Court, see sect 28, ante To justify an expante decree against all defendants, all must have been served, and if the defendant's hability is joint, and if a decree can only go against all, it has been held that without notice to all the defendants no indement could be passed (4) It was held with reference to sect 56 of the Code of 1859, that duly seried" refers to the mode of service and not to the igency by which it is effected (5) Where a summons is sent by post to a defendant leading out of British India, it is not, in the absence of evidence that the person to be served was at the time residing at the place to which the summens was sent sufficient proof of service to show that the summons was posted, but there must be some evidence of its having been received by the defendant (6) The Court mry proceed, cx parte, whether the defendant has been summoned only to appear and answer the claim, or, in addition, to attend and give ovidence In the latter case, it is not necessary, before proceeding ex parte, that all the processes prescribed by law for compelling the attendance of the defendant as a witness should be calcusted, it being sufficient that the service of the summons for his attendance has been effected (7) When defendant appears, the failure to put in a defence in writing or verbally does not authorize the trial of the smt or make the decree presed in it or parte, (8) not even if the defendant should have been ordered to file a written stitement (9) And if the defendant uppears it the first he iring and file a written statement, the fact of his non appearance at the final hearing does not operate to make the decision passed in the case ex parte (10) In England plaintiff is by Statute allowed in cut im cases to sign judgment for default

⁽¹⁾ Lakhr nd dm t Ghafur nd dm, 23 A 20 (1900)

 ⁽²⁾ Dulich and a Dhondt, 5 B 184 (1880)
 (3) 1b., at p 100., Ram Loch in a Artya Ralice, 12 W R 211 (1869)

⁽⁴⁾ Penfold a Slyfield, 68 N W Rep (hmer) 226 cited Hukm Chand, C P C

⁽i) Wackintosh i Ikalu Doss, D W. R 234 (1873)

⁽⁶⁾ Lakhr ud din t Ghafur id din, supra.
(7) Taruck Nath e Jeannat Neg 1 56 33

⁽¹⁸⁷⁹⁾ (8) Jankeo Ram e Chundrab illy, 7 W 1

<sup>235 (1867)
(9)</sup> Shiyarajadhani t Kuppagantulu, 2

V H C R 311 (1865) (10) Amentharam v Widher v, 1 V - 1

⁽¹⁸⁸¹⁾

but in this country it has been held that, in all cases where the Court proceeds ex narte, the plaintiff must produce prima facie proof of his case (1) and must prove the claim to the satisfaction of the Court, before he can obtain a decree. except in the case of summary proceedings on negotiable instruments. It is however to be noted now that under O VIII r 5 nvery fact not denied is taken to be admitted, though under that rule such admission is not necessarily equivalent to a proof (2)

The remedies open to a defendant against whom an ex parte decree has been passed, and who contends that the Court should not have so proceeded are either to apply under O IX r 13 (formerly sect 108), post, or, to appeal from the ex marte decree, under sect 96 Under O IX r 13, by which a summary remody is given, the complament must satisfy the Court not merely that the proof required by this rule was not given, but that in fact the summons was not duly served, or that the defendant was prevented by any sufficient cause from appearing Where a defendant appeals from an ex patte decree, it is sufficient, in the first instance to establish that in the Court which passed that decree the necessary proof of service of summons was not given It is not incumbent on the appellant to show that the summons was in fact not duly served (3)

Clause (b) -In the under mentioned case it was held that the Court is bound in every case to issue a fresh summons, though it may order the plaintiff to pay the costs of the postponement, and cannot dismiss the suit or reject an application governed by this rule (4)

Clause (c) - Where, if the defendant had not appeared, the Court would have been bound to postpone the hearing on the ground that sufficient time had not been given to him to appear and answer to the suit, his appearing ought not to put him in a woise position, and an adjournment should be granted (5)

Procedure where defendant appears on day of adjourned hearing and assigns good cause for previous non-appearance.

7. Where the Court has adjourned the hearing of the suit ! ex parte, and the defendant, at or before such hearing, appears and assigns good cause for his previous non-appearance, he may, upon such terms as the Court directs as to costs of otherwise, be heard in answer to the suit as

if he had appeared on the day fixed for his appearance

Appearance at adjourned hearing only-Sect III Act VIII of 1859 What the Lea lature intended was that the defendant might be admitted to defend the suit merely upon a petition and without any evidence being gone into to prove the truth of the fact stated in that petition. In fact

⁽¹⁾ Amrithnath . Dhunput Sm.J h i R 44 s c 15 W R 503 (1871) (2) Satyes Chaules | Monm lus IJ

⁽ L. J. 519 (1.114)

⁽¹⁾ lakhruldm + Chaftruld : 3 1 11(1 40)

⁽⁴⁾ Lallubbar Vancram v. Bas Malandavis 18B 53(18G) It doesn targear however why these proceedings, which were in a suit, were treate I as mis ellar cour.

⁽a) Shailh Salat c Shaile Maket 15 W R 111 (1572)

the section contains no provision for and does not appear to contemplate taking such evidence. (1) If the Court admits the defendant to defend, the sut will proceed in the ordinary course as a defended suit. If the Court refuses the then no appeal hes from the order of refusal; (2) the suit proceeds as an exporte suit, and the delendant may then apply to set aside the decree under O 1X. r. 13, post,(3) and if that application be refused he may then appeal under O XLII. r 1 (e); or he may appeal against the exporte decree without resorting to the procedure laid down in O.1X. r. 13, post (4) But where though the Court refuses to receive a written statement, it frames issues in the presence of the defendant's pleader, who is permitted to cross examine, the decree is not an exporte one (5)

Procedure where de- appear when the suit is called on for hearing, fendant only appears. the Court shall make an order that the suit be dismissed, unless the defendant admits the claim, or part thereof, in which case the Court shall pass a decree against the defendant upon such admission, and, where part only of the claim has been admitted, shall disnuss the suit so far as it relates to the remainder.

Application of rule.—This rule corresponds with sect 114 of the Code of 1859. In construing an order alleged by one side and denied by the other to be an order under this rule, the order will be considered as one under it il, apart from the incre description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear (6). It was formerly considered (7) that the Chapter in which the section corresponding to the rule appeared, applied to execution proceedings, but this was subsequently held not to be so, having regard to the change made in 1892 in sect 617, corresponding with sect 111, gost (8). The rule is applicable to adjourned hearings of cases, (9) and to proceedings before

Kuar, 10 A 119 (1587)

Ashruffunnissa v Leharcaux, S C 272, 273 (1882)

⁽²⁾ S 104, po t See Syed Mahomed : Shark Muntozul, 18 W R 400 (1872)

⁽³⁾ Sunkaralinga Mudali v Ratnasabha pati, 21 M 324 (1897), Ashruffunnissa t Lehareaux, 8 C 272, 274 (1882)

⁽⁴⁾ Ashruffunnissa i Ishareaux, supra (5) Raghapa bin Hanmapa i Parapa bin

Shivapa, I B 217 (1876) (6) Lalta Prisad r Naud Kishore, 22 A 66 (1899)

⁽⁷⁾ See cases cited ante, and Kalee Kristo Milamed Kader, 12 W. R 428 (1869).

Raja v. Sripivasa, 11 M 319 (1888), Bina Sonan v Binanda Chundor, 10 C 416 (1881), Sectul Pershad i Mahomed Kureem, 5 Ml H C R 164 (1873), Shoo Presad i Kasturi

⁽⁸⁾ See notes ante, and Jang Bahadur 1 Mahadeo Proshad, 8 C. W. N. 160 (1903), where the lower Court held that s. 103 of the

^{215, 237 (1907)}

the Court to which a reference is made under the Land Acquisition Act (1) It has been recently held by the Prvy Council that this rule does not apply where the main issue of the case has been decaded on its ments and there is a sub-equent idebult in appearance (2). In this case the plaintiff had sued to recover the sum paid by him to referse property from a wrongful attachment, and also for damages for it, the District Court had it missed the first claim on its merits, the plaintiff had then abandoned the second claim and had failed to appear in rule equent proceedings, and the District Judge had thereupon distinct due to be suit under each 102 of the last Code, now represented by this rule.

Non appearance—In order can only be made for non appearance (?) of the latinity A plantiff falls to appear within the meaning of this rule when his pleader declines to proceed with the suit, and it makes no difference that the party hunself was present in Court (!) It was held under the Code of 18.0 that where a commassion has issued for local inquiry and the Commissioner requires the attendance of the parties, should the defaultant appear and the plantiff male default in appearing on the day appointed the proper course is for the Commissioner to dismiss the suit under this rule (5). A suit can only be dismissed under this rule for default of a nature therein described and therefore not for non attendance of witherest (6). The Court should neither receive evidence on lichtly of a defaultant for examine the interits of the case (7). If a suit is dismissed for want of ovulence, the decision is one on the ments and not under this rule (8). Non appearance crused by the death of the plantiff should not be confounded with default (9).

Judgment —The suit should either be dismissed or decreed "Struck off is not a proper mode of dipoing of the case (10) though in a case in which such an order was passed, it was held that though the correct expression had not been used, practically the case had to be regarded as having been divided as parte (11)

- (1) Bhandi Sing t Ramadhin Roy 10 C W N 941 (150a)
- (2) Kanhaya Lal t National Bank of India 37 I \ 80 (1910) 37 C 4.6
- (3) to the meaning of appearance an this connection see falls Prasad 1 Nail Kishore 22 \ 06 (1899) Rampertah Mull 1 Jakeram Agutwallah 23 C 991 (1896) Hinga Bibee v Mania Bibee 8 C W 7 97 (1993), s c, 31 C 160 In Kanjir Hahib 2 Rom L R 206 (1990) it was held that there was no default on \s part as there was nothing to show that B by whem the sunt was admittedly instituted actet with
- (4) Gopala Row v Maria Susaya Pilfai 30 M 274 (1906) 17 M I J 225 hut see Esmaile Haji Jan Mahamed 33 B 465 (1908) (5) Fshan Chunder v Soorjo Lall Marsh 139 (1864), sed qw, as the parties were present

authority

- in the Judges Court through their vakils though where the failure was to pay the Commissioner's fices the order was not considered as 1 as ed under this section. Stark
- Sahdo v Mahomed, 13 M 5"0, 571 (1850) (6) Mahome l Arcem c Hah r Ah Buksh 5 Ml H C R 74 (1873)
- (7) Parbati t Tulsi Koeri 18 C L J 128 (1913) p 130, Kesri Chand v National Juje Mils Co 16 C W V 368 (1912)
- (8) Kartick Chaudra Pal t Sirdar Vandal 12 C 563 566 (1885)
- (9) Debi Baksh Singh t Habib Shah P C, 35 A 331 (1913) 40 I A 151
- 35 A 331 (1913) 40 1 A 151 (10) Aboob Latt: Toolsie Singh 17 W R 219 (1872) and of Mar: Seshammal 10
- W 2"0 271 (1887) Biswa Sonan v Binanda
 Chimder 10 C 416 (1884)
 (11) Beejoy Gobind 1 Radha Benode 10
- (11) Beeloj Gobind i Radha Benode 10 W R 348 (1868)

3.1

Plaintiff's remedy upon dismissal -Where the suit is dismissed the plaintiff may apply for a review without any previous application under the next rule, (1) or he may apply under that rule. It is not necessary to draw up a formal decree, and the fact that such a decree has been drawn up cannot alter the nature of an order of dismissal under this rule, which is not a decree within the meaning of sect 2, and is not liable to be challenged by way of appeal The present Code has in this respect altered the pre-existing law (2) An order dismissing a suit at an adjourned hearing for non appear ance of the plaintiff and his pleader was held to be an order under sect lai (now O XVII r 2), and its consequential section (the present rule), and not sect 158 (now O XVII r 3) (3)

(1) Where a suit is wholly or partly dismissed under rule 3, the plaintiff shall be precluded from Decree against plainbringing a fresh suit in respect of the same tiff by default bars fresh suit. cause of action. But he may apply for an order to set the dismissal aside, and if he satisfies the Court that there was sufficient cause for his non-appearance when the suit was called on for hearing, the Court shall make an order setting aside the dismissal upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

(2) No order shall be made under this rule unless notice

of the application has been served on the opposite party

Application of rule -This rule corresponds with sect 119 of Act VIII of 1839 The rule applies to original cases and not to cases in appeal (4) a special procedure in hearing appeals being provided, nor does it apply to execution proceedings (5) It bars a subacquent suit only when the plaintiff in the latter had been either the plaintiff in the former suit or represented by hum (6) It does not bar a suit the plaintiff in which had been a contesting defendant in a former suit (7) When an executor presents an application for probate he cannot be regarded as a plaintiff sung in respect of some cause of action, and therefore this rule will not apply (8) It makes it compulsory on a Court to set aside a dismissal order under r 8 of this Order where the plaintiff satisfies the Court that there was sufficient cause for his non appearance, but

⁽¹⁾ Raj Naram Purkait v Ananga Mohan Bhandari, 26 C 598 (1899)

⁽²⁾ Rukminimayı Dasi t Paran Chandra Bhera, 39 C 341, 15 C L J 334 (1910). Parbuti t Tulsi Koeri, 18 C L J 128 (1JI3) p 130 And see Gilkinson v Subramania

¹¹¹ an, 22 M 221 (1838) (3) Shrimant Sagaprao & Smith, 20 B 736 (1894)

⁽⁴⁾ Ram Iall Choudhry v Surdareo Jah (1864) W R Misc 21, Anonymous, 1 Ind for O 5 Cs (1869), Kalı Kishore i Dhu

nunjoy Roy, 3 C 223 (1877)

⁽⁵⁾ Madon Wohon Mondul & Baikuts Nath Mondul, 10 C W N 830 (1900) S o notes to r 8, ante, Asım ı Raj Mohan, 13 C L 1 532 (1910)

⁽⁶⁾ Ottapurakkal t Cherichil, 13 11 31

⁽¹⁹⁰⁹⁾ (7) Ottapurakkal : Cherichil 33 1 31

⁽¹⁹⁰⁹⁾

⁽⁸⁾ Ramon v Kumu l, 14 C W N -4 (1910)

it does not take away the Court's power to restore the case for any other valid reason (1) It was held to apply to rent cases under Act VIII of 1869, B C .(2) and to proceedings under sect 9 of the Specific Rehef Act (3) As to default of appearance before Commissioner, see notes to r 8, ante By O XVII r 2. nost the present procedure applies to any day to which the hearing of the trial may be adjourned, but not to the case of a person obtaining time to do some act and making default That falls under r 3 of the latter Order (4) This rule does not apply to suits dismissed for any other reason than non appearance. and includes suits dealt with under O XVII r 2 nost, but not those disposed of under r 3 of that Order (5) Where a suit was dismissed "in default of prosecution" on the ground that the plaintiff failed to deposit talabana, the order was held not to be one under the section corresponding with this rule (6) as was also the case where a suit was dismissed because neither plaintiff nor his pleader appeared on the day fixed for hearing the argument (7) At an adjourned hearing of a suit, witnesses on behalf of the plaintiff not being in attendance. the plaintiff applied for issue of a warrant against one of them. The Court refused the application, and the pleader for the plaintiff thereupon intimated that he had no further instructions to appear, and the suit was dismissed Subsequently an application was made under sect 103 (this rule) to set aside the order of dismissal On objection by the defendant that masmuch as the dis missal was under sect 158 (O XVII r 3) the remedy of the plaintiff was his way of an application for review -Hold, that the suit was dismissed under sect 102 (last rule) read with sect 157 (O XVII r 2) and that the application was maintainable under sect 103 the present rule (8) And generally if time is given to do an act and it is not performed, O XVII r 3 applies, otherwise r 2 of the latter Order See notes to these two rules, post Seet 38 of Act XV of 1882 did not preclude a plaintiff, whose suit had been dismissed for default. from applying under this rule to have the order of dismissal set aside two separate remedies under different enactments If he applied for a new trial under sect 38 he had to do so in eight days, if he applied under this rule, he had to do so in thirty days (9) The rule applies to proceedings before the

Court to which a reference is made under the Land Acquisition Act (10)

(1880)

- (I) Lalta Prosad t Ram Karan, 34 A 426
- (1912)
 (2) Oodwunt Mahtoon v Bidhee Chund, 15
- W R 207 (1872)
- (3) Anthony : Dupout, 4 M 217 (1881)
 (4) Sruraja l enkataramaya : inumukonda
- Rangayya, 7 V 41 (1853)
- (6) Comalammal : Rungasawmy Iyengar, 4 Mad H C R 56 (1805), Franks : Numb Mal, 7 All H C R 79 (1875), Mahon ed Azem ool lah : Ali Buksh, 5 M H C R, 74 (1873) See as to these cases Marianness et Hamkalra Gorau, 34 C 235, 239 (1.07)
- (6) Ram Sundar e Ram Bandhan, 7 411 Il C R 1.0 (1875), in which it was also held that at please n might be made fra review of judgment

- (7) Rat Chand t Mathura I rasad, 3 A 292
- (8) Mariannissa i Ramkalja Goram 34 C 235 (1997), followed in Fnatulla Basunia v Jibon Mohan 19 (L. J. 535 (1914) And see Kader Khan r. lugg swar. 35 (1923) (1998).
- (9) Sounderlal : Georgraval 3 B 414 (1895) As to Innutation under this system, see Hings Bibee v Manna Bibee 8 C W N
- JT (1903) Dela Balah Habib Shab 17 (W \ 829 (1913) 40 1 A 151 35 A 331
 - (10) Bhandi Suigh r Lamadhin Loy, 10
- (W \ 991 (1905) Bichary Lal Sur r \anda Lal G awami, 11 C W \ 4.00 (1 97)

"Fresh suit"-A plaintiff is only precluded from instituting a fresh suit where the previous suit was rightly dismissed under r 8, for it is only to such a case that r 9 applies (1) Nextly, assuming that the case was one to which the provisions of r 8 properly apply, the statutory bar raised by this rule only applies where the cause of action in the two suits is the same This is a matter to be determined on the facts of each particular case (2) It has been held that while dismissal of a suit under sect 102 of the last Code (now represented by r 8 of this Order) is not intended to operate in favour of the defendant as res judicata, yet when read with sect 103 of that Code (now represented by this rule) it precludes a fresh suit in respect of the same cause of action, referring to the grounds on which the plaintiff asked the Court to decide in his favour (3)

"Reasonable cause"-This must be determined according to the facts of each particular case See notes to r 13, post (4) Where when his suit 18 dismissed for default of appearance under r 8, the plaintiff applies for its restoration, the defendant cannot contest the application in limine as one which cannot be entertained at all under this rule by showing that at the time of the dismissal there was an appearance by the plaintiff, but as an answer to the application on the merits, the defendant can raise the conten tion that the plaintiff was not prevented from appearing, because, in fact, he did appear (5)

Appeal -If the planniff successfully applies under this rule no appeal hes from the order directing the suit to be readmitted, (6) though under the last Code an appeal was held to be against an order rejecting an application under sect 588 clause (8) of that Code, and an appeal is given by O XLIII r I (c) But it is not every order dismissing an application which is open to appeal, but only au order rejecting an application to have the dismissal of a suit set aside (7)

An appellate or revisional authority should not lightly interfere with an order of restoration of a case dismissed for default, but should do so only upon very strong grounds (8)

The effect of these rules (8 and 9) was recently considered in a Privy Council

4JI (1898)

⁽¹⁾ Kanji i Habib 2 Bom L R 206

^(1.00) (2) The curses of action were held to be different in Chand Kour : Pirtab Singh, 16 C 98 (1888), 9 c 15 I A 156, Gobind Chun ler Addya : Afzul Rabbum, 9 C 426 (1882) Ramchan les Javaja Talvo v Khafal Maliomed Gori 10 B 28 (1885), and the same in Shankar Baksh r Daya Shankar, 15 C 122 (1887) a c, 15 1 A 66 Upon the question of the finality of a decri a under s 102 mc Rungray Rasjer Srihi Mahomed, 0 B 482 (1882) it p 486, in las to suit fer partiti n dismisse l f r d fault, Bisheshar Des c Batt Ireal .. 8 A 627 (1906) Mala Milon Malil r Bukanta Nith ALTHOUGH 2 201(100)

⁽³⁾ Sankar v Madan, 14 C W N 293

⁽⁴⁾ And see Manual Dhunji t Gulam Husem Vazeer 13 B 12 (1888), Rampertab Woll v Jakeeram Agnrwallah 23 C 991 at p 995 (1896), Sm Toolsy Money Das co ! Sm Prosad Money Dassee, 2 C W N 490

⁽⁵⁾ Lalta Prasad: Nan I Kishore, 22 A 66

⁽⁶⁾ Hirdhamun Jha : Jinghoor Jha 5 (711 (1850)

⁽⁷⁾ Ghasitl Bibi t Abdul Samal . A "96 (1907) [order ref ising to restore all lica tion un lers 310 of last (ol.)

⁽⁸⁾ Capala Row : Maria Susay : I illale 17 M I J 2.7 (1 107) s c 10 M -7t

decision (1) In this case a suit was dismissed for default under r 8 on nonappearance by a plaintiff whose death was not known to the Court. His son
applied under r 9, and an order was made setting aside the dismissal. The
respondent applied for revision under seet 115, and the Court of the Judicial
Commissioner reversed that order and on review confirmed the reversal on the
ground that the order dismissing the suit was proper under r 8 and that the
application by the appellant (the son of the deceased plaintiff) had not been
within time, and that O 22, r 3 only applied to a pending suit. The Privy
Council held that the rulings of the Court of the Judicial Commissioner were
vitiated by applying to a dead man rules which referred only to a defaulter, and
that the order setting aside the dismissal was correct, and that "an abuse of the
process of the Court" within the meaning of sect 151 had occurred and that
(apart from any section) any Court might rightly have considered itself possessed
of inherent power to rectify the mistake made in inadvertently dismissing the

Procedure in case of more of them appear, and the others do not appear, the Court may, at the instance of the plaintiffs suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit

11. Where there are more defendants than one, and one or is.

Procedure in ease of more of them appear and the others do not more non-attendance of one or appear, the suit shall proceed, and the Court easts of several defendants.

make such order as it thinks fit with respect

to the defendants who do not appear

Non attendance of one or more of soveral plaintiffs or defon dants—These rules correspond with sect 116 of the Code of 1859. There is nothing in the latter section which conflicts with or limits the operation of sect 108 (now r 13) and the application of sect 108 is not limited to the cise of a sole defendant who has not appeared or where there are more defendants than one and none of them has appeared (2).

Consequence of nonattendance, without suflicient cause shown, of party ordered to appear in person, does not appear in person or show sufficient cause to the sitisfaction of the Court for failing so to appear, he shall be subject to all the provisions of the for going

⁽¹⁾ Debt Baksh Singh r Habib Shah P (35 \ 331 (1913) 17 C W \ \$29, 40 1 \ 151

^{(2) (}wher Equitable Coalto St. W. V. (2) (1.04)—Is rightly for each of Norganian and 12 W. R. 37 (1894) of ted in the original form of Language in it is to be of rightly form.

aftle judgment of Markhy J as soon I (as to which guarry), the interest was the same between the ec who as peared and those who dain to. The quarties, as we well as the same decree was expute against the sheet defendants was, according to the judgment of Bubblows, J, is treessary for the decrease.

"Fresh suit."—A plaintiff is only precluded from instituting a fresh suit where the previous suit was rightly dismissed under r 8, for it is only to such a case that r 9 applies (1) Nextly, assuming that the case was one to which the provisions of r 8 properly apply, the statutory hair raised by this rule only applies where the cause of action in the two suits is the same. This is a matter to be determined on the facts of each particular case (2). It has been held that while dismissal of a suit under sect 102 of the last Code (now represented by r 8 of this Order) is not intended to operate in favour of the defendant as res judicata, yet whou read with sect 103 of that Code (now represented by this rule) it precludes a fresh suit in respect of the same cause of action, referring to the grounds on which the plaintiff asked the Court to decide in his favour (3)

"Reasonable cause"—This must be determined according to the facts of each particular case. See notes to r 13, post (4). Where when his suit is dismissed for default of appearance under r 8, the plaintiff applies for its restoration, the defendant cannot contest the application in limite as one which cannot be entertained at all under this rule hy showing that at the time of the dismissal there was an appearance by the plaintiff, but as an answer to the application on the merits, the defendant can raise the contention that the plaintiff was not provented from appearing, heeause, in fact, he did appear (5)

Appenl—If the plauriff successfully applies under this rule, no appeal less from the order directing the suit to be readmitted, (6) though under the less Code an appeal was held to be against an order rejecting an application under sect 583, clause (8) of that Code, and an appeal is given by O ALIII 1 (c) But it is not every order dismissing an application which is open to appeal, but only an order rejecting an application to have the dismissal of a suit set aside (7)

An appellate or revisional authority should not lightly interfere with an order of restoration of a case dismissed for default, but should do so only upon very strong grounds (8)

The effect of these rules (8 and 9) was recently considered in a Privy Council

Mald loc W > \$11(1 cos)

⁽¹⁾ Kanji t Habib, 2 Bom L R 206 (1900)

⁽²⁾ The curses of action were held to be different in Chand Kour's Partial Single 16 (208 (1888), 5 c. 15 I A 150, Gobind Chimler (ddy's) (fital Bubbini, 9 G 426 (1882), Ramchimler Jusyl Titor Khatal Mahomed Gori, 10 B 23 (1885), and the same in Shankar Biksh / Days Shankar, 15

same in Shankar Biksh i Daya Shankar, 15 C (122 (1887) e c. 15 f A 60. Upon tho questi n of the finality of a decic ir in her s 102 sec Ringris Raype i Silla Milomed, 18 152 (1882) it p 180, on Lacto suit for partiti n dismissed for default, Bisheshar liss c. Ram Presert 28 A C. 7 (1904), Malin M. L. in M. 14 t. Rokinta Nath

⁽³⁾ Sunkar : Madan, 14 C W N 238

<sup>(1909)
(4)</sup> And see Mandal Dhunji t Gulan
Husem Vaxeer, 13 B 12 (1888), Ramperlab
Moli t Jakeeram Aguravillah, 23 C 94),
940 (1895), Sun Toolsy Money Daveet
Sun Provid Money Dassee, 2 C W X 40,
940 (1895)

^() Lalta Preside Nand Kishore, 22 1 to

<sup>(1811)
(</sup>b) Hir lhamun Jha i Jinghoor Jha, 5 (*)
711 (1800)

⁽⁷⁾ Ghasiti Bibi i Ab lul Samad 2) A 96 (1997) for her refusing to restore api hea tion under s. 310 of last (ode)

⁽⁵⁾ Capala Row : Maria Sucasa I illai 17 M I J 2-5 (1 807), s c, 30 M 274

ducision (1) In this case a suit was dismissed for default under r 8 on non-appearance by a plaintiff whose death was not known to the Court. His son applied under r 9, and an order was made setting aside the dismissal. The respondent applied for revision under sect. 115, and the Court of the Judicial Commissioner reversed that order and on review confirmed the reversal on the ground that the order dismissing the suit was proper under r 8 and that the application by the appellant (the son of the deceased plaintiff) had not been within time, and that O 22, r 3 only applied to a pending suit. The Privy Council held that the rulings of the Court of the Judicial Commissioner were vitated by applying to a dead man rules which referred only to a defaulter, and that the order setting aside the dismissal was correct, and that "an abuse of the process of the Court" within the meaning of sect. 15th had occurred and that (apart from any section) any Court might rightly have considered itself possessed of inherent power to rectify the mistake made in inadvertently dismissing the

Procedure in case of more of them appear, and the others do not appear, the Court may, at the instance of the plaintiffs appearing, permit the suit to proceed in the same way as if all the plaintiffs had appeared, or make such order as it thinks fit

11. Where there are more defendants than one, and one or is more of them appear and the others do not appear, the sunt shall proceed, and the Court shall, at the time of pronouncing judgment.

make such order as it thinks fit with respect to the defendants who do not appear

dants

Non attendance of one or more of several plaintiffs or defendants—These rules correspond with seet 116 of the Code of 1839. There is nothing in the latter section which conflicts with or limits the operation of sect 108 (now r 13) and the application of sect 108 is not limited to the case of a sole defendant who has not appeared or where there are more defendant than one and none of them has appeared (2).

12. Where a plaintiff or defendant, who has been ordered is.

Consequence of nonaitendance, without sufdient cause shown, of
party ordered to appear

the Court for failing so to appear, he shall be
subject to all the provisions of the foregoing

⁽¹⁾ Debt Baksh Singh r Habib Shah, P (, 3 , 4 331 (1913) 17 C W > 829, 40 1 1 151

⁽²⁾ Cocker Equitable Coal Co. SC. W. N. (21 (1904)). As regards the case of Deorga e. Shamanun 1.12 W. R. 376 (1804) c. ted in the c. 176 of arg im n. it is to be of a read that

if the judyment of Markhy J is soon I (axto which quarrel, the interest was the same between the e who as peared and those who do not. The question, however, whether the derive was experte against the absent the fundants was, according to the judyment of Ilbohouse, J, not necessary for the decision

not ex parte if the defendant has once appeared, it was held that there was no ground for so limiting the meaning of the words of the last Code and that a decree is ex parte if it was made at an adjourned hearing in the absence of the defendant, whether the defendant has or has not appeared at an earlier stage of the case. The present rule therefore applies to every case in which a decree is passed ex parte, either by reason of his non appearance at the first or at an adjourned hearing (1) The former section was held to apply to proceedings under Ch VII of the Presidency Small Causo Courts Let,(2) and to execution proceedings where the order amounts to a decree under sect 47, ante (3)

The rule, moreover, is not limited to the case of a sole defendant, or, when there are several defendants, to eases where none of them have appeared (4). The fact that an order under r 7 has been made against a defendant and has not been appealed against, is no objection to an application being made by him under this rule (5). And it has been held that the fact that an appeal from an exparte decree is pending will not preclude the defendant (against whom the decree was passed) from applying under this rule for an order to set it saide (6). Sect 37 of the Presidency Small Cause Courts Act (XV of 1882) does not apply to an exparte decree. An application to set aside such a decree passed by a P S C C falls within this rule (7). Satisfaction of an exparte decree does not disentitle a judgment debtor from applying to a Court to set it saide (8). Neither this rule not any other portion of the Chapter of the last Code in which this rule appeared applied to execution proceedings (9). Not does the rule apply where the case has been dismissed not for default by non appearance, but for semething clse, such as cases falling under O XVII r 3, post (10).

No 20], asmilarly under the Code of 1877 the words of which wero in any case in which a decree is passed or parte against a defendant under s 100 " Shoc Churn thera Lall, 11 C L R 537 (1882) As to the difference between the Codes of 18.9, 1877, and 1882, see I ucknidas Vithaldas v Ebrahim Oosman, 2 B at p 648 (1878), Jon ridan Debey: Paindhone Singh, 23 C at p 712 (1894)

p 712 (1836)
(1) Jonardan Dobey t Ramdhone Sm_ob, J. C 738 (1856), 1 B overruling Still Hart Bancepte t Hirs Lall Chatterpte, 21 (26)
(26) The question in issue in the hirst case w is as to non apper vince on the day to which the first hearing had been adjourned, but the Court expressed its opinion upon the case of non appervance on any a ljourned haring Scoales Rule .032 of 1966, Cal H. C. Hidreth e Sayap Prasil, 20 B 389 (1845) Hirs Date Hira Lal, 7A 73 (1885). Bhagwan Dat i Hira, 13 A 355 (1857). Lankar Dat Dule vi vi His Kriefin, 20 1.

135 (1877), Balles Shat t Manohar Lal, 1186 P. R. No. 82, Lamnath t Maniry, 1884 P. R. No. 13.J., and see Kader Khan t. Juggeavar, 35 C. 1023 (1908), and Mungpan Chetty t. Balayan Chetty J. V. 1905 (1908), Lnatulla Basuna v. Jiton Mohan Roy, 19 C. L. J. 51.J. (1914) p. 518, following Jonardan Dobey t. Ramdhone Sangh, syr a.

(2) Tyeb Beg Mahomed & Allibhai Vin galu 31 B 45 (1906)

(3) Arishna Chandra Palv Protap Chandra Pal, 3 C L J 276 (1906)

(4) Cooker Lquitable Coul Co. 8C W N 621 (1904)

(5) Sankaralin, a Mudali t Rath i Sublia nati Mudali 21 M 324 (1897)

(6) Dumodar v Sarat 13 C W V 810 (1,03)

(7) Roshan Lal t Jachmi Narayan, 17 B 507 (1832) and the limitation is thirty days (8) Zendoo Lal Nandlal t Kishorilal Meh

(abrai, I Bom L R 213 (1833)

(9) See notes to r 8 arte, Harr Charm
Chose t Manualla Nath Sen, H C J

(1313) (10) Scenetes to () \\11 r 3 1 HAST SCREEN APPLARANCE AND NON APPLARANCE OF PARTIES. 767

"Ex parto "-A decree is ex parte when the defendent does not appear Is to when a defendant is deemed to have appeared, see notes to r 1, ante (1) Court has jurisdiction to set aside an ex parte decreo if it is in fact ex parte If one of the parties alleges that it is ex parte and the other denies it, the Court must investigate the question though the word purports to show the contrury (2) When a defendant seeks to set aside a decree on the grounds mentioned in this rule, the fact that the decree appears on the face of it to be based upon a petition of compromise which is impugned as a forgery, does not make the rule nuappheable. The defendant is cutifled to go behind the decree and to show that it is in fact ex parte (3) And he can apply under O XVII + 1 to invite the Court to reconsider its decision in the light of facts subsequently discovered (4) Where a defendant does appear there is no ex parte decree in the strict sense This rule contemplates cases of ex parte proceedings strictly and properly so, and therefore not such as are made under O XI r 21, post (5) The expression 'passed ex parte' in sect 17 of the Provincial Small Cause Court let means a deerce " passed ex parte against a defendant, and does not include cases dismissed for default (6)

"Defendant"—The Alahabad High Court have in one case held that where is defendant against whom a decree has been passed at parte for default of appearance dues his legal representative cannot apply under this rule (7). But the Calcutta High Court has and it is submitted rightly held that he can (8). The case is now covered by the principle enacted in sect 146. But it has been held that where the defendant dies after at parte decree his representatives curnot upply to have it set aside unless they have been brought on the record (9). As to the procedure in the case of the non attendance of one or more of soveral defendants see: 11 and notes thereto.

"May apply "-Under Art 161 Schedule II of the Limitation Act, the application should be made within thirty days from the date of executing any process for enforcing judgment. The burden of proof is of course on the applicant (10). The very object, however, of an application under this rule is to show that evidence on the record cannot be used against the petitioner on the ground that it was taken behind his back and therefore if the applicant makes out a primal facie case the opposite party must rebut it by evidence taken

⁽¹⁾ Radha Kishan t Collector of Jann 1ur, 23 A 220 (1901) (2) Kunja Behari Ghose v Durgamoni

⁽²⁾ Kunja Behari Ghose v Durgameni Dassi J C L J 160 163 (1906) (3) Bholai Naskar t Alach Naskar 1

C W N exxvn (1897) kunja Behari Ghose t Durgamoni Dassi, 3 C L J 160 163 (1906) and see koruna Voyce v Nubo Kahore, 6 W R Visc 36 (1866)

⁽⁴⁾ Hakingir t Basdeo, 17 C W V

⁽⁵⁾ Chunni Lal t Chammau Lal 7 1 1.09 (1884), Kesharia Accomar v Potooah Sett 2 C W Y 676 (1898) Khushali Wal t 1ala Mal, 1898, P R No 43

⁽⁶⁾ Mussumat Jamina Bibi t Seri Chand

Bhagat 2 (W \ 693 (1838) (7) July Plays I t Sukhram 21 A, 274 (1899) The case was distinguished and apparently doubted in Beti Jeo t Sham

Behari Lal 29 1 574 (1907)
(8) Ganoda Prosad Roy t Shib Narain

Vukerjee 29 (33 (1901)

⁽⁹⁾ Sambasiva Chetti ν Veera Perumal 28 M 361 (1904)

⁽¹⁰⁾ Shaikh Torab Ali ε Chooramun Singh, 24 W R 262 (1875) khudeerun Lall ν Chatterdharee Lall 21 W R 242 (1874), Mussamut Jhuto ε Lulita Kooer, 22 W R 423 (1874)

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word "decree" referred to is the decree described in the first sentence of the section, viz the decree passed ex parte against the defendant who has not appeared, and that the words "shall appoint a day for proceeding with the suit" meant that a day is to be appointed for proceeding with the suit so far as the defendant, who has applied to the Court under the provisions of this section, is concerned (1) No difficulty arose where there was only one defendant, or where, if there were several defendants, an application was successfully made by all of them In such cases the whole decree against the defendant, or all the defendants, was set aside The question alose where there were several defendants, and one or more of several (but not all) applied successfully, whether the whole decree was or should be set aside against all the defendants, or only the decree so far as it affected the defendant or defendants who applied In this connection two sets of circumstances required consideration, (a) where an application was made by one or more defendants to set aside a decree which had been made ex parte against all defendants, none having appeared, (b) where a similar application was made in a case where some of the defendants had appeared and contested the suit and some had not appeared, and a decree was passed against all the defendants. Any interpretation of the section which led to the conclusion that a Court must in all cases set aside the decree against all defendants, or could not in any case do so, led to difficulties Some of the defendants might not object, and in fact might have no ground for objecting to the deciee, and the Court would not be justified in such case in reopening the whole suit (2) On the other hand, if the Court's power was strictly limited to setting aside the decree as against the defendant who applied, difficulties equally arose (3) For instance, the relief given might be toint and indivisible

It was therefore hold that though "decree" meant "uhole decree," and

Dovaması Dası v Sarat Chunder Mojumdar, 25 C 175 (1897), s c, 1 C W N 656, Apodhja Pershid e Sheo Pershad, 5 C W N 58 (1900), dist Jadubansa Naram v Mo hunt Hari Charin, 6 C L J 226 (1907) , Bhura Mal v Har Kishan Dis, 21 A 383 (1902), per Stanley, C J [ref to Gauri Sahai

t Ashfak Husain, 23 A 623, 625 (1907)] (1) Huro Krishno Doss v Moteo Chand Babou, S W R 260 (1867) [and see Brojonath Surmalia Anund Moyco, 7 W R 237 (1867) a case unler s 58, Act X of 1859, Dooil 1 Persau I Chose i Greeschunder Bose, I W P 22 (1861), Koroona Moyce Debia t Nubo Inshen, H W R IS (1860), ref to an Bholm Naskare Mach Naskar, JC L J Los (1807), hosho Pershad a Harday Narum, 6 C L R () (1880)]. Manaku t Sitarim, 18 B 112 (1533), Bhura Mila Har Kishan Das, 21 1 353 (1302) pr likman, J, at pp 3 % 333 As read in the citation of cases and r the Cole of 150 1, Dwarkanath Mitter, J , in the

first mentioned case, pointed out that the language of s 58, Act \ of 1809, and of b 119 of the Code of 1859 were pary nearly similar, and except that the word "judg ment" is used instead of "decree" in the Code of 1859, the provisions of a 119 of that Code are similar to those of the present section Therefore, in accordance with the observation of Aikman, J, Bhura Wal v Har Ashan Das, supra, at pp 335, 396, the caller

decisions were of use (2) Huro Israshno Doss v Motco Chand Baboo, 8 W R 2(0, 26I (1867) Some of the defendants may not object, and, in fact, ma) have no ground for objecting, to the decree Dookhee kh m t Rajessurco Rance, 15 W R 371 (1871), and see Bhura Mala Har Kishan Das, 21 A , at pp 390-391 (1902)

(3) See Mahorned Hamidulla : Johur enussa Bibi, 25 C 155 (1837) at 1p 157, los, mil me, for met mee, Sharla Husam t Hub Husam, 25 A 12 (1.00.)

thus the Court had power to set asido the whole decree a minst all defendants. the Court was not bound in every case to set aside the decree against all the defendants (1) It would do so where the decree was really one decree pro coding upon a common ground (2) and was indivisible. (3) but it might refuse to do so where the decree, though nominally one, really consisted of several decrees against several parties (4) Where the question involved in a case was whether the lightly of the defendants was munt or several, and in such case the ex parte decree was set aside, on the application of some of several defen dants the entire decree was set aside (5) Similar conclusions were arrived at by Aikman, J. in whose opinion "decree" meant the ex parte decree referred to in the opening words of the section, and who held that when the decree was one and indivisible it must be set aside as a whole or not at all and that the Court must be assumed to have the power to set aside the whole decree if either the decree was from its nature one and indivisible, or if in order to give to the defendants against whom an ex wirte decree has to be pronounced the relief to which they are entitled, it must be set aside as a whole (6) The Calcutta High Court held that the Court might set aside the whole decree even where one or more of the defeedants had appeared and contested the suit, while in the case of the remaining defendant or defendants the decree had been massed or parte (7) A contrary view was taken in the Bombay High Court . (8) and Stanley, J. and Burkitt, J. in the Allahabad High Court (9) reserved their opinions on the point

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(1) Jaduban's Narun & Mobunt Hati Charan, 6 C L J = 0 (1.97), Nanyo Behari Gloso & Dargamoni Dasat, 1 C L J 160 (1.904), Monmolini Chowdhuran & Narayan Roy Chaudhi, 4 C W Ago (1.904), at p. 453, 1 at see the words of the section, "shall pass" and if decre must whole decree, then the whole derive must hive been set assiet, and see dopals Creft to Subur, 20 M (01 (1994)) at p. 404 Natural Pinga Achan & Marutha Ve ra Karun Lin, 31 M 454 (1.995)

(a) See Doublie Chaire Logi saure Baire, 15 W. B. 371 (15-1). See G. pola Cheiri e Subber ao M. 103 (16-3). See Manshu e Statano. 15 B. 142 (16-3) it was h. H. that the which case warmor tree e electron. It is lowever (when first hard of action. It is lowever (when field that in that cases we call the d. feel has be a jest of

 Chowdhuranic Nara Narayan Roy Chaudhir, sepror, at p. 453, Rhura Val e Har Kadari Das, 24 1 333 (1902), per Stanley, CJ, Mohua Chandra Gutta e Unasida Charan Datt 6 C W 109 (1901), copials their e Subhar 25 W 604 (1903) which their e Subhar 25 W 604 (1903) which their him Brighall'e Wahad. It sal 17 C W N 133 (1911)

(4) 16. This are it) as be it ulid point traily an excit in a stip, are in off it is a spanished from the starl letters and it will be to a span it the particular defer himself are it.

(a) In the Hatt Das Karmakar 5 (1) J. 2.2 (1) who

(6) Bhura Mal e Har Kirban Das of § 3-3 1 * 2) at p. 4 *1

(7) Male and Ham force of Distributed 1 ht suggest

*) Variation > man 15 h 142(15/0)

41 I Lua Malie Har Kubau Das irgen, at L. 30 3 1 word "decree" referred to is the decree described in the first sentence of the section, viz the decree passed ex parte against the defendant who has not appeared , and that the words " shall appoint a day for proceeding with the suit ' meant that a day is to be appointed for proceeding with the suit so far as the defendant, who has applied to the Court under the provisions of this section is concerned (1) No difficulty arose where there was only one defendant or where, if there were several defendants, an application was successfully made by all of them In such cases the whole decree against the defendant, or all the defendants, was set aside The question alose where there were several defendants, and one or more of several (hut not all) applied sneecssfully, whether the whole decree was or should be set aside against all the defendants, or only the decree so far as it affected the defendant or defen dants who applied In this connection two sets of circumstances required consideration, (a) where an application was made by one or more defendants to set aside a decree which had been made ex parte against all defendants, none having appeared, (b) where a similar application was made in a case where some of the defendants had appeared and contested the suit and some had not appeared, and a decree was passed against all the defendants Any interpretation of the section which led to the conclusion that a Court must in all cases set aside the decree against all defendants, or could not in any case do so, led to difficulties Some of the defendants might not object, and in fact might have no ground for objecting to the decree, and the Court would not be justified in such case m reopening the whole smt (2) On the other hand, if the Court's power was strictly limited to setting aside the decree as against the defendant who applied, difficulties equally arose (3) For instance, the relief given might be joint and indivisible

It was therefore held that though "decree" meant "whole decree," and

Doyaması Dası t Sarat Chunde 1 Mojumdar, 25 C 175 (1897) s c 1 C W N 606. Ijodhya Pershad : Shee Pershad 5 C W N 58 (1900) dist Jadubansa Naram v Mo hunt Hari Charan 6 (L J 226 (1907) Bhur i Mal t Har kishan Dis 24 A 383 (1902) jer Stanley, CJ [ref to Giuri Sahai i Ashfik Husam, 23 A 6.3, 625 (1907)] (1) Huro Krishno Doss t Motee Chand Baboo, S W R 260 (1867) [and see Biolonath Surmah t Anund Moyce, 7 W R 237 (1867) a case under s 58 Act X of ISoJ, Doorsa Lersand Ghose e Greeschun fer Bose TW R -22 (1504), Koroona Moyee Debia t Nubo Kishen 11 W R 18 (1809) 1cf to in Bhol ii Naskiri Mach Naskir 10 L J 158 (1837). Kesho Lershala Hirliy Naram 6 C L R (J (1880)] Manaku : Sifaram 18 B 112 (1833), Bh ua Mid i Har Kishan Das, 21 A 353 (1302) per Alkman J. at 11 33 333 Is read is the citation of cases in 1 r tho to le of 150), Duarkanath Matter J. in the

first mentioned case, pointed out that the language of a 58, Act \(\) of 1809, and of s 119 of the Code of 1859 were very nearly similar, and except that the word "pub, ment" is used instead of "decree" in the Code of 1859, the previous of s 119 of the Code are similar to those of the pressiscetion. Therefore, in accordance with the observation of Ahlman, J., Bluras Malt. Har hishan Dis., supra, at pp. 315, 316, the caller

decisions were of use

(2) Huro Krishno Doss v Moteo Chand
Baboo, SW R 270 201 (1867) Some of the
dekindants may not object, and, in fact, my
have no ground f robjecting, to the decive
Dookhee Khurt Rajesureo Raice, 15W 1

371 (1871), and see Bhura Malt Llarkashan
Das, 21 V, at 11 y 100-201 (190-)

(J) See Mahor ed Hamadulla : Tohur emissa Bibi, ... C 1.55 (1817) et pp. 15-5, 16-3, au l. s., for instance, Starla Husain t Huh Husain, ... y 42 (1995)

thus the Court had power to set aside the whole decree against all defendants, the Court was not bound in every case to set aside the decree against all the defendants (1) It would do so where the decree was really one decree, pro ceeding upon a common ground (2) and was indivisible, (3) but it might refuse to do so where the decree, though nominally one, really consisted of several decrees against several parties (4) Where the question involved in a case was whether the hability of the defendants was joint or several, and in such ease the cx parte deerce was set aside, on the application of some of several defen dants the entire decree was set aside (5) Similar conclusions were arrived at by Askman, J, in whose opinion "decree" meant the ex parte decree referred to in the opening words of the section, and who held that when the decree was one and indivisible it must be set aside as a whole or not at all, and that the Court must be assumed to have the power to set aside the whole decree, if either the decree was from its nature one and indivisible, or if in order to give to the defendants against whom an ex parte decrea has to be pronounced the relief to which they are entitled, it must be set aside as a whole (6) The Calcutta High Court held that the Court might set asido the whole decree even where one or more of the defendants had appeared and contested the suit, while in the case of the remaining defendant or defendants the decree had been passed ex parte (7) A contrary view was taken in the Bombay High Court , (8) and Stanloy, J, and Burkett, J, in the Allahabad High Court (9) reserved their opinions on the point

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⁽¹⁾ Jadubansa Naram t Mohunt Harr Charan, 6 C L J 226 (1907), Kunjo Behan Chose v Durgamoni Dassi, J C L J 160 (1906), Moninchini Chowdhurani i Aara Narayan Roy Chaudhri, 4 C W N 456 (1899), at p 459, but see the words of the section, "shall pass," and if decreo meant whole decree, then the whole decree must have been set aside, and see Gopala Chetta t Subbier, 26 M 604 (1903) at p 606, Valia Panga Achau t Marutha Vcera harundan. 31 31 454 (1908)

⁽²⁾ See Dookhee khant Rajessuree Rance, 15 W R 371 (1871), see Gopala Chetli r Subbut, 26 V 604 (1903), see Manaka : Sitaram, 18 B 142 (1893), it was h ld that the whole case was not reopened, even though there was a common cause of action It is however, to be noted that in that case some of the defendants appeared

⁽³⁾ Mahomed Hamidulla r Tohurenussa Bib. . 5 C 155 (1837) at p 160, Vonmohint

Chowdhurant Nata Narayan Roy Chaudhri, supra, at p 458, Bhura Mal v Har Kishan Das, 24 1 383 (1902), per Stanley, CJ Mohini Chandra Gutra t Annada Charan Dutt, GC W & 109 (1901), Gopala Chetta s Subbser 26 M 604 (1903), where the de fence of the second defendant was peculiar to him Britall : Mahadeo Prosad 17 C W A 133 (1911)

^{(4) 1}b This case it may be contended as not really an exception as there are in effect several decrees and the whole decree is as a_ampt the particular defendant set as it

⁽⁵⁾ In re Hari Das harmakar, 5 t L J ـ02 (190ء).

⁽⁶⁾ Bhura Mal : Har hashan Das, 21 A 383 (1902) at p 400

⁽⁷⁾ Vahomed Hamidulla 1 Tohurennisa Bibi supra

⁽⁸⁾ Manaku t Sitaram, 18 B 142 (1893) (9) Bhura Mal : Har Kahan Das, surra, at pp 330, 391

prepared to put in a written statement does not warrant the trial of a suit expante. The Judge should in that case ascertain what are the matters in issue by an examination of the defendant under this rule (1). The object of this examination is not to take evidence or to ascertain what is to he the evidence in the case, but to see whether a cause of action exists, what are the matters in dispute, and, if necessary, to allow an amendment of the pleadings (2). Under the Code of 1859, provision was made for the examination of three persons, viz the party, pleader, or companion of either R 2 now excludes the pleader, though r 4 contemplates his examination. Under the Code of 1859, the examination was (unless the pleader was the person examined) to be ou oath or affirmation. But as this provision has been omitted, the examination may now take place without eath or affirmation.

R 4 provides for the appearance of a party, not to give evidence in the ordinary way, but to put the Court in possession of information necessary to the framing of issues or other points in the conduct of the case. The power given is discretionary, the intention of the section being to enable the Court not only to get obscure points cleared up by obtaining information from either of the parties (3) but also, if possible, to get admissions so as to narrow down the 188ues (4) If the party does not appear, the Court may pass a decice (a) against the defaulting party, but this east only he done if the pleader has pre viously thereto refused or been unable to answer a material (6) question (1) If the plaintift is in default the Court may dismiss his suit If it be the defendant, the question arises whether the Court can or should decree the plaintiff's suit without any evidence in support of his claim (8) Apparently the Court has power to do so (9) The Court, however, is not bound to pies a decree, it may pass any order it thinks fit. The amended section substitutes " pronounce judgment " for "pass a decice " Apparently, honever the two phrases are meant to mtend the same thing R is of a penal charictir, and it is therefore incumhent on the Court which professes to act under it to take care that the contingency contemplated by it has in fact occurred (10)

(1) Swaraj Shemi Mitkanthim v Kupjaj puntul iRamadi 2 M. H. C. H. (1865) (2) Cun a. Nirum Cupta v. Jubakram Cl. wilarv. 15 (153) 537 (1889) s. c., 15 I. A. 111 [c. vanunation of pleader] is to the main v. m. valida lamescus of the [1/4] valida lamescus of the [1/4] valida lamescus of the 2 direction of A. 9 (406) (1854)

(3) Dier tionis oven to the Court to decide which if the parties ought to miswer the first in Bhim irro Gopala Venkatrie Narsagaia 3 Brin 1 B CS7 (1963)

(4) Ih

(5) Sec Nilmen e Singh D. H. Rom Hures, 2 W. P. Inf (1865); Sature Hammarter, "A. B. J18 (1878). Bhumira i G. pale Venkatrao. Nata 1777 of B. in. L. R. 187 (1808).

(i) Scill raise (1st) Venkates Sir

(7) Sr H rate =110 HSHS(S)

(8) Under a 170 of the Code of 1853 (while has not I centre enroted) some evidence was required to I ogiven by a plantiff, Danio I is Bhoorsum it Pogl ornath Prop. 12 W. R. 42 (1804), Isban Chinder i Harish Chanler 12 W. R. 169 (1854), Isban Chinder i Harish Chanler 12 W. R. 169 (1854), Isban of Jahl Brohm i V. 18 (1871), casts in which a party was summand by greathered.

the opposite party (J. Ren. | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower | Lower |

ORDER XI

Discovery and Inspection

1. In any sunt the plaintiff or defendant by leave of the some parties. Court may deliver interrogatories in writing for the examination of the opposite parties or any one or more of such parties, and such interrogatories when delivered shall have a note at the foot thereof stating which of such interrogatories each of such persons is lequired to unswer. Provided that no party shall deliver more than one set of interrogatories to the same party without an order for that purpose. Provided also that interrogatories which do not relate to any matters in question in the suit shall be deemed irrelevant, notwithstanding that they might be admissible on the oral cross examination of a witness.

Discovery—The provisions as to discovery have been remodelled in conformity with the present English Rules, and the English decisions will be more closely applicable. This is 0.31 r. 1. It does not apply to rent suits in Bengal [sect 148] clause (a). Act VII of 1885]. The words through the Court have been omitted. Other amendments are noted post according to the folium English practice actions were instituted to obtain discovery. Under the present practice these can be arrely necessary (I). Order 31 of the Judicature Act Rules following the extended principles of the Court of Chancery, now gives power to the Court in all suits to order discovery in aid of the action (2). This part of the Court of all suits to order discovery in and of the action (2). This part of the Code closely follows the English Rules. The main object of administering interrogatories is to save expense by obtaining admissions from the opposite party (3). A plaintiff may interrogate with a view to obtain information or admissions in support of his our case and this right extends with proper qualifications not only to his original case but also to any answer which he has to make to the defending a case.

⁽¹⁾ Se generally as to B lls for discovery Brayon Discovery 609-619, Ann Pr notes to O 31, see Orr : Draper 4 (D). Rei ert Salislury, 2 (D 37)

⁽²⁾ See Ann Pr lor cit ed (1905) p 384
(3) Waghji Thackersey t Khatro Rowji
10 B 167 at p 171 (1886)

But the right is always subject to the qualification that the interrogatories must be directed to a case on which the plaintiff has already determined and to which he has committed himself He cannot be allowed to put fishing ques tions in order to try whether he can discover any flaw in the defendant's case or suggest any answer to it (1) Discovery is not limited to giving the party a knowledge of that which he does not already know, but includes the getting an admission of anything which he has to prove on an issue between himself and his opponent, (2) to facilitate proof or save expense, (3) and to diminish the burden of proof (4) So one party may be asked as to any admissions he may have made tending to support his opponent's cause of action (5) And discovery may be had of the names of persons to make them parties, and the names and securities of prior incumbrances (6) The interro gatory must be as to facts, and must not ask for conclusions of law, inference of facts or construction of a document (7) In short, a party is entitled to discovery of every fact which makes out his own case or shows that he is in the right and this includes specific aflegations in the nature of a replication to an anticipated defence. He is not however, entitled to discovery of matters which support his opponent's case or show that his opponent is right. It has been held that he cannot ask the opposite party by what evidence he intends to support his case (8) But in a suit for the recovery of the amount on a hundi alleged to have been drawn and accepted by the defendant in consideration of a loan, it has been recently held in the Calcutta High Court that a party is entitled to interrogate on facts directly in issue in the pleadings and that therefore the defendant was entitled to discovery of all necessary details, including the names and addresses of the persons by whom it was presented (9) In this country it was formerly held that interrogatories viswed as machinery for eliciting facts bearing upon issues arising in suits were intended only to have

⁽¹⁾ Alı hader v Gobind Dass 17 C \$40 SIS (15%) and in Bemolamoney Dassee t Hulodhur Bullubh, 1 Boula 618

⁽²⁾ Att Gen t Gaskill, 20 Ch D 528 Aconedy t Dodson (1895) 1 Ch 334, 341

⁽³⁾ Grumbrecht : Parry, 32 W R (Fng) 201, Hall : L & N W Ry Co, 32 L T S.O So it is admissible to microgate to facts which will inform the party as to videne to be obtained the Gen i Gaskill supri the names of persons who may give

supratic names of persons who may give excluse in his favour. Hall t. Laird t. W. V. 83 (1870) the names of persons it is not at an alleged shaul r and so forth

⁽i) Att Gen : Cashill supra, 27, 28 (5) H lell i Faylor, L 1 3 Q B 73, and see Brill i Malay, 1 C B \ 5 203,

⁽i) tikn Bark (liki link Mant) 14 (i) 231[mitar (sink mane sunts]

Hancocks: Lablache 3 C P D 202 [defendants husband], West of Lagland Bank v Nicholls 6 C D 613 [prior securities], Effer Rodgers 40 W R (Fig.) 137 [names of

defendants tenants in ojectment actions]
(7) Automojo Dassoo t Soobul Chund f
Lau 23 C 117, 123 (1890) [where it was
sought to obtain the opponents views as to
the construction of a will]

⁽⁸⁾ In hader; Gobind Dass, 17 C 510, 847 (1890), Neckam Dobay; Bank of Bengel, 14 C 703, at p. 706 (1887) ("thu is a matter relating exclusively to the plant if a

cave]
(9) Banjaath & las r Raghumth I rast I
II C 6 (1 H3) distinguishing All badis s
Gol ind Days, 17 C 140 (1890) on the ground
that the facts were hifter at all that in the
last Co let the jarna one were not the asi of
asthed in plants (N N N)

a limited operation (1) So though English authorities establish that a plaintiff may interrogate the defeudant in order that he may know what case he has to meet-not the evidence but what the defence is-such interrogatories are really framed to anticipate or supply defects of pleading. But the system of procedure in this country, it was held, was different. Two modes were held to be specially provided for meeting the difficulty in question. If the pleading was too vague the Court might require a further and fuller written statement under the section corresponding with O VIII r 9 The other method referred to was that provided by the Code in the settlement of issues. Interrogatories should not in such a case, it was held, be resorted to in this country (2) So again it was held that sect 131 of the last Code indicated that in a case falling within it a party should proceed not by way of interrogatories but according to the procedure had down in that section, and that the Code did not contem plate that a party should be compelled to gue discovery of documents by means of interrogatories or otherwise the relevancy of which was denied (3) Further particulars may now be demanded under O VI r 5, but there can be no doubt that the framers of the present Code intended to approximate the two systems as far as possible

Time for delivery of interrogatories -The former Codo contained the words " at any time which have now been omitted In England a plaintiff is hardly over allowed discovery hofore statement of claim for from the earliest times the Court has set its face against allowing discovery for the purpose of fishing out a case (4) and this must always be so under the Code where a suit is not instituted until after the presentation of a plaint (5) In Common Law actions the proper time for discovery was not until after defence for until then it was not usually possible to say what was really material But a plaintiff has been allowed to interrogate before defence, and in the Chancery Division it is common practice to allow a plaintiff discovery before defence (6) And the Court has a discretion to allow this under this rule The same principles which prohibit discovery before the plaintiff has stated his ease apply to a defendant. As a rule therefore in England a defendant will not be allowed general discovery before putting in his defence (7) and this was laid down as an absolute rule in all cases by the second paragraph of the former This portion of the former provise has been omitted and the English

⁽¹⁾ Automoyo Dassee v Soobul Chunder Law 23 C 117 at p 124 (1880) where it was held that s 134, now r 17 indicated one direction in which the scope of interrogatories was intended to be limited just as Ali Asder t Gobind Dass 17 C 840 (1890) which it followed explained another direction limiting the scope of operation

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tho proced re are sufficient to derrive a party of the right to use all his remedies. O Ainealy C.P.C. Notes to s. 125. The creum-tances of litigat on in this country have undoubtedly

cast upon the Courts in regard to pleadings some responsibilities which do not find a counterpart in English practice but that a no reason for excluding the very material assistance which the parties can render in giving precision to the points in issue

⁽³⁾ Attomoje Dassee v Soobul Chunder Law 23 C 117 at pp 124 125 (1895)

Law 23 C 117 at pp 124 125 (1595)

(4) Ann Pr 1905 p 383 notes to O 31

⁽⁵⁾ Lides 26 aute

⁽f) Ann. Pr 1900 p 3x3 notes to O 31,

⁽⁷⁾ Ann 1r 1905 p 384 notes to O 31,

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practice will be followed The same procedure may be adopted in miscellaneous proceedings after decree Interrogatories as to accounts pending or to make the judgment available, or to find out how the property in cases of mesne profits has been managed, have been allowed, and no doubt will be admitted under the Code (1)

Leave -Application should be made on petition in Chambers, the order being that the plaintiff be allowed to interrogate (2) It was held to be the duty of the Court to determine whether the applicant should be allowed to interrogate, but not to determine at that stage what questions the opposite party should be compelled to answer (3) But see now next rule . In giving leave the Court, as a rule, decides nothing as to the specific interrogatories but only that there is a case for interrogating the party, that the interrogatories may possibly be relevant, that their genuine character is not improper, and that their administration is not sought for the mere purpose of annoyance Where the party on being served refuses to answer them the Court enters upon a considered adjudication under r 11 post, and the resulting order may be enforced under r 21 The grant of leave to one party to dehver interrogatories to another does not amount to an order requiring the other party to answer them, for that party may perhaps have good ground for refusing to answer them or some of them (r 6) Leave granted is, therefore, not an order to answer within the meaning of r 21 entailing a dismissal or striking out a defence (4)

- "Interrogatories"—For form of interrogatories, seo Schedule IV 123 of last Code and easo cited, (5) and r 4 post Interrogatories are only affidavits obtained in a particular way, and the party wishing to use them must put them in as his evidence (6) Seo as to their use r 22, post
- "Opposite parties"—Primarily this is a party on the other side of the record to the applicants (7) A party not on the other side of the record is an opposite party within the meaning of the rule if between him and the applicant there is some right to be adjusted in the action, which in Chancery might often be the case between two plaintiffs or two defendants (8) But defendants were
- (I) See Ann Pr. O 3I, r 1, 'discovery after and for working out judgment or order, Brsy, 507-56) (2) Sham Kishore Mundle t Shoshi

Bhoosun Biswas, 5 C 707 (1880), and as the service, see the

- service, ace ib
 (3) Sham Irishoro Mundle t Shoshii
 Bhox sun Bisway (1880), 5 C, at p 709
- (4) Prem Sikh Clunder i Indro Nith Banerge, 18 C 4-0 (1841) I B, overruling Lally Dabee Perstad i Sinto Pershau, 10 (505 (1854), see notes to r 21, po t
- (5) Nitton by Dissoc & Soobul Chunder Law, 23 C. 117 of pp. 118-120 (1895) and Chuty F. 267-272, D. C. I. 57, Ann. Peters, App. B.
- (c) Washie Thackersey t Islata House, 10 tt 1-7 at p 171 (1991 C st. Bilary

- delication (o) Date described
- Pal v John Lall Pal, 1 C 836 (1879)
 (7) In Spokes v Grosvenor (1897) 2 Q
 B 124 the Court held that such a party might
 be ordered to give discovery of documents of
 a necessary party though these might be no
- ssuo between hun and the applicant (8) Shawr Smith, 18 Q B D 103, Moloy of kurby, 15 C D 102, Alcoy, etc., Co 1 Greenfull 71 L T 317, where discovery of documents between the december to counter claim was ordered and in 1 len 1. We wishes 35 th D 257 it was said at pp 295 % to mean that a planning his internession of the theory of the transition in the theory of the wrote willow to make the liberth works were on against the cit riams procedure, any quaster which the country of the procedure.

refused leave to interrogate to defendants who had put in no defence, there being no issue is twen them (I)

In England formerly the decrease established that an infant, by reason of incapacity, could not be interrogated (2) nor could be be made to give discovery of documents (3) nor could such orders be made against a next friend (4) or guarden ad litem (5) as such mether having the status of a party as that term is understood in the rules define with the subject. Now, however, reason where the order applicable to infant plantific and defendants, and to the next friends and guardians of litem of persons under disability (6).

The Bombay High Court (7) has however, in the case cited, anniving the present English rule, held that an affidavit of documents may be required from a minor defendant, though the Judge stated that he did not decide that a next friend or cuardian of an infant could be directly ordered to make an affidavit of documents. It has however, been pointed out (8) that the order as made was invalid (the guardian od litem being willing to make in iffidicit) and that the the current was in reality to be made by the guirdish and the Calcutta High Court has in the case cited held that a minor cannot be comes hed to sive dis covery under sect 129 of the former Code, nor on the same principle (viz. his me marity) could be be interrogated under the section entresponding to this rule, nor could his next friend or guardian be considered an "opposite party" upon whom such interrogitories can be served within the meaning of that action It has however, been said that a guardian ad litem in as under circumstances be made a party for the purpose of obtaining discovery from him (9) But even in this case which was an excentional one, it was held that where the guardian had been made a party defendant for purposes of discovery, the discovery was not intended to include the right to administer interrogatories

- (1) Marshall (Langley, W N (50) 222
- (2) Ann Pr notes to this rule which was introduced in 1833 in consequence of the decisions cited by to lunating, see Bray, Discovery 63-67, and Ann Pr vol in Pirt IV "Lunatics"
- (B) Mayor t Collins, 24 Q B D dol, commented on in Reddern t Reddern (1891), 13.3, where it was doubt d whether in the P D the old Chancery practice of refusing to make an infant give discovery oblished to Casas cited in Waghii Thickeney t Ahrito Rowji, 10 B 107 (1886), Aathmull Asimigdiss t, Malharrao Holkar, 19 B 3-0 (1891), Duncan t Bhoyro Prosad, 22 C 891 (1893)
- (4) Curtis : Mundy, 2 Q B 178 (1632) See Indian cases in last note
- (5) Lawton v Elwes, 48 L 1 425, Scott t Consolidated Bank, W N (93) 56, Dyke t Stephens, 30 Ch D 189 See Indian cases in last note but on:
 - (6) Ingram | Lattle, II Q B D 257 Sec.

Indian cases in last note but two

(7) Nathmull Narangdass t Malharrao
 Holkar 19 B 3.0 (1894), per Firran, J
 (8) Duncan t Bhoyro Prosad, 22 C 591

(9) 15 , at p 835 citing Wighii Thackersey * Khat to Rown, 10 B 167 (1886) but see. now Berry & Keen 26 Sol Jo 312 , Burchard Wiciarlane, 2 Q B 217 (1891) Symonds tety Bank 79 L P J 175 . Burstall : Beyfus, 26 Ch D 10-42, disapproving the old practice establishing that a person should not be made a party solely for the purpose of discovery Ann Pr 1905 pt 414 notes to O 31 r 12 In Rahambhov (Turner, 17 B 341, 318 (1892), a defendant having been megularly made a party but only for the purpose of discovery to a prior suit brought by the plautiff, was held not a party to that suit, so as to make applicable to him the provisions of as 13 or 43, corre spouding with s 11 and O 11 r 2 of the

present Code

practice will be followed. The same procedure may be adopted in miscellaneous proceedings after decree Interrogatories as to accounts pending or to make the judgment available, or to find out how the property in cases of mesne profits has been managed have been allowed, and no doubt will be admitted under the Code (1)

Leave -Application should be made on petition in Chambers, the order being that the plaintiff be allowed to interrogate (2) It was held to be the duty of the Court to determine whether the applicant should be allowed to interrogate, but not to determine at that stage what questions the opposite party should be compelled to answer (3) But see now next rule . In giving leave the Court, as a rule, decides nothing as to the specific interrogatories but only that there is a case for interrogating the party, that the interrogatories may possibly be relevant, that their tenuine character is not improper and that their administration is not sought for the mere purpose of annoyance Where the party on being served refuses to answer them the Court enters upon a considered adjudication under r 11, post, and the resulting order may be enforced under r 21 The grant of leave to one party to deliver interrogatories to another does not amount to an order requiring the other party to answer them, for that party may perhaps have good ground for refusing to answer them or some of them (r 6) Lewo granted is, therefore, not an order to answer within the meaning of r 21 entailing a dismissal or striking out a defence (4)

"Interrogatories"—For form of interrogatories, see Schedule IV 123 of last Code and case cited (5) and r 4, post Interrogatories are only affidavite obtained in a particular way, and the party wishing to use them must put them in/as his evidence (6) See as to their use, r 23, post

"Opposite parties"—Primarily this is a party on the other side of the record to the applicants (7) A party not on the other side of the record is an opposite party within the meaning of the rule if between him and the applicant there is some right to be adjusted in the action, which in Chancery might often be the case between two plaintiffs or two defendants (8) But defendants were

- (1) See Ann Pr, O 31, r 1, "discovery after and for working out judgment or order,
- Bray, 567–569
 (2) Sham Kishoro Mundle v Shoshi
 Bhoosun Biswas 5 C 707 (1880) and at to
- service, see ib

 (3) Sham Kishoro Mundlo & Shoshi
 Blioosun Biswas (ISSO) 5 C, at p 709
- (4) Prem Sukh Clunder v Indro Nath Banerjeo 18 C 420 (1891) F B overruling Lalla Dubeo Pershad t Santo Lershan 10
- (505 (1884) see notes to r 21 po t
 (5) Nittomoye Dassee t Sochul Chun ler
 Law 23 C 117 at pp 118-120 (1895) and
 (hitty F 267-272 D C 1 977 Ann Pr
- form 6 Appx B

 (6) Waghir Thackersey t Islatro Roun

 10 B 167 at p 171 (1956) Costo Bilary

- Pal v Johur Lall Pal, 4 C 836 (1879)
- (7) In Spokes v Grosvener (1897) 2 Q B 124 the Court held that such a party might be ordered to give discovery of documents of a necessary party though there might be no
- ssue between him and the applicant
 (8) Shaw t Smith Is Q R D 103 Molloy
 w hirby, Is C D 162, Alcoy, etc Co t
 Greenhill, 74 L T 345 where discovery of
 documents between oe defendant to counter
 claim was ordered and in E ien v Weardide
 35 Ch D 257 it was said at pp 292 296,
 to mean that a laintiff might intercogate a
 defendant, and a defendant a plaintiff and
 last the word is were so wide as to include all
 persons who litigate one against the offer in
 any proceeding any question which the
 full minimum proceeding any question which the

to fue d leave to interionate co-defendants who had jut in no defence, there being no issue between them fit

In Ingland ferments the decisions established that in infinit, by reason of inequeity, could not be interrepted. (2) nor could be be inside 16 give discovery of discovery of discovery of or could such orders be made against a next friend (4) or grandian of litem (3) as such neither bring the status of a party as that term is understood in the rules dealing with the subject. Now, however, r. 23 makes the order up healst to infant plaintiffs and defendants and to the next friends and curious and litem on the rules and reason mader disability (6).

The Bombay High Court (7) has however, in the case cited, applying the present English rule held that an allidavit of documents may be required from s minor defendant though the Judy stated that he did not decide that a mext from lor annidate of an infant could be directly ordered to make in affidavit of documents. It has however been named out (8) that the order is made was invalid (the guardian of liters being willing to make in islidavit) and that the affiliest was in reality to be made by the guardian and the Calcutta High Court has in the case cited held that a minor cannot be compelled to are dis covery under sect. 1.3 of the former Code nor on the same principl. (viz. fus. meanight) could be be interrogated under the section corresponding to this rule, nor could his mat friend or an irdian be considered an opposite marty up in whom such interro, itories can be served within the incaring of that action. It has however been said that a guardian of litera may under circum stances be made a party for the purpose of obtaining discovery from him (9) But even in this case which was an exceptional one at was held that where the guardian had been made a party defendant for purposes of discovery, the discovers was not intended to include the right to administer interrogatories

⁽¹⁾ Marshall t Langley W N (83) 222.

^{(2) 1}nn 1r notes to this rule which was intro lo ed in 1833 in consequence of the decisions cite! As to limitude, see Bray, 1 lise overy 63 67 and 1nn 1r vol in 1 art 1V 1 limites.

⁽³⁾ Mayor t Collins _1 Q B D _361 commented on in Redfern r Redfern (BoH) P _133, where it was doubted whether in the P D theo lold Chancery prutice of refusing to make an infant give discovery obtuined Sec cases cited in Waghii This kersey is khitao Rowji 10 B 107 (1886), Nathmull Narsing lives v Malbatrao Holkar 19 B _350 (1894), Duncau i Bhoyro Frosad 22 C _891 (1854)

⁽⁴⁾ Curtis i Mundy 2 Q B 178 (1832) See Indian cases in last note

⁽⁵⁾ Lawton v Elwes 48 L 1 425, Scott t Consolidated Bank W N (3) 50 Dyke t Stephens JO Ch D 189 See Indian cases m last noted ut on

⁽⁶⁾ Ingram : Lettle 11 Q B D 207 Sec

ludian cases in last note but two

^{(7) \}athmull \arsingdass t \laharrao \text{Ilohar L3 B 3-0 (1891), per Firrin J (8) Duncan c Bhoyro Prosad 22 C 831

⁽¹⁶³⁵⁾

⁽⁹⁾ Ib at p 835 citing Wight Physicses · Khat to Rown 10 B 167 (1886) but see now Berry t Acen _6 Sol Jo 312 Burchard t Macfarlam 2 Q B 217 (1831) Symon ls t (ity Bank "3 L 1 J 1"s Burstall t Beylus, at Cle D 40 42 disapproving the old practs establishing that a person should not be made a party solely for the nurrose of tracevery Ann Ir 100 p 414 notes to O 31 r 12 In Rahambhoy : Turner 17 B 341 318 (18 L) + defendant having teen irregularly made a party but only for the nurpose of discovery to a prior suit I rought by the plantiff, was held not a party to that suit, so as to make applicable to him the provisions of as 13 or 13, corresponding with a 11 and O 11 r 2 of the HEREII Code

to hum (1) Now, however, r 23 makes the preceding rules of the Order applicable to minors and lumities, their next friends and guardians

2. On an application for leave to deliver interrogatories, Particular interroga to the particular interrogatories proposed to be to be submitted to the Court In deerding upon such application, the Court shall take into account any offer, which may be made by the party sought to be interrogated, to deliver particulars, or to make admissions, or to produce documents relating to the matters in question, or any of them, and leave shall be given as to such only of the interrogatories submitted as the Court shall consider necessary either for disposing fairly of the suit or for saving costs

Submission of interiogatories —This ink which is new, is taken from 0.31 r. 2. Under this rule the Judge has not it has been said (2) to settle the interiogatories, but to decide what should be administered. Allowing an interiogatory does not preclude any objection height acken in the answer under r. 6 post (3). Where some have been allowed and some refused application may be made for leave to deliver further interrogatories (4). In the under mentioned cases, defendant undertaking to make admissions leave was refused (5).

and admissions having been refused, leave was given (6)

3 In adjusting the costs of the suit inquiry shall at the costs of interest instance of any party be made into the propriety of exhibiting such interrogatories, and if it is the opinion of the taxing officer or of the Court, either with or without an application for inquiry that such interrogatories have been exhibited unreasonably, vexatiously, or at in proper length, the costs occasioned by the said interrogatories and the answers thereto shall be paid in any crent by the party in fault

Costs —This is taken from O 31 1 3 and does not apply to rent suits in Bengal (vide r 1 ante)

- 4 Interrogatories shall be in the Form No > in Appendix C, Form of interroga with such variations as circumstances multiplicate require
- 5. Where any party to a suit is a corporation or a body of persons, whether meorporated or not, empowered by law to sue or be sued, whether in its own name of any officer or other person.

⁽¹⁾ Waghii Thackersey : Khatao Rowji, 10 B 107 (1886) (2) Per Chitty, J., in Tyo : Willoughby,

⁽⁴⁾ Bookt v Stevenson (1895) 1 Ch 301 (5) Jubbt Bibbs W V (83) 203 and see Kekenich, J, in Clube i Clarke, 43 Sol J 71J

³⁸ Sol J 338 (1) Lock t Lay (1834) 3 Ch =82

⁽¹⁾ Helhert Ellis W N (81) J

any opposite party may apply for an order allowing lum to deliver interregatories to any member or officer of such corposition or body, and an order may be made accordingly.

Corporations and Companies .- Lughsh O Jf, r 5. Does not apply to rent suits in Bengal (tide onte, r 1) The Linglish rule is practically the same except that instead of the word " suit," it uses the words " cause or matter," which also appear in O 31, r 1 of the English rules, and is identical with that under the C L P. Act except that "member" is added. The old practice in Chancery was to make him a party for the purpose of discovery, but this can no longer be done (1) As to body corporate, or other body; Crown , (2) foreign sovereigns . (3) humidator . (4) see cases cited. (5) The secretary of a corporation or company is, as a rule, the proper person to answer, and it was the practice of Jessel, MR, not to durcet a member to answer unless there was no officer who had a compatent knowledge of the facts.(6) The officer or member is the representative or ulter ego of the body for the purposes of answering the interrogatorics.(7) It is not his answer but the answer of the body, and, therefore, there is no obligation either to disclose his knowledge, or to obtain and disclose the knowledge of other servants or agents of the body acquired by him or them otherwise than in the course of his or their employment. (8) As regards discovery and production of documents, this is obtained by an order against the body for an affidavit of documents in its possession, to be made by the secretary, clerk, or other proper officer on its behalf (9) It should, if possible, he made by some person who has personal knowledge as to documents in the possession of the body (10)

6. Any objection to answering any interiogatory on the is a conjection to interpolate and that it is scandalous or irrelevant or registeres by answer not exhibited bond fide for the purpose of the suit, or that the matters inquired into are not sufficiently material at that stage, or on any other ground, may be taken in the affidavit in answer.

"Any objection."—This rule is taken from O 31, r 6 It does not apply to rent-suits in Bengal (see r 1, ante) Where interrogatories are scandalous

⁽¹⁾ Wilson t Church, 9 C D 552

⁽²⁾ Att Gen a Newcastle (1897), 2 Q B 384, discussing generally, the Crown s

position in matters of discovery

⁽³⁾ S A Rep v La Coup France Belge (1898), 1 Ch 190 [if a foreign soveregin Brian an action here he must give discovery], Prulcant USA, L R 2 Lq 663, 664 [on his own oath] after foreign republics, Rep Costa Rua t Estange, 1 C D 171, see post

⁽⁴⁾ Who is under an obligation to give discovery Re Contract Corp. 7 Ch. 207, Re Burned S Banking Co. 2 Ch. 350, but not an affidavit of document as of course Re

Muturl Society, 22th 720, 721 The liquidator has a recipiocal right of discovery Re-

Alexandra Lo , 16 Ch D 58
(5) Bray 8 Digest on Discovery, Art 3, and

Ann Pr, notes to O 31, r 6
(6) Berkeley : Standard Discount Co,

¹³ Ch D 99

⁽⁷⁾ lb, at p 101

⁽⁸⁾ Welsbach Co v New Sunlight Co (1900) 2 Ch 1

⁽⁹⁾ Ann Pr. note to O 31, r 5, see forms in Chitty, F, 247-249, s 54.

⁽¹⁰⁾ See Bray's Digest, Art 24, Rep of Liberia : Roje, 1 App Cas 139

purpose of submission to the advisor, are protected (1) On the same principle as a witness cannot be examined so he cannot be interrogated as to questions of law (2) Nor is he bound to discover the evidence of his case, for this would enable his unscrupulous opponent to tamper with the witnesses and to manu facture evidence in contradiction, and so shape the case as to defeat justice (3) But according to the English authorities a party must discover the nature of his case, or the facts on which he rules in support of his case, as distinguished from the evidence of his case or the way in which he is going to make out his case (4) According to the English rule a party is not compelled to give discovery which will tend to cuminate him or expose him to the risk of any kind of punish ment (5) But in this country a witness is not excused from answering on the ground that an answer will criminate (6) Though, therefore, a party may and should for his protection (?) claim privilege on this ground, it would appear that he may be compelled to answer an incriminating interrogatory Objection able or oppressive interrogatories should be disallowed (8) The mere fact that questions would be admissible in cross examination will not make them good as interrogatories (9)

7. Any interrogatories may be set aside on the ground that they have been exhibited unreasonably or rexaaside and Setting trously, or struck out on the ground that they striking out interroga are prolix, oppressue, unnecessary or seanda tones lous, and any application for this purpose may be made within seven days after service of the interrogatories

Setting aside of interrogatories —See notes to last rule rule is taken from O 31, r 7

Interrogatories shall be answered by affidavit to be 1 filed within ten days, or within such other time as the Court may allow. filing

Time for answer -Order 31, r 8 If defendant is out of the jurisdiction or there be other sufficient cause for allowing a greater length of time, a reason able time will be given If ten days have been originally fixed the Court may, upon an application supported by affidavit, extend the time for filing the affidavit

⁽¹⁾ See the matter fully dealt with in Authors Evidence Act, 6th Ed., notes to 88 126-129, Information obtained from third parties for the purpose of litigation , and Vishnu Yeshawant v New York Life Assurance Co , 7 Bom I R 703 (1905)

⁽²⁾ Vide arte

⁽³⁾ Ann Pr, notes to O Ji, r I, Bray 445, aco Benbow t Low, 16 C D 95, Re

Strachan, 1 Ch 445 447, 448 (1890) (4) Ann Pr., O 31, r 1, p 397 (190a) | but see Ali Kader t Gobin I Diss, 17 C Sio (18 0) arte which case has recently

been distinguished in Bannath Kelia v Raghunath Presad 41 C 6 (1913) in which it was held that a party may interrogate on all facts directly in issue in the I leadings]

⁽⁵⁾ Ib, at p 386 (6) Indian Evidence Act s 132

⁽⁷⁾ See R : Gopal Doss 3 M 271, and other cases cite I in Authors Pvidence Act, notes to a 132

⁽⁸⁾ Winters t Dubbs W N 21 (1876) See Lockett v Lockett, 4 Ch App 330

⁽⁹⁾ Bha wandas Parashrum t Burgirji

Ruttonji 37 B 347 (1912)

in answer. As to objections and mode of stating them, and as to answering authentify, so notes to ref. 11, respectively. The rule does not apply to rent suits in Bengal (see r. 1, ante).

- 9 An affidacit in answer to interrogatories shall be in form of affidacit in Form No. 1 in Appendix C, with such variations as circumstances may require.
- 10 No exceptions shall be taken to any affidavit in answer,
 No exception to be but the sufficiency or otherwise of any such
 affidavit objected to as insufficient shall be deter
- 11. Where any person interrogated onuts to answer, or is answer for the court for an order requiring may apply to the Court for an order requiring him to answer, or to answer further, as the ease may be And an order may be made requiring him to answer or answer further, either by affidavit or by surface examination, as the Court may direct

"Insufficiently '-O 31,r 11 It does not apply to rent suits in Bengal (see r 1 atto) The same necessity for clear specific answers and ab ence of all orasion is required as in the case of pleading as to which see O VIII r 4 If the answer is evasive the usual practice is to require a further answer More over, matter of supererogation should not be introduced. It is, of course legitimate to explain or qualify an answer But when an answer is couched in a form which makes it embarrassing that is to say which prevents the person who asks it from using it without having thrust upon him irrelevant matter as part of it it is insufficient (1) A party must answer to the best of his knowledge information and belief (2) He is bound therefore to state all the information he already possesses, though he is not bound to obtain it of any one except his agents and servants Of these he must inquire using his best efforts bond fide to get the information. He must also examine documents in his possession or power if necessary (3) The question in all cases is whether the answer is insufficient The Court has not to go into the question of its truthfulness. If the Court is clearly satisfied (from certain sources as to which see r 6 ante) that the oath of the party by which he claims his protection cannot be really available for the purpose for which he puts it forward a further answer may be ordered But the oath should not be disregarded on mere suspicion. A substantial answer is sufficient under the present practice the substance and not the form being that at which the Court looks If looking at all the answers together the Court thinks that every question material to the issue has been fairly and substantially

⁽¹⁾ See Lyell'e Kennedy 27 C D 23 33 (2) Emy, D 2 Arts. 10 19 Ann Pr. W 44 Richardts Crawshay 8 Tines R loc cat 446 An Pr. 10tes to 0 31 r 11 (3) lb.

horamana a anatagi tahi ani dan tahi ta gan tahir ta labi da lah dari Birta ti tabi milila ورميون المالانتاالة

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The terminate former is an expensive type and amore the extensive as anti-

 Pomession of power."—These votes in the less less the Imitel meanng iki ku har nara dag na grugusa né na urusa da gawi satuan. Na imberdungsu-فتستنطف وتصفيفها وروادور والمراور والمراور والمراور والمراور والمناورة والمراورة والمراورة والمراورة والمراورة the second and appropriate or joint in the research or joint in the joint we did , เทาเก็ทเลท และ เทริโย กับตาวทางเมเพิ่มเล แมน และเทาการทางสามเหมือนการกับมา นั้นตานี้ใน กับทางและ of one for it are alliforms of operations. For the graphic of an order fin ك المستقلة المناسخة والمراسخة والمراسخة والمناسخة والمناسخة والمناسخ المان والمان والمناسخة والمراس والمراسخ المراسخ . Na maa gangaray is nasalg Og fisin parabahan wini nilaa gana babig 🕾 ง เกิด ตาก (รูก) ได้โดยจาก ขางเกิดเดิด และสาด เกาการ การการการสาด <u>โดยสมัติ</u> the entropy of the plant of the state and favor and a part and and the transfer of all before the back the که و هنده و هند گفتند ارسینیست اینوان ده دری و مسترین وی و دروهٔ ایرکهٔ و دروروه رسود، هراه کرد ایرد. کود · this is a controlling for . But proceedings of the agent is presented in the extension To יינות לו בשות בשל הוא בתבודות דינות בינות בנות בבינים בינות בבינים בינות בבינים בינות בינות בינות בינות בינות a action of decrements by this among the present rule all documents have be and retire in which else going has any possession or property filtedly with relies. or even în which he has no property at all it they are zonle corpored possesclosely. Caset il search much be made for all relevant Comments in the evaphysical graviting and proper highers and effects since is to there with one not; for inchere, but ments absorbed the artificity must enter a only the door events work is are but to one which have been in the party is question South.

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^{11.} A large of the good bearing on Ash - in 20 15, 474 (1965).

⁽²⁾ Francis y r. Pauline, 19 Q. R. D. D. C.

Par : C. A. d. 155. (4) Maria, r. Walter, Cr. E 12, 116.

⁽¹⁾ this and we cave eard in Han-Jakater v. Hap Casim, I B. 458 (1876). (b) Beardey r. Philippe, supra.

the Berill of Com at C 15, 5 Ch. 196. 20 Ann Pr , wite & for C . . .

⁽⁷⁾ Bray's D.ger, 195. clames lien, we Lexis

^{1 (1897 - 1} · 203 45 " " He Hawara (10" ege, z. 131, 13vid B. 4.6

and an. Pr., 1600 a 2 steef.

lian Bila : 7 (1556).

"Relating to any matter in question therein"—The following interpretations have been given of these words —Documents containing information which may either directly or indirectly enable the party seeking discovery either to advance his own case, or damage that of his adversary, or which may furly lead him to a train of inquiry which may have either of these two consequences (1). They are not confined to such as would be admissible in evidence (2) Every document which will throw any light on the case (3).

Objection to production—1s to what documents are privileged from production, see notes to r 6, ante The affidavit should set out the grounds on which privilego is claimed

But a party is not confined to the affidavit in which the claim is first set up

He is entitled to put m and use a further affidavit in support of his claim of privilege (4)

Sealing up—According to the Equity practice followed in the High Courts, a party may scal up such portions of otherwise maternal documents as he swears are privileged. A party must, however, specify what parts of the documents referred to he claims to scal up, and the grounds upon which the claim is based (5). If he does not, though the Court has allowed an application to consider the sufficiency of the affidativit, (6) jet technically the right way of raising the question is hy taking out a summons for production and inspection (7). When the right of a party producing documents to scal certain portions of them is contested, the Court appoints an officer to whom the plaintiff states in confidence why he wants to inspect any portion of the documents scaled, and the officer, after looking at the documents, reports whether and in what way the part noted or desired to be noted is material to the case of the other party (8).

Objection to affidavit—When an affidavit is technically insufficient, that is, in its terms, and fails to comply with the requirements of the Code, a summons may be taken out to consider its sufficiency, (9) and the party will be ordered to amend his affidavit or file a further affidavit, (10) as where the description of documents is imperfect (11) or improperly verified, (12) or where the affidavit does not specify what the plaintiff claims to scal up, and is not in the prescribed form (13). The only occasion where a party can be compelled to file a further

⁽¹⁾ Compagnie 1 manei re v Peruvian Guano Co , 11 Q B D 63

^{(2) 1}b, 62, Jessel, MR in Bustros t White, 1 Q B D 425, Hutchinson t Glover,

¹ Q B D 141 (3) 1b 141

⁽⁴⁾ Ambika Churn t Ben, al Spinnin, Co I td 22 C 105 (1834)

⁽⁵⁾ Jadub Loll Shaw c Kann L II Shaw, 20 (587, 583 (1833)

⁽b) 1b

⁽⁷⁾ lb , Horendra \ath Mukerpee e Gerendra kumar Dutt, 3 t W \ 495 (1897)

⁽⁸⁾ Herra Lall Rukhit e Ram Suran Loll, 4 U 835 (1873), Natiomoje Dasses e

Soobul Chunder Lav 23 (117 at p 126 (18.)5)

⁽⁹⁾ See Oriental Bink Corporation t Brown 12 C 265 (1885), Keuelly t Wyman I C 178 (1870) Jadub Loll Shaw v Kanat

Loll Shaw 20 C 587 (1633)
(10) Amarendra Nith Chatterjee v Kally

Absen Tagor. 2 C W > 17 (1807)
(11) Orantal Bank Corporation : Brown,

⁽¹²⁾ Kahan Bibi e Safdar Husain 8 A =65 (1886)

⁽¹³⁾ Jadub Loll Shaw e Kanai Loll Shaw, 20 C 55" (1833) but see Horendra Nath Mukerpeet Grendra Kumar Dutt, 3 C W N 494 (1839)

affidavit of documents, is when the original afhdavit is insufficient, that is, in its terms, and fails to comply with the requirements of the Code If it is not alleged that the affidavit is defective in that respect, but that the affidavit contains statements which are untrue in fact, the party so alleging should specify the documents which he requires to see, and which have been omitted from the affidavit, and apply for an order of inspection under r 18, post (1) He must (as appears from that rule), in addition to the matters mentioned, show that the documents of which he claims inspection are relevant to the matters in question in the suit (2) If he is then met by an affidavit of the other party denying posses sion, that is a risk which the party seeking inspection must take For just as for the purposes of discovery an affidavit of documents denying possession is conclusive, so for the purposes of production and inspection an affidavit denying possession of such documents would be equally conclusive (3) The Court, however, in this decision distinguishing cases on the question of privilege which stand on a different footing, was not prepared to assent to the broad proposition that, as the oath of the party is conclusive on the question of possession, so also in an application under r 18, the affidavit of the opposite party is conclusive ou the issue of relevancy (4) An effective remedy may, however, be obtained at the hearing where possession is deuted. For if on cross examination or other wise it appears that the party has failed to disclose or refused inspection of relevant documents in his possession the Court will then direct immediate inspection to be given, adjourning the hearing at the cost of the person who has so evaded giving discovery (5) If the Court is clearly satisfied on a perusal of the affidavit, the documents therein referred to, and the pleadings, that the affidavit cannot be accepted the Court may, according to the English practice, order a further affidavit of documents But these are the only sources to which the Court may look for this purpose (6) It is not clear upon the Indian cases what course should be taken in such a case The case cited below (7) seems to suggest that a further affidavit will only be ordered where the affidavit is techni cally insufficient in its strictest sense, and where a defendant in his written statement referred to documents not set out in his affidavit, the Court discharged a summons to consider its sufficiency, holding that as the omitted documents were sufficiently described in the written statement, an application could be forthwith made for inspection if inspection were needed (8)

Conclusiveness of affidavit —Where, however, a proper affidavit has been filed, either originally or as the result of an order for a further affidavit, the oath of the party swearing the affidavit is conclusive upon the questions

⁽¹⁾ Amarendra Nath Chatterjee t Kally Kussen Tagore, 2 C W N 17 (1897), and see Basanta t Kumudun 16 C W N

<sup>81 (1911)
(2)</sup> Nittomoye Dassee z Soobul Chunder

Law, 23 C 117, at p 125 (1895) (3) lb, at p 127

⁽⁴⁾ Ib, at p 126

^{() \}marendra \ath Chitterne t Killy

Absen Lagore, supra

⁽⁶⁾ Ann Pr 1905, pp 385, 386, notes to O 31, r 1, Jones : Montevideo (o 5

Q B D 558 Compagnie Financi re ⁰ Peruyian Guano Co , 11 Q B D 63 , Hall ¹ Truman, 29 C D 319

⁽⁷⁾ Amarendra Nath Chatterpo t Kally Kasen Tagor 2 C W N 17 (1897)

⁽⁸⁾ Kanelly a Wyman 1 C 178 (1875)

of possession, (1) privilege, (2) and, according to English practice, relevancy (3). The Court cannot regard the opponent's oath, the general rule in all questions of discovery being that where you have the oath of the party claiming discovery challenging the oath of the party giving discovery, the oath of the latter is for this purpose conclusive. The party seeking discovery must rest upon the affidavit, and he cannot even examine upon it, nor adduce evidence to contradict it, nor can he do this in another form by administering general interrogatories

14. It shall be lawful for the Court, at any time during is production of does the pendency of any suit, to order the proments duction by any party thereto, upon oath, of such of the documents in his possession or power, relating to any matter in question in such suit, as the Court shall think right, and the Court may deal with such documents, when produced, in such manner as shall appear just

"It shall be lawful"—This rule is taken from O 31, r 14 Scc, as to the discretion, note "Order the production" The rule enables any party who has obtained privitely, by interrogatories or by affidavit of documents knowledge of a document in the hands of his adversary, to compel production But no order for production can be made against a party unless he has directly in unitted it to be in his possession or power. See notes to r 13, and

"At any time"—Therefore even as late as in appeal. As regards the earliest point at which the order may be made, the Court will act upon the content principles governing the time or stage for discovery. Vide onle, notes to r 1. An order under this rule may be made even before the issues have been framed (4)

"Order the production "—Under the Evidence Act in regard to cert intidocuments where they are absolutely privileged the Court has no power whith ever to order production. But under this rule the Court does possess the discretion, and this discretion is to be exercised according to the practice of the Court (5). In the case cited the Court held that though a document might not be such as passed directly between the legal adviser and the client yet if it was of such a nature as to make it quite clear that it was obtained confidentially

(I) Antomoye Dasse v Soobul Chund r Law, 23 C 117 125 127 (1895) Ann Pr p 385

(2) 10 at p 1.6 Vmayakrao Dhundezay v Narotam Unandp, 17 B 581 (1893) [claim that documents privileged as relating solely to d fendant stitle and did not tend to prove resupport laintiffs fittle hill that Court cull not go behind defendants affidavit] Inn Pr 105 p. 415 it to what is privileged see notes to r 6.

(3) Jun 1r 35 4ls whether however the affidavit is con lusive on this point under r 15, sec Vittomiyo Dasseo t Soobul Chunder Law 23 C at p. Lo (18-b), and in O hinealy, c P C, notes to s 130 it is said that it is not possible to say how far this rule (conclusiveness of statement) as to relevancy will apply in oth r cases it being suggested that the Court should follow the rule laid down in a 162 of it e Erakhere tet

(4) Gobind r hunja 10 (L. J. 407 (1 40).

(a) I shinu I cabasant r New York Lafo Insuran v to 7 Bom, L. R 703 (1.80). for the purpose of being used in litigation, and with a view to being submitted to legal advisors, then the Court will not compel the production of such a docu ment (1) In an earlier case in the same Court it was held that a Judge has no discretion to refuso to allow inspection of documents relating to matters in question in a suit, provided that they are not privileged (2) This decision was based on Bustros v. White,(3) at which time it was held that there was no dis cretionary power under this rule But in England the Court has since been given a discretion by the amendment of O 31, r 18 (2) And this is so here also under the second clause of r 18, post A party is entitled to production or inspection only when the books or papers are material and necessary to establish his cause of action The exercise of the power under this rule cannot be delegated to a commissioner (4) Upon an application for inspection of documents, which is objected to on the ground of immateriality, the Court will, if necessary, order them to be produced for its own inspection in order to judge of their materiality (5) The power of refusing inspection should be excreised with great caution, and the opposite party should be allowed to inspect and take copies of the documents when they relate to matters in issue, unless they are privileged in law, relate exclusively to the case of the party producing them, and contain nothing supporting or tending to support the other side (6)

Party.—Therefore, the order should not assue against any other person, not even the party's solicitor (7)

"Possession or power"-See ante, and notes to r 13, ante

"Relating to," etc -- As to the interpretation to be given to these words see notes to r 13 ante

Revision —An order under this section is not open to revision, and cau only be impeached in appeal from the final decree (8)

15. Every party to a suit shall be entitled at any time to give inspection of documents reterred to in predatings or affidavits reference is made to any document to produce such document for the inspection of the party giving such notice, or of his pleader, and to permit him or them to take copies thereof, and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such suit unless he shall satisfy the Court that such document relates only to his own title, he being a defendant to the suit, or that he had some

⁽¹⁾ Vishnu Yeshawant t Now York Life Insurance Co , 7 Bom L R 70J (1905)

⁽²⁾ Wallaco t Jefferson, 2 B 453 (1878)

^{(3) 1} Q B D 4.6 (4) Gobind v Kunja, 10 C L J 407 (1903)

^{14 (} W \ 147 ()) Curnerk Roy t Tulatum, 28 C 421

⁽⁶⁾ Bilation y t. Lanusani Chilliar, 30

^{11 230 (1906),} s c, 17 M L J 79, and notes may be taken during inspection Goland t kunp, 10 C L J 407 (1909), 14 C W N 147

⁽⁷⁾ See Cushin : Craddock, 2 C D 140
(8) In re Nizam of Hyderabad 9 M 200
(1886) Balamoney : Ramasam: Chettiar,

³⁰ N 230 (1906)

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other cause or excuse which the Court shall deem sufficient for not complying with such notice, in which case the Court may allow the same to be put in evidence on such terms as to costs and otherwise as the Court shall think fit.

Notice to produce for inspection.—This is r 15 of the English O 31. There is a distinction between an application for general discovery of documents and an application for production of a specified document, that is, a document referred to in the pleadings or offidavits. The order for production may be made at ony early stage of the case, and, unlike the case of general discovery, a delendant is entitled to inspection although he has not filed his written statement (1) As to form of application, see No 124, Schedule IV of last Code and r 17. A Judge bas no power under this rule, or r 18, to direct inspection to be given of documents unless there he as an essential preliminary to the right of inspection either the specification of a document by the party seeking the inspection, or its disclosure by the other side in the pleadings or otherwise (2)

"Other party,"-A defendant may obtain discovery or inspection, as against a co-defendant, if the latter can be regarded as on opposite party (3) If the party on whom the notice is served should answer in the manner prescribed in the next rule, he should object to produce such documents as he considers he ought not to be compelled to produce, leaving his adversary to get an order for inspection under r 18, post

"And any party not complying "-The concluding words of this rule give an express power to the Judgo to allow the document to be used in evidence, a power which the Judge was originally held to hove by implication. As to documents referring to party's own title and "sufficient cause," see notes to rr 1, 6, ante (4)

- 16. Notice to any party to produce any documents referred to in his pleading or affidavits shall be in Form Notice to produce No. ; in Appendix C, with such variations as circumstances may require.
- 17. The party to whom such notice is given shall, within is. ten days from the receipt of such notice Time for inspection when notice given deliver to the party giving the same a notice stating a time within three days from the delivery thereof at which the documents, or such of them as he does not object to produce, may be inspected at the office of his pleader, or in the case of bankers' books or other books of account or books in constant

⁽¹⁾ Quilter v Heatley, 23 Ch D 42, 49, 50. followed in Ram Dyal Saligram v Nurhurry Balkrishna, 18 B 368 (1893)

⁽²⁾ Secretary of State v Jehangir, 4 Bom L R 342 (1902)

⁽³⁾ Anandrao Vithal v Budra Malla, 17

B 384 (1592)

⁽⁴⁾ And Webster v Whewall, 15 C D 120, Quilter v Heatley, supra, Dhapi v Ram Pershad 14 C 768, 777 (1887), Venayakrao Dhunduraj : Narotam Anandu, 17 B 581, 584 (1833)

by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs, and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense.

Notice to admit documents -This rule, which has been considerably remodelled and is, with some slight alterations, the same as the English rule, is taken from O 32, r 2 For form of notice, see No 127 in Schedule I Part II of the former Code and the next rule A fuller form is given in the Annual Practice, Vol II Appendix B No 11 The rule is enacted for the facility of proof and saving of costs The rule has been held to extend to all documents which a party proposes to adduce in evidence, and whether in possession or other wise, and even though the opposite party has stated that he would not admit them (1) According to the Euglish practice, if a party does not save all just exceptions he is precluded from objecting to the admissibility in evidence of the documents admitted (2) Though that may sometimes be the case here, it would be necessary to consider in certain instances, eg a question of stamp and possibly in others whether the admission of the party could render that admissible which the law savs should not be admitted Further, an admission with the "saving" that a document is a copy merely dispenses with proof that it is a copy It does not, however, dispense with proof of circumstances per mitting secondary evidence being given Admissions of documents between co defendants to which the plaintiff is not a party cannot be entered as evidence against him (3) If the party having notice fails to prove the documents, the party refusing to admit will not be made liable for the costs of the unsuccessful attempt (4) This also appears from the words of the rule, which imply successful proof

Notice to admit facts —This section is limited to documents Under the English practice (3) however, and that of the Calcutta High Court, (6) notice may be given to admit specific facts, and in case of refusing pays the costs of proving such facts unless the Judge certifies that the refusal was reasonable —The form of notice and answer are given in the Annual Practice, Nos 12 and 13 in Appendix B, and in forms 269 E (1) (2) of the Calcutta High Court Rules —See as to admissions for purpose of trial Authors' Evidence Cet, 4th ed p 349 —The Code now provides in r 4, post, for admission as to facts

3 A notice to admit documents shall be in Form No 9 in

Appendix C, with such variations as circum stances may require

⁽¹⁾ Putter t Chapman, 8 M & W 388, Spencer t Borough, 9 M & W 425, as to giving notice to admit proof of photographer, see East Stonehous Lorne Board t Victoria Brewery Co (1895), 2 Ch 574

⁽²⁾ Vance Whittington 2 Dowl N S 757. Chapling Lavy, 9 Fx 531, in which a party was held not to be procluded from of jecting

to the insufficiency of the stamp and see Taylor, Ev. \$724 A 9th ed

⁽³⁾ Dodds t Tuke, 25 C D 617

⁽⁴⁾ Stracey: Blake 7C & P 404, Door Peters 1C & k 279, Freeman'r Rosher o D & L 517

⁽⁵⁾ O 32 r 4

⁽⁶⁾ Cal H C rules, O 5 269 D

4. Any party may, by notice in uriting, at any time not later than nine days before the day fixed for the hearing, call on any other party to admit for the purposes of the suit only, any specife fact or facts mentioned in such notice. Ind in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Court, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Court otherwise directs. Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purposes of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person other than the party giving the notice. Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be just

"Not later than nine days before "—I aglish O 32 r i This expression of time is unusual and might be construed to be identical with clear days," i.e., exclusively of both the day of service of the notice and the day named for hearing. The day of service is in Lingland excluded and the word "before appears to exclude the day of hearing (I). A notice to admit facts should, where practicable, supersede interrogatories (2). This notice may be delivered with the statement of claim and the Court cannot ext it aside as improper. The defendant's only course is to refuse to answer it which he would do at his peril as to costs (3). Where plaintiff disregarded a notice under this rule given by the defendant the latter was allowed to administer interrogatories (4).

"Any other party"—Semble these words mean any opposite party as in O AI r 11 ante (5)

- 5 A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be in Form No 11 in Appendix C, with such variations as circumstances may require
- 6. Any party may at any stage of a suit, where admissions

 of fact have been made, either on the pleadings,
 soms

 or otherwise, apply to the Court for such judg
 ment of order as upon such admissions he may be entitled to, without
 uniting for the determination of any other question between the

⁽¹⁾ Ann Pr note to O 32, r 4

 ⁽³⁾ Crawford t Chorley W N (83) 198
 (4) Helber v Ellis, W N (84) 9

⁽²⁾ O 31, r 2, and see Clarker C, W N (99) 130

⁽⁵⁾ See Brown : Watkins 16 Q B D 125

by the party so neglecting or actusing, whatever the result of the suit may be, unless the Court otherwise directs, and no costs of proving any document shall be allowed unless such notice is given, except where the omission to give the notice is, in the opinion of the Court, a saving of expense

Notice to admit documents -I his rule, which has been considerably remodelled, and is with some slight alterations, the same is the I uglish rule, is taken from O 32, r 2 For form of notice, see No 127 in Schedule I Part II of the former Code and the next rule A faller form is given in the Annual Practice, Vol II Appendix B No 11 The rule is enacted for the facility of proof and saving of costs. The rule has been held to extend to all documents which a party proposes to adduce in evidence, and whether in possession or other wise, and even though the opposite party has stated that he would not admit them (1) According to the Linghish prictice, if a party does not sive all just exceptions he is precluded from objecting to the idmissibility in evidence of the documents admitted (2) Though that may sometimes be the ease here it would be necessary to consider in certain instances e.f. a question of stimp and possibly in others whither the admission of the party could render that admissible which the law says should not be admitted. Further, in admission with the "swing ' that a document is a copy merely dispenses with proof that it is a copy. It does not, however, dispense with proof of circumstances per mitting secondary evidence being given Admissions of documents between co defendants to which the plandaff is not a party cannot be entered as evidence iguist him (3) If the party having notice fails to prove the documents the party refusing to admit will not be made hable for the costs of the unsuccessful ittempt (i) This also appears from the words of the rule, which imply successful proof

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3 .1 notice to admit documents shall be in Form No) in form of notice 1. Appendix C, with such variations as circum stances may require

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⁽⁴⁾ Striceyr Blake 7C VP 404, INOT Leters 1C Vk 270 Premart R der 6 D CI 517

⁽a) (b) 32 r 4 (a) (c) 11 (c) rd 4, 0 \ 263 D

Any party may, by notice in writing, at any time not later than nine days befare the day fixed for the hear-Notice to admit facts Notice to admit facts ing, call an any other party to admit, for the purposes of the suit only, any specific fact or facts mentioned in such notice And in case of refusal or neglect to admit the same within six days after service of such notice, or within such further time as may be allowed by the Caurt, the costs of proving such fact or facts shall be paid by the party so neglecting or refusing, whatever the result of the suit may be, unless the Caurt otherwise directs Provided that any admission made in pursuance of such notice is to be deemed to be made only for the purpases of the particular suit, and not as an admission to be used against the party on any other occasion or in favour of any person ather than the party giving the Provided also that the Court may at any time allow any party to amend or withdraw any admission so made on such terms as may be rust

"Not later than nine days before "-English O 32 r 4 This ex pression of time is unusual and might be construed to be identical with clear days," ic, exclusively of both the day of service of the notice and the day named for hearing. The day of service is in England excluded and the word "before ' appears to exclude the day of hearing (1) A notice to admit facts should, where practicable, supersede interrogatories (2) This notice may be delivered with the statement of claim and the Court cannot set it aside as improper The defendant's only course is to refuse to answer it, which he would do at his peril as to costs (3) Where plaintiff disregarded a notice under this rule given by the defendant, the latter was allowed to administer interro gatories (4)

"Any other party "-Semble these words mean any opposite party as in O XI r 11 ante (5)

- 5. A notice to admit facts shall be in Form No 10 in Appendix C, and admissions of facts shall be Form of admissions in Form Na 11 in Appendix C, with such variations as circumstances may require
- 6. Any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judganous ment or order as upon such admissions he may be entitled to, without narting for the determination of any ather question between the

⁽¹⁾ Ann Pr note to O 32, r 4

⁽²⁾ O 31, r 2, and see Clarket C, W X

^{(39) 130}

⁽³⁾ Crawford r Chorley, W \ (53) 1 is

⁽⁴⁾ Helber r Ellis, W A (84) 9

⁽⁵⁾ See Brown r Watking 16 O B D 125

parties: and the Court may upon such application make such order, or give such judgment, as the Court may think just.

Judgment -The rule is merely permissive, and the plaintiff by not availing himself of it, and proceeding to trial in the ordinary way, does not thereby waive his right to rely, at the trial, on the admission contained in the pleadings (1) "This rule (1875) enables the plaintiff or defendant to get rid of so much of the action as to which there is no contioversy. That is the meaning of it, "(2) and the same learned Judge frequently decided that the former rule must be read as if the words "if any " were inserted after the word "question (3) The Court will not, on motion, give judgment on admissions contained in the defence of an infant defendant nor, semble, on default of infant in filing a defence (4) The plaintiff must have a clear case, and the mere admission or non-denial by the defendant of a right asserted by plaintiff, but which in fact has no existence in law, is not sufficient to entitle the plaintiff to a judgment establishing the right (5) In any case the power of the Court is discretionary, and will not be exercised where the case cannot be conveniently tried on motion (6)

- 7. An affidavit of the pleader or his clerk, of the due signature of any admissions made in pursuance of any notice to admit documents or facts, shall be Affidavit of signature sufficient evidence of such admissions, if evidence thereof is required
- 8. Notice to produce documents shall be in Form No 12 in the to produce Appendix C, with such variations as cucum stances may require. An affidavit of the pleader, or his clerk, of the service of any notice to produce, and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served

Object of rule -The object of this rule is to enable secondary evidence of documents to be given at the trial if they are not then produced pursuant to the notice (7) See English O 32, r 8

9. If a notice to admit or produce specifies documents which are not necessary, the costs occasioned thereby Costs shall be borne by the party giving such notice

D 735 and see Gilbert & Smith 2 C D (1) Lildesley v Harper 7 C D 403 (2) Per Jossel, MR, Thorp v Holdsworth,

^{3 (} D p 640 (3) Clutton v Lec, 24 W R 607 (Eng)

⁽⁴⁾ Byrne v B, 5 L R Ir (Ch D) 134 and note there to, p 136, National Provincial Bank v Evans, 30 W R 177, but see confra Litzwalter v Waterhouse, 52 L J, Ch 83

⁽⁵⁾ Chilton v Corporation of London, 7 C

^{686,} judgment of Mellish, LJ , Rutter t

Tregent, 12 C D 758, Landergan v Teast, 34 W R 691

⁽⁶⁾ Welton v Sidebottom, 5 C D 342

⁽⁷⁾ Dwyer : Collars 7 Ex 639, Stulz : 5,5 Sum 460, Days C L P Acts, p 141

Taylors I vid , pp 440-56

ORDER XIII.

Production, Impounding and Return of Documents.

1. The parties or their pleaders shall produce, at the first bearing of the sut, all the documentary evidence of every description in their possession or power, on which they intend to rely, and which has not already been filed in Court, and all documents.

ments which the Court has ordered to be produced.

(2) The Court shall receive the documents so produced. provided that they are accompanied by an accurate list thereof prepared in such form as the High Court directs

Documents to be ready—If a plaintiff sussoricles on a document he not either produce it with his plaint or enter it on the list attached to it (O VII r 14). Any document which has not heen produced or entered cannot be received in evidence without leave of the Court (O VII r 18, see notes thereto). And by this rule the parties must bring with them and have in readiness at the first hearing, all the documentary evidence in their possession or power, (I) and on which they rely, and file it. But they need not file them unless they are

good and assignable cause, abstained from bringing it before the Court at the first hearing, (4) or formal evidence beyond suspicion such as certified copies of public decuments (5)

See Syed Ikram Hossem v Ram Lochun Dutt 23 W R 29 (1875) [s 128 of the Code of 1859, though it did not contain them, and was hold to be so limited]

⁽²⁾ Mahbub Hossem v Patasu Aumari, 1 B L R 120 (1868)

⁽³⁾ Syed Ikram Hossein v Ram Lochun Dutt, 23 W R 29 (1874), per Phear, J [s 128 of Code of 1859], Ranchhod Hirabai v Secre

tary of State, 22 B 173 (1896), Lulabati Maram v Bishun Chobey, 6 C L J 621 (1907)

⁽⁴⁾ Syed Ikram Hossein v Ram Lochun Dutt, supra

⁽⁵⁾ Ranchhod Hirabai v Secretary of State, 22 B 173 (1896), Lilabati Misrain v Bishun Chobey, 6 C L J 621 (1907)

the book, account or record in which it occurs to be returned to the person producing it

Stamp—This section was added to the last Code by sect 13, Act VII of 1888. A copy or extract from an entry in an account book filed under the provisions of this section and seet 1424 (now r. 7) requires no stamp (1).

Endorsements on documents releaded by the Court to be inadmissible in evidence, there shall be endorsed thereon and (e) of rule 4, sub-rule (1) together with a statement of its having been rejected, and the endorsement shall be signed or initialled by the Judge

A] 7. (1) Every document which has been admitted in

Becording of admitted evidence, or a copy thereof where a copy has been substituted for the original under rule 5, shall form part of the record of

the sut

(1863)

(2) Documents not admitted in evidence shall not form part of the record and shall be acturned to the persons respectively producing them

"Admitted in evidence"—The rules as to the admissibility of evidence will be found in the Evidence Act Primary rules are that documents must be proved by the party relying on them (2) unless admitted (3) And it is not sufficient that they have not been demed by the opposite party (4) Secondary evidence should not be accepted without sufficient reason (5)

"Form part of the record"—The corresponding section in the last Code was added by Act VII of 1888, sect 13 Documents which have not been proved but simply filed in accordance with a usage in the Mofussil should not be put up with the record It is the duty of the Judge to pass over such

⁽¹⁾ Kastur v Fakiria 26 B 522 (1902) s c, 4 Bom L R 223

⁽²⁾ Kirtcebash Mayettee t Ramdhun Khoria, B L R F B 658 (1867), Reazoon issa r Bookoo Chowdhrain 12 W R 267

⁽³⁾ Burjorji Cursetji t Muncherji Kuverji, B 143 (1880)

⁽⁴⁾ See cases in last note but one

⁽⁶⁾ See Ramalakshmi Ammal t Sira nautha Perumal, 14 M I A 570, 588 17 W R 553, Run Gopal Roy t Gordon Stuart, 14 M I A 453, 461 (1872) Syud Abbas M v Yadeem Ramy, 3 M I A 156

⁽¹⁸⁴³⁾

documents unproved but it is also the duty of the phader of the party against whom they are intended to be used, to mast that they should not remain on the record it all (1). When a document tendered in evidence in a Court of first instance is rejected as inchineable but is nevertheless allowed to remain on the record of the ease the mere fact of the document remaining on the record does not null at it evidence in the Appellite Court, but it must be tendered in evidence in that Court and irect left thereby (2).

8 Notwithstanding anything contained in rule 7 or rule 7 is Court may brider any document to be impounded and kept in the custody of an officer of the Court, for such period and subject to such conditions as

Impounding document—let \N of 1882 sect 113 as amended (sect 14 \text{ ket VII of 1885) \ \text{ claim was unde under sect 278 of the last Code by one L G R in respect of property attached as that of H \ \text{ Fhat claim was rejected. The District Fudge finding that the document under which L G R claimed executed in his favour by H \ \text{usas fraudulent preference ordered the document to be impounded and wrote across the document in red ink \ \text{declared} to be fraudulent D J \ \text{L G R obtained a rule for the return of the document and the expunging of those words which was made absolute the Court ordering that the words should be expunged and the document returned and holding that this rule does not apply to a case of this kind where that which is challenged is not the document itself which was admitted to be genume but the transaction evidenced by the document (3)

9 (1) Any person whether a party to the suit of not, is a Return of admitted desirous of receiving back any document documents produced by him in the suit and placed on the record shall, unless the document is impounded under rule 5 be entitled to receive hack the same.—

(a) where the suit is one in which an appeal is not allowed,

when the suit has been disposed of, and

(b) where the suit is one in which an appeal is allowed, when the Court is satisfied that the time for preferring an appeal has elapsed and that no appeal has been

⁽¹⁾ Kallida Pershad Dutt v Ram Hari Chuckerbutty 5 G 317 (1879)

⁽¹⁸⁹²⁾

huckerbutty 5 C 317 (1879)
(3) Rule 820 of 1304 Cal H C 23 May
(2) Har Cobind v Noni Bahu 14 A 3.56
1904

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preferred or, if an appeal has been preferred, when the appeal has been disposed of

Provided that a document may be returned at any time carber than that prescribed by this rule if the person applying therefor delivers to the proper officer a certified copy to be substituted for the original and undertakes to produce the original of required to do so

Provided also that no document shall be returned which, by force of the decree, has become wholly void or useless.

(2) On the return of a document admitted in evidence, a

receipt shall be given by the person receiving it.

Court may send for papers from its own other courts over records or from other courts.

Court may send for parties to a suit, send for, either from its own records or from other court, the record of any other suit or proceeding, and

inspect the same.

(2) Every application made under this rule shall (nuless the Court otherwise directs) be supported by an affidavit showing how the record is material to the suit in which the application is made, and that the applicant earnot without increasinable delay or expense obtain a duly authenticated copy of the record or of such portion thereof as the applicant requires, or that the production of the original is necessary for the purposes of justice.

(3) Nothing contained in this rule shall be deemed to enable the Court to use in evidence any document which under the law

of evidence would be madmissible in the suit

"The Court"—This rule, which corresponds with sect 138 of the Colo of 18.9, except that the latter section empowered the Court to send for records from public officer also, applies to Appellate Courts as well as those of original jurisdiction (1) The Judge should pass a distinct order on the application instead of recording the objectionable and meaningless order "Aults Shamd pesh" (2) But where a party petitioned the Court to send for certain documents and an order was made that the matter should be decided at the he ung, but no

Juggernath Schoot Mithomed Hossein
 W R 173 (1871)

further application was made, it was held that the applicant was not entitled to appeal on the ground that the record had not been sent for (1)

- "May."—The Court has a discretion, and is not bound to send for the necord (2) though the discretion must be judicially exercised, and, as in other cases where the legislature uses the word "may." where a proper case for the evercise of the power arises, the Court should exercise it (3). The Court will see that the facts set out in the second paragraph are made out in the affidavit But if so the Court ought not to refuse the application merely because in its opinion the documents cannot be produced before the termination of the trial (4). The Court is not bound to send for the whole record, but only such papers as are mentioned in the application (6).
- "Application"—This must show that the record is material, (6) that copies cannot be obtained, or that if obtainable they are insufficient, the original being necessary, as where copies cannot be attested by subscribing witness (7) It was held that in all cases the party for whose benefit the documents have been used should be required to file copies in the record (6)
- "Other Court "—As already stated the Court cannot now, as under the Code of 1859, send for records from public offices (9) The record must be that of a suit or proceeding in another Court. The proper means of obtaining the other records is by summons directed to the proper officer. The Court to which the direction is issued has no discrition to refuse to send records which have been sent for by another Civil Court (10).
- (1) Chundi Churn Sashmul v Doorga Pershad Virdha, 12 C L R 81 (1882)

(2) Hecramun Roy v Kazce Tahoour, 7 W R 109(1867)

- (3) Rughoonath Bose v Oomed Ali, W R, F B 117 (1864), at p 180, per Norman, Off O J, where the Court had not sent for the papers or considered them the case was remanded Ram Runjun t Gopee Bullub, 18 W R 127 (1872)
- (4) Krishna Churn Baisack e Protab Chunder Surma, 7 C 560 (1831) [the same rule applies as regards summens for writesses, ib]
- (5) Mt Janokeo Bebeet Shah Habeebul, 1864, W R 272 (1864).
- (b) Mollwo, March and Co t Pertab Chunder, I Ind. Jur N S. 283 (1880), Rughoonath Rose t Oomed Un W R. P B, 177 (1861)
- (7) See Louis Coraal r Gooroo Churn Choo, 15 W R 13 (1872), where the Court

- held that the party should first apply for re turn of original from the other Court, putting in a copy, and then, if refused, apply under this section
- (8) Natappa v Gapaya, 2 B H C R 341, 342 (1866)

(9) See Juggerath Sahoo v Mahomed Hossen, 15 W R 173 (1571) The Court of Wards was held not to be a Government Office in the ordinary scare of the term Sobbec Jha t Scahernath Jha, 15 W R 150 (1870), where anything must be done by the parts requiring it. Thus where the party requiring it at the farm it at the fact of the parts of the Court to obtain the necessary anython of convernment to its disclosure Lekhraje Pale Ram 2 A 11 C R 210 (1870).

(10) Gelsup Country Done : South r Natural Dec. 4 C. L. H. 56 (1973) Saving Clause.—Thus embodies the ruling in the case undermentioned.(1)

Provisions as to documents shall, so far as may be, apply to all other ments applied to material objects producible as evidence.

(1) Narappa v. Gapaya, 2 B. H. C. R. 341 (1866)

ORDER XIV

Settlement of Issues and Determination of Suit on Issues of Law or on Issues agreed upon

1 (1) Issues arise when a material proposition of fact or is a law is affirmed by the one party and denied by the other

(2) Material propositions are those propositions of law or show a right to sue

his defence

(3) Each material proposition affirmed by one party and

denied by the other shall form the subject of a distinct issue

(1) Issues are of two kinds (a) issues of fact (b) issues

(1) Issues are of two kinds (a) issues of fact (b) issues of law
(5) At the first hearing of the suit the Court shall, after

reading the plaint and the written statements, if any, and after such examination of the prites as may appear necessary, ascer tain upon what material propositions of fact or of law the parties are at variance and shall thereupon proceed to frame and record the issues on which the right decision of the ease appears to depend

(6) Nothing in this rule requires the Court to frame and record issues where the defendant at the first hearing of the suit

makes no defence

- 2 Where issues both of law and of fact arise in the same [states of law and of suit, and the Court is of opinion that the case fact or any part thereof may be disposed of on the issues of law only, it shall try those issues first and for that purpose may, if it thinks fit postpone the settlement of the issues of fact until after the issues of law have been determined
- 3 The Court may frame the issues from all or any of the is is in the state of the issues may be framed

 (a) allegations made on eath by the parties, or by any persons present on their behalf, or made by the pleaders of such parties,

- (b) allegations made in the pleadings of in answers to interiogatories delivered in the stut,
 - (c) the contents of doenments produced by either party.
- 4. Where the Court is of opinion that the issues caunot be court may examine witnesses or documents before framing issues.

 In the suit, it may adjoin the framing of the issues to a future day, and may (subject to any law for the time being in force) compel the attendance of any person or the production of any document by the person in whose possession or power it is by simmons on other process
- Power to amend, and strake out, issues.

 The Court may at any time before passing a decree amend the issues or frame additional issues on such terms as it thinks fit, and all such amendments or additional issues as may be necessary for determining the matters in contioversy between the parties shall be so made or framed
 - (?) The Court may also, at any time before passing a decree, strike out any issues that appear to it to be wrongly framed or introduced.

Object and effect of issues—The object of pleading is that each side order that each may bring forward evidence appropriate to the issues (1). The pleadings, therefore, are the first stage at which the differences between the parties are made to appear. They may contain an express admission. Pleadings, however, in this country lave hitherto not been construed with the same strictness as in England, where legal assistance of a highly expert character is always available. The Counts therefore, have refused to apply to Indian pleadings the strict rule that avarients not traversed must be taken to be idmitted (2). Orders VI and VIII now require a stricter practice which is itself justified by the increased professional efficiency. Where, however issues have been framed, it was held prior to this Code that avariments upon which no issue have been framed must be taken to be admitted (3). For if praties intend

⁽¹⁾ Savid Muhammad t Fittch Wuham mid, 22 (-324), 22 1 A 4 (1891)

⁽²⁾ Mt Anun Imooyeo 1 Sheeb Chunder Roy 9 M 1 A 257, at p 301, 2 W R P C D (1562), Mt Ahmedo Begum 1 Dabe 1 ran 1 Is W R 257 (1572) [but

see Chun lee Churn t Mobaruck Mi, 12 W R 40J (1870)], Ma thop raid t Gajudhar,

¹¹ C 111, 118 (1859)
(3) Wt Ahmedee Begum t Dabee Per
sum 1 18 W R 257 (1872) An laste a limit
suon in la ling see O. VIII r 5

to ruse a question they should request the Court to frame an issue upon it Where parties in a lower Court allow a sunt to be conducted as if a certain fact was admitted, they cannot afterwards in appeal question it, and recede from the tacit admission (1) It has been said that the duty of raising issues rests under the Code on the Court, and that an admission cannot be inferred from the omission to ask the Court to raise an issue (2) The Court no doubt frames the

that a

attention to it, with a view to recream if it is contested or admitted, and if contested to raise an issue on it. If this is done and no issue is raised, then the averiment must be taken to be admitted, otherwise these provisions are useless. As regards other cases, something may depend on the circumstraces, but if the detum cited was intended to be of general application, it is, with respect, submitted to be insourced.

"One party."—That is ordinarily the plaintiff on one side and the defendant on the other. At issue between co-defendants is generally not allowable (3) In some cases, however, thus may be done, as where the recording and determination of such issue is necessary to giving the appropriate rehef to the plaintiff (1). No issue can be decided between co-defendants if the suit is dismissed (5).

"Shall" Omission to settle issues—The Court is directed to do so, and to omit to settle in order that the parties may before the trial know to what points they would have to address themselves is a great irregularity (6). At the same time, if it appears that the necessary points have been raised and discussed, the omission to settle issues is not fatal to the trial of the suit (7). The Code contemplates the settlement of issues whether there is a written statement or not, though it is not obligatory on the Court to frame issues if the defendant makes no defence (8). And where hoth parties invoked the decision of the Court upon a question raised by the pleadings and the question was argued,

1 25 27 (1860)

pleadings

⁽¹⁾ Moluma Chander v Ram kashore, 15 ls. L. R. 142, 155 (1875) but see Madho persad v Gayadhar, 11 C 111, 118 (1884), in this case, however, it is to be noted that it was not suggested that further evidence was obtainable

⁽²⁾ Gano Hari Sawant & Shri Dev Sudheshwar, 4 Bom L R 58 (1901)

⁽³⁾ Degumber Mitter v Khetter Wohun Mitter, 2 W R 45 (1865)

⁽⁴⁾ See s 11 as to res judicada in such cases, and Madhavi t Kalu, 15 M 261 (1892), Kalee Kinkur t Kristo Mungul, 11 W R 462 (1869)

⁽⁵⁾ Bevan v Crawford, 6 C D 29

⁽⁶⁾ Muitayan Chettar v Sangul Vira, 12 C L R 169, at p 174 (1882), Baboo

Rewan Pershad : Jankee Pershad II V I

^(?) Katchekallyans v Kachwigas, 12 M A 495 (1890), especially where the parties well knew what the question between them war, 14 Witna v Syad Fod Rub, 13 W I A 573 (1870), 15 W R P C 15, and this procedure has been adopted without objection, Mahoused Basiroollah Ahmed Ah, 22 W R 448 (1874) Sayad Muhammad v Patteh Widshammad 22 C 324 (1894) where the questions though not formally stated in the issues had been sufficiently open upon the

⁽⁸⁾ Rustun Gazı v Tara Prosanna Chowd hurt, 11 C W N 871 (1907)

it was held that the judgment upon it was not ultra vires because an issue was not framed embracing the whole question (1) Where, however, a settlement of issues is considered necessary the case may be remanded on appeal for a new trial after settling and recording the points in dispute, (2) as also where the issue does not sufficiently direct the attention of the parties to the main question to be decided (3)

On what fixed.—In the first place issues may be framed on the plaint and written statement which are the pleadings in the suit (4) When the issues come to be stated wider questions may be propounded (5) The Court is not hound to try the suit in the manner in which the plaint is framed, for its object is merely to bring the matter in dispute between the parties before the Court but on the settlement of issues the Judge is to ascertain the question (6) In fact the issues fixed, and not the pleadings, ought to guide the parties as to pro duction of evidence (7) The real points, however, are often missed or obscured by the infelicitous mode of drawing pleadings which sometimes prevails in the Mofussil And it is therefore the duty of the judge to ascertain from enquiry of the parties or their pleaders the real points in dispute between them A Court is not hound down to the language of the pleadings (8) Issues, it has heen said, may he settled even where a plaint discloses no cause of action (9) though a Court has also in such case a discretion to reject it A defendant is not precluded from setting up a defence which does not appear in his written statement (10) But the issues rused should not be inconsistent with the plead ings Thus, where the plaintiff sued alleging a deed purporting to be executed hy himself to be a forgery, the Court should not admit the inconsistent issue whother it was executed under undue influence (11) The Court may also look to interrogatories and contents of documents produced

What should be subject of issues —As a general rule only such averments should be made the subject of issues as are essential to support the cause of

⁽¹⁾ Soorjomonee Dayce v Suddanund Mohapatter, 20 W R 377 (1873)

⁽²⁾ Baboo Rowun Pershad : Jankee Pershad, 11 M I A 25 (1866)

⁽³⁾ Oolagappa Chetty v Arbuthnot, 1 I A 268, 14 B L R 116 (1873), foll Kuverp

¹ Babal, 19 B 374, at p 380 (1890) (4) knsen Lall v Lalljeemult, 1 Ind Jur N S 364 (1866)

⁽⁵⁾ See Sm Kamini Debi v Asutosh Mookerjee, 15 I A 159, 162, 163 (1888)

⁽⁶⁾ Arbuthnot & Co : Betts, 14 W R 181 (1870)

⁽⁷⁾ Huro Soondureo Debia v Ameena Begum, 5 W R Act X 72 (1866)

⁽⁸⁾ Apaya v Rama, 3 B 210, 213 (1873), Moulvio Abdoollah v Shaha Mujeesooddeen, 15 W R 286 (1871), Mahomed Mahmood v Safar Ali, 11 C 407 (1885), Modho v Dongre,

⁵ B 609, 614 (1881), Radha Prasad t Lal Sabeb, 13 A 53, 64 (1890), a procedur's resembling the old Common Law pleading fore teams." Thakur Roban t Thakur

Surat, 12 I A, at p 56 (1884) (9) Mun Gobind Sucar v Umbika Monec, 16 W R 218 (1871)

⁽¹⁰⁾ Soonder Naram v Shaikh Namdar, 21 W R 407 (1874), Gungapershad Sahu + Maharam Bett, 12 I A 47, 50 (1881), Secretary of Stato r Dipchand, 24 C 306, at p 309 (1890), where hie objection though not taken in the written statement was

raised in argument
(11) Mahomed Buksh Khan z Hosseni
Bib, 15 I A S (1888) or failed for wast
of consideration, I55appa v Ramalakahn
amma 13 M 546 (1890)

action and are demed by the defendant, or as are essential to support a plea and are denied by the plaintiff, and mere pieces of evidence which are to be adduced to enable the Court to infer the truth of a material statement ought not to be made the subject of separate issues (1) Where a fact is expressly or impliedly admitted no issue, of course, arises, nor is proof of that fact necessary But where the proof given falls short of legal requirements, the mere default of a party to contest a point which also falls short of an admission will not avail to cure the actual want of evidence (2) If a plaint and its proof lead to particular issues the Court should raise them and give relief, provided they do not come by surprise on the defendant and are within the scope of and not inconsistent with the pleadings (3) But a plaintiff will not be allowed to set up one case, and having proved another, ask issues to be raised to suit the proof (4) See, however, notes on "Amendment of Issues," post If a case not alleged by the plaintiff is disclosed on the evidence the Court can allow it to be set up, provided a specific issue is raised for it, and the defendant is given an opportunity of meeting it (5)

Some of the cases which have been eited in this connection are as follows but on lease, genuineness of which disputed, (6) suit for kabulyat, (7) rent, (8) moitgage, (9) account, (10) easement suits, (11) plaintiffs suing as partners, (12) suit against representative of person deceased, (13) misdescription of plaintiff, (14) misjoinder of defendants, (15) suit for damages, issue framed to recover rent, (16)

suit for malicious prosecution (17)

Where the parties accept issues laid down by the Court they are bound

(1) Birch v Farzind Ali 3 A H C R 303, 307 (1871)

(2) Bhoobun Chunder Shome v Ram Dyal Shamunto, 14 W R 55 (1870)

- (3) Obboy Churn v Woomesh Chunder 2 II, de, 203 (1864). Asshun Pershad i Bhowance Deen I Agaa (1860) 47 F B I shan Chunder: Shama Chun Bhutto, 6 W R P C 57 (1866). Sharoda Koomaree t Wohnte Mohun 20 W R 272 (1873), Virssami Granunt i Vyjasvami Granunt, 1 VI II C R 471 (1863).
- (4) Obh y Churn v Woome h Chunder sepra
- (5) Parashram t Miraji 20 B 569 (1835) (6) Thakourauce Dossee t Golick Chun
- d r. 5 W R 157 (1866)
- (7) Ra lha Kislore: Goluck Chunder, 11 W R 366 (1869)
- (8) Kutty Sabramanya e Chuma Muttu, 3 M H C R 25 (1806). Parbooddeen Mullak e Wolarm Bibee, 14 W R 143 (1870). Miss Mack e Luchure Naram 17 W R 404 (1872). Sh rhoomar Singh e Cruiss, 6 W R 100 (1886).
 - (1) Muzboot unch i Mi (1 un 1 r M sh v

16 W R 44 (1871) Nundo Lali Vitter : Prosunnomoyee, 19 W R 333 (1873), Khoob Chund v Uchul Singh S D N W, 1862,

- (40) Bykunt Nath Sandyal ε Malec Churn Paul 17 W R 149 (1871), Prausochk Ishan ν Ramzan Khan S D N W 1863, ρ do0 account settled Kahen Pershad ε Blow ance Deen 1 Igra 1 B 47 (1866) Obhoy Churn ε Woomesh Chund r 2 Hyd _03 (1864)
 - (11) Achul Mahta + Rajun Mahta + 6 (812 (1881) - Rajun Koer + M (1 Hossem + (3)4 (1880)
 - (12) East Indian Railway (Jorda (14))
- L II (1870) L O J (13) Aval Khadar e An Hou Set 2 M II (
- R 423 (1865) (11) Doorga Varain e Birjo Kishote 3 W
- R 172 (1875) (L) Rance Madhub Laborce r Brarodass
- Dey 15 W R 169 (1671)
 (10) Narasan Gamesh e Hari Gamesh, 13
- B 664 (1893) (17) Raboo Lam Bu Heen c Sudar Deal Smalt 17 W 1 104 (1872)

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by them (1) Where a defendant pleaded limitation but placed that issue upon the simple fact that he himself had possession for twelve years and upwards which issue was found against him held it was too late for the defendant in appeal to object that that finding did not dispose of the issue of limitation (2)

Order of disposal—A Court is not under any obligation as to the order in which it is to try the issues which are raised before it, but may dispose of them in the way which it considers most likely to conduce to the ascertamment of the truth (3) But issues should be tried separately, and not mixed up together (4) Issues of law may, under the circumstances stated in r. 2, be tried first (5)

"Nothing in this rule"—It was held under the Code of 1859, that if both parties appear, issues should be recorded, but if the defendant does not appear it is not possible to ascertain the points at which the parties are at variance In such a case i Court does not frame issues, but hears the cases exparte (6) The rule explessly oxcludes such a case

Amendment of issues -It will be observed that the word "may" occurs in the early part, and the word "shall" in the concluding portion of the first paragraph of r 5 The power of amending issues is almost the same as that given by the Common Law Procedure Act, and it has been held that a Judge is not bound to make such amendments, except for the purpose of more effectually putting in issue, and trying, the real question in controversy as disclosed by the pleadings on either side In some cases the Courts, in their discretion, have gone boyond this, and, where no injustice would be done to either party, have allowed issues to be raised on matters which do not strictly come within the scope of the pleadings The power to allow such amendments is given by the first part of the rule which give a discretion, and not under the obligatory words of the latter part of the rule (7) The power which is given to the Court by r 5 (corresponding with sect 141 of the Code of 1859) to modify the issues in the course of the trial is meant to enable it to bring out the questions really arising out of the counter averments of the parties It is not intended that the Judgo should take the case altogether out of the hands of the hitgants and make for the plaintiff or defendant a case which he had no intention of making for himself (8) A Court's power of raising additional issues is co extensive with

Shew Sukoy Lall t Wajed Ah Khan,
 W R 205 (1870), Moondur Beebee t
 Hunooman Pershad 11 W R 277 (1869),
 Bem Chunder t Tarmee Chunder, 11 W R
 (1869)

<sup>-0 (1869)
(2)</sup> Kisto Mohun v Noyan Tara, 10 W R

<sup>359 (1868)
(3)</sup> Situath Dose : Doyadionath Dose,

²³ W R 54 (1874)
(4) Umbika Soonduree v Woodin 3 W R
2-5 (1850)

⁽⁵⁾ See Secretary of State : Jehinger, 1

Bom L R 342 (1902), where in application to this effect was refused on the ground that the issues of law and fact were not

separate
(6) Ameer Ali i Imamooddeen 15 W 1
145 (1871)

⁽⁷⁾ Nchora Roy 2 Radha Pershad Sugh 5 C 64 (1879) See Shamu Patter 2 Abdul Kadir, P C, 16 C W N 1109 (1912).

¹⁴ Bom L R 1034, 39 I \ 218
(8) Naro Huri v Appurnabat 11 B 160 B

at p 151 n (1874)

its power of amending plants, and is subject to the same restrictions. A Court therefore was held not authorized by the corresponding section to this rule to frume new issues which had the effect of altering the nature of the suit (1). A permission to a defendant in file a supplemental answer does not entitle him to make a new case or raise a freel issue in contradiction of his former defence (2). Every matter fairly within the seopa of the plaint, if important for the decision of the substantive difference between the parties, should be framed into an issue, and the duty of framing them is thrown in the Court in order to render substantial justice, and to prevent a party suing from heing remitted to a new suit, when, by a amtable order as to terms upon which amendment shall be made, the Court, by framing additional issues, can determine in the existing suit the real question in controversy between the parties (3)

The rule says "et any time" heforn decree But when there has heen a hearing and settlement of issues, the Court will, ordinarily, not exercise its discretionary power to raise a new issue except on clear proof of inadvertence, or mistake, or the discovery of new matters affecting the merits not within the knowledge of the parties at the date if the forumer settlement of issues (4) If the Court intends to frame an additional issue, it should do so and then ma a day for the further hearing upon such issue. It should not merely record its intention to do so and leave the actual framing for the time of giving judgment (5) plant has been amended in first appeal and the suit remanded for the determination of a fresh issue arising upon such amendment (6). The form, however, of a suit may not allow of particular lights heing declared in it (7). An amendment may be set saide in appeal (8).

Although, under certain circumstances, a Judge at a trial may allow amendments or raise sease other than those settled yet when a Judge at the retitement of issues, has refused to raise a certain issue, that question ought not to he reopened at the trial, and the Judge at the trial ought not to modify the issues so as to re open any question which the Judge settling the issues has decided (9) When a Judge transfers a case to his own file he is nt liberty to amend the issues first laid down, and to frame additional issues and to go into the whole ease, except upon any question upon which there has been a judicial finding (10). The first part of cl (1) of r. 5 leaves it in the discretion of the Court to frame such

 [\]arayan Gaucsh t Hari Ganesh 13 B 664 (1889) but see observations at p 614, in Modilo t Dongre 5 B 609 (1881), and as to unendments of plaints, see notes to O \frac{1}{2} r 17

⁽²⁾ Douglas t Collector of Benares 5 M 1 \ 271 (1851)

⁽³⁾ Lishen Pershad t Bhawenee Deen,

⁽³⁾ Albhen Pershad t Bhawenee Deen, 1 Agra, F B 46

⁽⁴⁾ Baboo Lall t. Ram Aarsun Coryton, 8 n (1865) In Bolyo Meah e Khetoo Goras, O.W. R. 208 (1873) amendment was allowed after all the evidence had been taken. 4s 4o new matter turning up during trial, see 4gs Syud Saduck t. Hadjeo Jackarah Mahomed.

² Ind Jur N S 309 (1867)

⁽⁵⁾ Kamul Kaminee t Obhoy Churn Ghose 15 W 1 131 (1871), Srechurgo Mundul t Judoonath Ghose, 10 W R 169 (1868)

⁽⁶⁾ Abdul hadar v Vihomed 15 M to (1890) (7) Americonissa Khatoon v Abedoonissa

Ahatoon, 21 A 87, 112 (1875) See Shareda Koomaree t Mohince Mohin, 20 W R 272 (8) Narayan Ganesh r Hari Ganesh, 13 B

⁽⁸⁾ Marayan Ganesh r Hari Ganesh, 13 B 664 (1889)

⁽⁹⁾ Bolyo Chund Sing : Moulard, 4 C 572 (1878) (10) Tarucknath Mookenee : Gource

Churn Mookerjee, 3 W R 147 (186w)

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additional issues as it thinks fit, but the latter part makes it imperative to fame such additional issues as may be necessary for determining the matters in controversy (1)

Appellate Courts—In appeal the ease should be dealt with not on the mere wording of the plaint, but on the issues settled for trial, and the mainer in which the ease was tried by the first Court (2). A ground of defence, which was not taken in the written statement nor made the subject of issue, was not allowed to be argued (3). Where issues have not been settled, but the judgment states the points for consideration which appear to have been raised by the parties, then these points have been taken as the issues (4). Where a new issue is raised in the Appellate Court, it should be done in such a way as to give the parties the fullest opportunity of producing evidence upon it (5). See O. XLI, it 25, 26.

Questions of fact or law may by agreement be stated in form of issues.

Questions of fact or law to be decided between them, they may state the same in the form of an issue, and enter into an agreement in writing that, upon the finding

of the Court in the affirmative or the negative of such

(a) a sum of money specified in the agreement or to be ascertained by the Court, or in such manner as the Court may direct, shall be paid by one of the parties to the other of them, or that one of them be declared entitled to some right or subject to some hability specified in the agreement,

(b) some property specified in the agreement and in dispute in the suit shall be delivered by one of the parties to the other of them, or as that other may direct,

(1) Shamu Patter v Abdul Kadır, P C

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 ¹⁶ C W N 1009 (1912), 14 Bom L R
 1034, 33 I A 218
 (2) Rajah Rup Singh t Ram Baism, 11

I. A 149, at p 155 (1884), 7 A 1
 (3) Young Hmoon litaw t Mah Hpwah,

⁽³⁾ Young Imoon Haw t Man Inwan, 111 A. 109, at p 120 (1884), 10 C 777, and see Punchanan Roy t Troylucko Mohunce, 14 W 1 166 (1870) [doparture from case made in Lower Court]

⁽⁴⁾ Gunga Pershad Sahu : Maharani llibi,

 ¹² I A 47, 50 (1884)
 (a) Latoo Mundul v Bhoobun Mohun, 17
 W R 361 (1872), Ram Persaud Dutt v

W R 361 (1872), Ram Persaul Barry, Arishto Mohun Shaw, 18 W R 297 (1872), W R

no the Laban

Chunder & Shaikh Dhonaye, 11 W R 61 (1863)

- (c) one or more of the parties shall do or abstain from doing some particular act specified in the agreement and relating to the matter in dispute.
 - Where the Court is satisfied, after making such inquiry is as it deems proper,-

Court, if satisfied that agreement was executed in good faith, may pronounce judgment.

(a) that the agreement was duly executed by the parties,

(b) that they have a substantial interest in the decision of such question as aforesaid, and

(c) that the same is fit to be tried and decided, it shall proceed to record and try the issue and state its finding or decision thereon in the same manner as if the issue had been framed by the Court,

and shall, upon the finding or decision on such issue, pronounce judgment according to the terms of the agreement, and, upon the judgment so pronounced, a decree shall follow.

Agreement to state issue -These rules deal with the stating by consent of a special issue in a suit, whilst O XXXVI deals with proceedings without suit on the agreement of the parties (1) These rules provide for what may be called the adjustment or compromise of a suit, not absolutely as does O XXIII r 3, but contingently on the opinion of the Court on certain issues of fact or law submitted to it (2) Upon the finding of that issue the adjustment or compromise becomes absolute, and when it does, the duty of the Court is to pronounce judgment (3) The word "may ' in the corresponding section to 1 7 meant "shall," and the Court was bound to give judgment according to the agreement. even though specific performance of it might ordinarily be refused (4) In a case decided under the Code of 1859 the defendants filed a regular appeal. The respondent objected that no appeal would be as both parties had entered into an agreement in writing to abide by the determination of a single issue set forth in the agreement, and which had been decided against the appellant. It was held that the Lower Court's decision on an issue so determined by agreement could not be contested in the appeal which was dismissed (5) These rules deal with a question being referred to the finding of the Court But where the question of fact was referred to the finding of a Commissioner at was held that the principles had down in these rules were applicable and that the defendants were estopped

⁽¹⁾ See cases in notes to O 34, rr 1 8 Annual Practice, 1905 p 449 and rr 235

⁽³⁾ Ib (4) Ib at p 216

⁽⁵⁾ Hadee Alee t Khorshed Begum S D V W 1861, p 335

⁽²⁾ Gocullas t Scott 16 Born 202 216 (1891)

from impugning the decree given by the Court in accordance with the finding of the Commissioner (1). In the absence of such an agreement the Court enunct go outside the allegations in the plaint to decide an issue as to whether the plaint discloses a cause of action (2).

(1) Bahır Dıs Chackravarlı v Nobm (2) Kıbıtıshı Osmond Beeby, 19 C 557 Chunder Pal, 29 C 366 (1901), s c, 6 (1912), 15 C W N 516 C W N 121

ORDER XV.

Disposal of the Suit at the first Hearing.

1. Where at the first hearing of a sint it appears that is. the parties are not at issue on any question Parties not at issue. of law or of fact, the Court may at once pronounce indement.

Parties not at issue -This rule corresponds with sect 111 of the Code of 1859, and 152 of the last Code If the defendants voluntarily appear in Court and confess judgment, no summons is necessary for their appearance, and the Court may at cace give judgment for the plaintiffs (1) When the plaintiff sues the right person, but serves the summons on another person of a sumilar name, who appears and denies liability the suit should be dismissed with costs (2)

Where there are more defendants than one and any one is One of several defend. of the defendants is not at issue with the plaintiff on any question of law or of fact, ants not at issue, the Court may at once pronounce judgment for or against such defendant and the suit shall proceed only against the other defendants

One defendant not at issue -In in action commenced against several joint debtors, judgment recovered against one of them who adaints the claim does not but the further prosecution of the suit against the others (3)

(1) Where the parties are at issue on some question of [s. 1 law or of fact, and issues have been framed Parties at Issue by the Court as herembefore provided, if the Court is satisfied that no further argument or evidence than the parties can at once adduce is required upon such of the assues as may be sufficient for the decision of the suit, and that no injustice will result from proceeding with the suit forthwith, the Court may proceed to determine such issues, and, if the finding thereon is sufficient for the decision, may pronounce judgment accordingly, whether the summons has been issued for the settlement of issues only or for the final disposal of the suit

Provided that, where the summons has been issued for the settlement of issues only, the parties or their pleaders are present and none of them objects.

⁽¹⁾ Bank of Bengal v Currie, 3 B L R Bank v Wahomed 1brahim 4 B 619 (1880) 403 a c, 12 W R 432 (1869) (3) Dick t Dhunp 25 B 378 (1901)

⁽²⁾ London, Bombay and Mediterrancan

(2) Where the finding is not sufficient for the decision, the Court shall postpone the further hearing of the sint, and shall fix a day for the production of such further cyclence, or for such further argument as the case requires.

Determination of issue -A Judge cannot dispose of a suit at the first hearing if a party appears and objects to the adoption of that procedure (1) When a summons has been issued for the settlement of issues only, a Judge should not proceed and try the cause unless under the circumstances laid down in this rule, for otherwise he might preclude a party from adducing evidence in support of his case, (2) but if the evidence adduced is decisive of the matter in dispute, then the Judge may dispose of the cause unless either of the parties distinctly objects and asks for time to produce evidence in support of his case (3)

In the under mentioned case (4) the Privy Council observed entering upon the particular questions raised by this appeal, it may be right to observe, that the Courts in India, in disposing of the case, were bound to proceed as the High Court appears to have preceded, upon the facts alleged by the plaint, and upon the assumption of the truth of those facts When a plaintiff, on certain alloged facts, asks relief, and is unable to obtain a trial of the facts, and a hearing on the facts that he may establish, by reason of the con clusiens of law which the Judgo forms on the case in its then condition, justice requires that the Court should proceed upon the plaintiff's allegations The caso must be determined as if it had arisen on a demurrer to a pleading or to evidence where such procedure exists Courts cannot be justified in refusing to allow cases to go to proof upon any other assumption than that the facts alleged are capable of proof, and are preved This assumption of the truth of the facts alleged must, however, be limited to the consideration of the legal effect of the facts alleged upon the bars raised against the trial of those facts

Where the summons has been assued for the final disposal of the suit and either party fuls Fallure without sufficient cause to produce the evidence. evidence on which he relies, the Court may at once pronounce judgment, or may, if it thinks fit, after framing and recoiding issues, adjourn the suit for the production of such evidence as may be necessary for its decision upon such issues

Failure to produce evidence -It was held under sect 145 of the Code of 1859, which corresponds to this rule, that although a case may have been set down for final disposal, yet if it be a case in which further evidence is required the Judge is bound to adjourn the case, unless he is satisfied that the plaintiff has, without sufficient cause, failed to produce his evidence (5)

hearing is close l)

⁽¹⁾ Krishnabhupati e Rama Vurti 16 M

^{193 (1892)} (2) Jeewun v Goolab Khan 1 V W P

^{147 (1869)} (3) Soorendro 1 crsha l + Jugobundho, 22

W R 426 (1874)

⁽¹⁾ Nuzur Ally t Opoodhyaram Khan, 10

VI J 1 540 552 553 (1866)

⁽⁵⁾ Moonshee Syul Ameer All : Baboo Run Bahadoor Singh 7 W R 84 (180") See Bat Kashibai t Shidapa Annapa 37 B 682 (1913) (case shoul I not be a hourn I for | reduction of further evidence after the

ORDER XVI

Samemon and Allendares of Wateries.

1. At one take the rat is made tol, the parties may be detained in application to the Court, or to such the stillness of rectus to her as it appears in this behalf, summons to persons also cattered necessiry and either

to give evidence er to pisslince docuir ents,

Buttimons on withers. When the early some a corresponding to the form of the appearance of the form a transfer of the form a transfer of the form a transfer of the form a transfer of the form of the

(1) N In Clusher P v. e. to use Monjune 23 W. B. M (1974), where the tours all of that parties who have the barne's of high above only to be left to manage their count name, without inderference from the Court

(2) Bai hali e Alarakh Puthai 15 lt % (1840)

(3) In., Kaji Minad e Kaji Makamad, 9 Il. 20x (1884), Gera Chan I Islaoo e Haqi Germar Boos, 5 W. R. 111 (1866), Ram I hal Pandoy e Wahed Alli blan, 14 W. R. 66 (1880) Under the Code of Both the Gunt had very little, if any, discretion at all in the matter, afth the persent as will as the last Code above there is none except where there is alone of procedure. See Rapindro Aurain, S. Rapah Kunud Naram, 3 C. L. R. 569, as regards exemption from guing evalunce in Court, we et 401.

(4) Raia Phul Pansh y r Wahed McKhon, anger

(5) Net 151 Of 257, to Pr Code, though their was more presentation of the same character in the hast code, the matter might have been dealt with under the informal power states.

(b) han Ahmad + han Mahamad 4 B 305 (1881), that ad ha hr i Shaikh Abin Mudha 24 W R 240 (1974) Unfer tin tode of 1851 the tourt had a decreten to refuse summons if the ambanton was made at a time which appeared to mile! it impossible that the witness a should be brought Rajendro Saram . Rajah Kumad Namain, J ! L R 56J (1878) Indice Chun ler : Dunlop 9 W R 530 (1868), but see Brojo Nath Mookhopadhya r Pretap Chunder, 22 W R 206 (1874), and now the Court should assue summenses at the apple cant s risk, aml unk sa proper cause is shown refuse to adjourn the la aring if the witness is not mattendance Bhagwat Dasa Dibi Din, 18 1 215 (1891)

Where the party had himself originally undertaken to bring the witnesses it was held that his failure to do so was no sufficient reason for depriving the party of his right to have subpoems issued, although it might be a reason for not waiting for them if the plaintiff's case had been in other respects finished before they could be examined (1) In fact the question whether a Court should issue a summons or should adjourn, are two entirely distinct matters (2) The Court has, except in cases of manifest abuse of procedure, no discretion to refuse an application for summons. Even after issues have been fixed or the hearing has commenced, the Court must grant summonses if applied for, though it may inform the party applying that it does not intend to adjourn the hearing for the attendance of the witness. For it might happen that the hearing was not concluded before the witness appeared and that it would be right to hear the witness so summoned , (3) and a Court cannot tell beforehand what means a party may have for facilitating the attendance of his witnesses (1) If the Court wrongly refuses summons the High Court may interfere in revision (5) If summons has been granted and the witness does not appear, the Court will proceed unless an application is made The Court ns shown

first fuls, or to take stronger measures, as to which see O. XVI rr. 10-12, 17, 18 It is, however, the business of the party to move the Court to do what is necessar) for his ease (6) When, however, a witness has been summoued to give evidence in a case which is not reached, it is not necessary to issue a fresh summons to the witness. He need only be wirned that his attendance will be required on the day to which the hearing of the case may be postponed (7) The question of the issue of summons must also be distinguished from the question whether a party will be allowed to supplement his evidence after his case has been closed (8)

2. (1) The party applying for a summons shall, before the summons is granted and within a period Expenses of witness to be fixed, pay into Court such a sum of to be paid into Court on applying for summons. money as appears to the Court to be sufficient to defray the travelling and other expenses of the person summoned in passing to and from the Court in which he is required to attend, and for one day's attendance.

⁽¹⁾ Pandurang Anpare Keshavp Jadbava, 6 B 742 (1882)

⁽²⁾ Abdool Kadir (Shaikh Abra Mirdha, 24 W. R. 290, 231 (1575)

⁽³⁾ Bu Kali t. Alarakh Pirkhas, 15 B 86 (1800); Krishna Churn Baisakh : Protab Chunder Surma, 7 C. 500, 565 (1881) [Court should not refuse application merely because in its opinion the witness cannot be present or document cannot be produced by fore termina tun of the trul the application may in the

event prove fruitful? (4) See Kap Ahmad t Kap Mahamad, 9 H

^{30%,} at p 310 (1581)

⁽⁵⁾ Ib to Dowlet Mandar r Oparao Single, 14

W R 336 (1870)

⁽⁷⁾ Subbarayadu 1. Chenchuramata, 21 W 200 (1900), Vijayaraghava i Komur appa, 22 M L J. 109 (1912)

⁽⁵⁾ Synd Abdool Ahr Mullick Suddensel den, 11 W R 193 (1870).

- (2) In determining the amount payable under this rule, the Experts Court may, in the case of any person summoned to give evidence as an expert, allow reasonable remuneration for the time occupied both in giving evidence and in performing any work of an expert character necessary for the case
- (3) Where the Court is subordinate to a High Court, regard shall be had, in fixing the scale of such expenses, to any rules made in that behalf

Expenses of witnesses - See sect 151 of Act VIII of 1859 Before a witness is summoned, a sufficient sum for his expenses in going to and from the Court and for one day's attendance must be deposited in Court (1) It was in an early case (2) held that the sum fixed must have reference to the travelling expenses or other charges of a similar nature, and where a witness who had incurred ne expense in travelling asked for compensation for loss of time the application was refused. A party need not pay any more into Court until it has fixed what is reasonable (3) Once swern, a witness must give his ovidence even though his expenses have not been paid. But he does not cease on that account to be under the protection of the Court, and he is entitled to be paid his expenses though he has not applied for them before giving his evidence (4) The provisions relating to the payment of witnesses no doubt contemplate that the expenses should be paid by the party who asks the Court to summen the witness before he gives his cyldence but they do not declare that unless this is done the Court has no power to require their payment. They are intended for the benefit of the person summoned and there is nothing in them to protect the party who asks the Court to issue a summons from his hability to pay the expenses of the witness if the Court per incurram or in order to save delay issues the summons without seeing that the party applying for it discharges the duty imposed on him by law If he partially fails in such duty, and deposits some part but not the whole of the expenses the Court may require him to pay a further sum, and may levy the amount summarily from him There is no reason why the party should be in a hetter position when he fails to deposit any part of the expenses or if the witness has given his evidence than if he has not done so (5) A Court while bound to fix a reasonable amount to defray the expenses of a witness may allow only travelling expenses and charges of a similar nature not including compensation for loss of time. It may be a question whether this is in all cases sufficient. The case of expert witnesses is, however recognized as exceptional and the section has been amended to allow of a fee to such a witness

⁽¹⁾ Se Saran t Biswas 5 W R S C

Ref 6 (1860) as to further expenses seer 4
(2) Nawab Nazim t Prosono Nazim L
11s le 230 (1864)

⁽³⁾ Mol 11 Muntir + Brj Bl olan 9

W R 127 (1868)

⁽⁴⁾ London Bombay & Mediterranean Bank r Vahomed Rerahm, 4 B 613 (1850) (ω) Vol t: Chenchuramaya ν Annasmay) Varasmbayva 17 M L J 435 (197)

- (b) without such limits but at a place less than fifty or (where there is railway or steamer communication or other established public concegance for five sixths of the distance between the place where he resides and the place where the Court is situate) less than two hundred miles distance from the Court house
- 20. Where any party to a suit present in Court refuses, is in Consequence of refusal of party to give evidence. When called on by Court, to give evidence or to produce any document then and there in his possession or power, the Court may pronounce judgment against him or make such order in relation to the suit as it thinks fit
- 21 Where any puty to a suit is required to give evidence is in Rules as to witnesses to apply to parties summoned or to produce a document, the provisions as to witnesses shill apply to him so far as they are applicable

Parties -The preceding rules deal with witnesses who are not parties A party may appear by pleader or in person. In the former case if the pleader refuses or is unable to auswer any material question the Court may direct the absent party to attend under O X r 4 and on his failure to do so may pronounce judgment against him If a party whether appearing hy pleader or in person who is present in Court refuses without lawful excuse to carry out an order under r 20 the penalty is that stated therein Under sect 170 of the Code of 1839 a party who being summoned to give evidence or to produce a document failed without lawful excuse to comply with the order was also hable to have judgment passed against him. But this section has not been re enacted, and hy sect 178 of the last Code and r 21 of this Code a party is to be dealt with in such a case on the same footing as any person summoned as a witness. The liability therefore to judgment in case of default is limited to the specific instances mentioned in O X rr 4 and 20 supra Contempt of Court may be punished by fine and imprisonment (1) This rule gives a further power which is one to be used with forbearance and is to be enforced generally in cases of contumacious refusal (2) What is or is not lawful excuse must depend upon the circumstances of each case. The decision in one case can scarcely be a guide in another unless the facts are precisely the same (3) R 20 applies to Probate cases but it will not justify the Judge in dispensing with proof of the execution of a will (4) It has

⁽¹⁾ See as 480 484 Cr Pr Code

⁽²⁾ See Jeshta Ramji v A vaker Vullandea gata 3 Vi H C 1 239 (1867) where though the case was und r the Cod of 1859 the encumstances were smilar to those of r 20

⁽³⁾ See Baboo Durga Dutt t Jhengoor

Jha 18 W P 63 64 (15 2)

⁽⁴⁾ Ravp Ranchod Vail v Visla of Ranchod Vail J B 241 (1884) ref Mon mohinee Guha v Banga Chandra Das 31 (357 (1503)

been held by the Pirry Council that even when no order is made by the Court under this rule it is incumbent on plaintiffs to give evidence in support of their claims, (1) and in a recent Pirry Council decision where plaintiffs who had executed separate mortgages abstained from giving evidence to explain how these could be consistent with jointness, it was held that this abstention helped to rebut the presumption of jointness (2)

(1) Lal Kunwar i Chuann Lal, 37 I A (2) Ram Singh v Musst Tursi Kunwar, I, 4 (1903) 17 C W N 1085 (1913)

ORDER XVII

Adjournments

1. (1) The Court may, if sufficient cause is shown, at any is court may grant time stage of the suit grant time to the parties of and adjourn the hearing of the suit

(2) In every such case the Court shall fix a day for the further hearing of the suit and may make such order as it thinks fit with respect to the costs

occasioned by the adjournment

Provided that, when the hearing of evidence has once begun, the hearing of the suit shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the hearing beyond the following day to be necessary for reasons to be recorded

"Grant time"—That is at the instance of the parties—It has been held that the sections in the last Code which correspond with this and the next rule did not apply to an adjournment which is not made at the instance of the parties but which is necessitated by the rules of Court which regulates the disposition of its own business (1)

"Sufficient cause"—This must depend upon the circumstances of each particular case and precedents (2) are not generally of use. The Court how ever should act reasonably and with indulgence towards hitigants where there is no ground for imputing a deliberate intention to delay. A party has a legal right to ask the assistance of the Court in obtaining summons to or a commission for the examination of a writness. But if he has delayed so long that he fails to get the process executed in sufficient time, he of course must take the consequences of his delay. The Court will not adjourn the case to remedy his neglect (3).

Gosts -This rule gives the Court ample discretion as to the particular directions to be given in the matter of costs occasioned by the adjournment

(I) Sm. Tiolist. Motive Dassee r. Sm. Prosad Money Dassee 2 C. W. V. 4 30 (1984) (2) See Baboo Sectaram Sahoo r. Gollam Sahoo, 18 W. R. 323 (1872), Sum n. Elass r. Jorawar, Mull. 24. W. R. 202 (1875). Dadabhat r Sorabji 3 Bom H. C. R. 55 (1869) Sm Toola y Moneo Dasser r Sm Prosad Money Dasse 2 C. W. N. 4 0 (1835) (3) Hart Dass c Meer Moaram, 15 W. P., 447 (1871) Sufficient opportunity should be given to the party obtaining the adjournment to enable him to carry out the order of the Court and produce his evidence (1)

Review. Appeal—Once an order for adjournment has been mide it should not be resemded on review unless on good and sufficient cause shown and in the presence of the other party (2) Orders under this rule are not open to appeal (3) Their propriety can be questioned in an appeal from the final decree. An Appellate Court, however, is not generally inclined to interfere with inferior Courts, in the exercise of the discretion allowed to them to grant or refuse an adjournment (4). An order made by a Judge of the High Court at settlement of issues fixing a distant date for the hearing of a suit is not an order under this rule and is appealable under the Letters Patent (5).

2 Where, on any day to which the heating of the sub roccedure if parties is adjourned, the parties or any of them fall to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit

Applicability -This rule is an application to adjourned hearings of the procedure prescribed for the first hearing The distinction between this rule and the next is that where there is a default in the appearance of the parties and their pleaders on the date fixed for the adjourned trial of the suit, a decree may be passed under this rule and subsequently the ease may be revived under O IX r 9, but where time has been given to one of the parties to do an act and he fails, the order is passed under the next rule, and the matter cannot be revived but is only subject to review of judgment or to appeal (6) This rule, which speaks of the disposal of the suit includes cases in which there may not be any materials before the Court to enable it to pronounce a decision on the The next rule contemplates a case in which the Court has materials before it to enable it to proceed to a decision of the suit The contingency, however contemplated in this rule may happen in a ease which falls within the letter of the next rule Iu such a case, if there are no materials on the record, the appropriate procedure to follow would be that laid down in this rule, whereas if there are materials the Court should proceed under the next rule (7) The effect of this rule is to make O IX r 8 applies ble to adjourned hearings of cas s (8) See notes to that rule

⁽¹⁾ Dhaniran 2 Murli Lal 13 C W N 25 (190) (2) Relan Parkula 4 Puttum Coor 20

⁽²⁾ Bolen Perkish a Puttun Ceer, 20 W P 3 (1873)

^{(3) 0} XIIII r 1

⁽⁴⁾ Simon Thus τ J rawar Mult 21 W R 202 (1875)

⁽⁵⁾ R 1 R, 14 M 88 (1830)

⁽c) So Ryalla Sherman, I M 287 (1877), And alayana a Sul ramania, 6 M H C R 202 (1871) [under the corresponding section

of the Code of 1859] Sriraja Venkataramaya t Anumukouda Rangaya, 7 M 41 (1883). Mwar Myangar t Seshammal, 10 M 270 (1887), Kader Khan t Juggeswar, 35 C.

<sup>1023 (1908)
(7)</sup> Marannassa v Ramkalpa Geran 34
C 235 (1907) discussed in Chandrumilli t
Varayanisami 33 M 241 (1909), I natulla
Bismus i Idon Mohin 11 (1 J 30

⁽¹⁹¹⁴⁾ (8) 1b, at p 237

"Anv day."—That is the specific day to which the suit is adjourned The

the hearing of the case, if the hearing had not taken place on the day originally fixed (2)

"Dispose,"—This term in this rule refers not only to the disposal of the suncer parte, but also to the final disposal of it, and includes therefore not only the procedure up to the passing of the decree, but also the procedure for setting aside that decree when made. A Court, therefore, which has rightly dismissed a suit on an adjourned hearing by virtue of the provisions of this rule and O. IX r. 8, may also restore tunder r. 9 of that Order (3).

"Other order"—The Court is not bound to proceed under the rules mentioned (4)

Appeal.—It was held that an order dismissing a suit at an adjourned hearing for non appearance of the plantiff and his pleader was an order under sect 157 of the last Code, and its consequential sect 102 and not 158 and a refusal to consider an application under sect 103 of that Code was appealable (5) No appeal was held to he from an order under the section corresponding with this rule read with sect 108 of the last Code setting aside a decree passed exparte in default of appearance of the defendant on the day to which the hearing of the suit had been adjourned Under O XLIII an appeal is given in the case of orders under it? 9 and 13 (6)

3. Where any party to a suit to whom time has been granted is court may proceed not fails to produce his evidence, or to cause the attendance of his writnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed, the Court may, notwithstanding such default, proceed to decide

Applicability.—This rule applies to a party to whom time has been given to do some act and who makes default (7) As to the distinction between it and

the suit forthwith

⁽¹⁾ Baboo Sectaram 1 Roy Baboo 18

W R 325 (1872)
(2) Meer Mukhoo : Ameerun, 5 S D N

⁽²⁾ Meer Mukhoo : Ameerun, 5 S D W 1865, p 197, O Kinealy, s 157

⁽³⁾ Bangsulhari Ghoso i Digamber Mitra Call H C Rule 2032 of 1906, 18th July, 1906, referring to Janardhun Dobeys Ram dhono Singh, 23 C 738 (1896) [which was a case of a defendant applying under sect 108 and not of (as was the case in the decision first cited) a plaintiff applying under sect 103] Alvar Ayyangar i Seshammal 10 M 270 (1887) proceeds upon a similar viow Strigaja Venkataramaya i Ammakonda

Rangaya, 7 M 41 (1883) Shrimant Sagaprao o Smith, 20 B 736 (1895) in which two latter cases the subordinate Courts were directed to hear applications under sect 103

of the last Code

(4) See Him Day 1 Hum Lal 17 A 538

⁽⁴⁾ See Hira Dat t Hira Lal 17 A 538 (1885)

⁽⁵⁾ Shrmant Sagajirao : Smith, 20 B 736 (1895), dissented from in Naganada r Krishnamirit 14 V 97 (1910), see s. 588, clause (8) of last Code

⁽⁶⁾ Bhagwan Dai 1 Hira, 19 A 355 (1897) (7) See Kader Khan 1 Juggeswar, 35 C

⁽⁷⁾ See Kader Khan 1 Juggeswar, 35 (1023 (1908)

the last rule see notes to that rule and post It was held under the last Code that the former section did not apply to proceedings in execution (1)

"Any party"—The rule does not refer to adjournments by the Court at its own motion, (2) and appears to apply to a case where any one party and not both has had a case adjourned (3). Where after issues had been settled the hearing was adjourned to a fixed date for final disposal, and on that date plaintiff did not appear ou which the suit was dismissed, it was held that the former section did not apply, as it had been adjourned in the ordinary way and not in favour of either party for the purposes mentioned (4)

"To whom time"—\ date must be fixed within which the act must be done The stringent provisions of the full cannot be put in force unless the part has had distinct notice in respect of time of what is required of him and default in the matter of time is of the essence of the particular kind of default contemplated (5)

"Fails"—It must be shown that a specific order has been disobered either as regards time (wide ante) or otherwise. So as costs are ordinarily recover able in execution there is no default to obey all order as to costs in the absence of a specific direction making the payment of costs a condition precedent to the hearing of the evidence of the party in default (6). Where the Court refused to grant plaintiff's application to be allowed to examine a defendant as a wriness on her behalf and on the adjourned date of hearing the plaintiff failed to produce any other witness it was held that as plaintiff a application should not have been refused she had not committed default (7)

"Any other act'—The rule while mentioning the production of evidence and the attendance of witnesses (8) says any other act, provided that that at is necessary to the further progress of the sunt, such as the payment of costs for the issue of a commission (9) but not where the plaintiff fulls to make up a deficiency in respect of stamp such matter having been provided for hy sect 54 now O VII r 11 ante (10)

"To decide the suit —Default does not lead to the dismissal of the plaintiff is suit or the decreeing of the claim against the defendant if the plaintiff of defendant make default respectively (11) nor is an order striking the case of

⁽¹⁾ Runayaw Rangaya 7 M 41 42 (1883) See Firthasami : Annappayya 18 M 131 (1874) Dhonkal Singh t Hakkar Singh Lo A 84 (18+3)

⁽²⁾ I caree Mohan Bera : Shama Churn Mytee 13 W R 34 (1872)

⁽³⁾ We ir v Seshammel 10 M 270 271 (1887)

⁽⁴⁾ Lyilla Sherman I M 287 (1877)) Shark Sal ba Wah ned 13 M 570

⁽t) Viril Filrippi Chimirina "IM.

^{403 (1897)}

⁽⁷⁾ Latchmana Rau : Raghumiti : Rau 6 M H C R 299 (1871)

⁽⁸⁾ See Comalammal v Rangasawii) Iyengar 4 M H C R "6 (1866) Rangasam)

s Serangan 4 M H C R 254 (1809) (9) Sitara Begum v Fulshi Singh 23 A 462 (1901)

⁽¹⁰⁾ Muhamma I Sadik t Mul anir ia I Jan

¹¹ A 91 (1899) (11) Sitara B Liun e Tulshi Siegh - 1 A

^{112 464 (1901)}

the file regular (1) The words "notwithstanding such default' clearly imply that the Court is to proceed with the disposal of the suit, in spite of the default upon such materials as are before it. If in the case of a plaintiff such materials fail to substantiate the claim the suit will be dismissed for this reason and not for If default be by the defendant the suit cannot be decreed without the default taking any evidence or without reference to the evidence which has already been adduced In both cases the decree is on the merits (2) The effect of a decision, provided that the case comes within the terms of the rule (3) is to bar a second suit (4) Under the Code of 1859 the Court was bound to decide the suit "on the record" The effect of these latter words was that though the Appellate Court could remand a case for decision the Lower Court could not admit any evidence after the remand, but was bound to decide it on the record as it stood when the ease was remanded (5) These words were omitted in the former Code Where a suit is dismissed under this rule on the merits, the

(1) Alwar t Seshammal 10 M 270 (1887) (2) Sitara Begam v Tulshi Singh 23 A 462 464 (1901) Badam : Nath : Singh 25

plaintiff a remedy is by way of appeal (6)

A 194, 195 (1902) (3) Shaik Sahob t Mahomed 13 M 570

(1890)

(4) Venkatachalam v Mahalakshmamma

10 M 272 (1886)

(5) See Puddo Lochun v Sirdar Khan 12 W R 23 (1869) Lochun Wundal v Wuzeer

Paramanck 13 W R 464 (1870)

(6) Gaura Bibi : Ghasita 34 1 129 (1911)

ORDER XVIII.

Hearing of the Suit and Examination of Witnesses.

1. The plaintiff has the right to begin unless the defendant admits the facts alleged by the plaintiff and contends that either in point of law or on not entitled to any part of the rehef which he seeks, in which case the defendant has the right to begin

"Right to begin"—This rule is taken from the Explanation to sect 179 of the last Code, the remainder of the section being incorporated in the next rule. The party on whom the onus probands hies as developed by the record must hegin. As to this, see the Authors' Evidence Act, 5th ed, pp 629-70. At the hearing of a case on a preliminary issue the defendant by whom the issue is raised has the right to begin, (1) and if in appeal the respondent objects that no appeal lies the appellant hegins (2)

2 (1) On the day fixed for the hearing of the suit of statement and production of evidence adjourned, the party having the right to the issues which he is bound to prove

(2) The other party shall then state his ease and produce on the whole case

(3) The party beginning may then reply generally on the

Some of which hese on the other party, the party beginning may, at his option, either produce his evidence on those issues or reserve it by way of miswer to the evidence produced by the other party, and, in the

⁽¹⁾ Latin Balt Ashabat, 12 B 4 of (1888) (2) Rustompi Burjorji i Kessowji Naik, [an I two co insol may be leard] (8 B 287 [1884]

1 irst schip hearing of suit and examination of withfsqf 8, 843 0 18, 1 4

latter case, the party beginning may produce evidence on those issues after the other party has produced all his evidence, and the other party may then reply specially on the evidence so produced by the party beginning; but the party beginning will then be entitled to reply generally on the whole case.

Statement and production of evidence -The first paragraph of r 2 is the first paragraph of seet 179 of the last Code. The third rule is taken from sect 10 The plaintiff and such of the defendants as support the plaintiff a case, wholly or in part, must address the Court and call their evidence first, and the other party (namely the persons opposed to the plaintiff's case and that of the defendants supporting it) must address the Court and call their evidence (1)

The evidence of the witnesses in attendance shall be taken orally in open Coint in the presence Witnesses to be examined in open Court and under the personal direction and superintendence of the Judge.

Witnesses -The parties must elect their witnesses, summon them, and if they do not attend, move the Court to secure their attendance, and when a Commission has been issued the Court must be moved to wait for the return It is not the business of the Court to determine what witnesses shall be examined They should then call upon the Court to examine such of them as may be offered for examination (2) It is the duty of the Court to examine every witness tendered. though he has not been summoned or his name has not been enlisted in the list , (3) unless it is clear that the intention of the party producing the witness is to delay or obstruct justice (4) He should not select a certain number only for examina tion . (5) nor send some away because he had examined as many on one side as on the other, (6) or because he thinks their evidence will probably not be of much value, (7) or because they would only prove the same facts as already deposed to (8) It is in the discretion of the Court of first instance to allow a party to call further evidence after he has closed his case (9). A plaintiff who does not care to be present to support his own case when he knows it is tried cannot of

⁽¹⁾ Haji Bibi v Sultan Vahomed 32 B 599 (1908)

^{(2) \}und \lobun Chowdhry v Goluck Nath Acogce, 11 W R 99 (1869) Morne Movee t Bheem Coomar, 6 W R 231 (1866) Deen Dyal t Dance Roy, 13 W R 185 (1870) In Ramuwun Singh v Radha Proshad Singh 16 W R 109 (1871), summons was not taken out as the Court considered the evidence unnecessary

⁽³⁾ Rakhat Dass Mundal : Protap Chunder Hazrah, 12 W R 455 (1870)

⁽⁴⁾ Chowdhry Khoorgo v Shib Tohul, 17 W R 172 (1872), Ramdhan Mundal

v Rajballab Paramanik, 6 B L R App 10

⁽a) Ramdhan Mundal e Rajballab Para manik, supra

⁽⁶⁾ Gopee Otha t Hur Gobind Singh, 12

W R 229 (1869) (7) Looloo Sungh v Rajendur Laha, 8 W R 361 (1867), Shaik Ibhram : Shaik

Suleman 9 B 147 149 150 (1884) (8) Jeswant Singhjeo : Jet Singhjee, 2

M I A 424 427 (1841)

⁽⁹⁾ Rakhal Dasa Mundal t Protap Chunder Hazrah, 12 W R 455 (1869) [and there is no right of special appeal on that point]

of their original Civil junisdiction
Central Provinces (Act II of 1879)

A separate memorandum on each witness should be recorded at the time of the Cammation in the vernacular of the Judge, and it should contain every material inswer in ide by the witness in the examination in chief, the cross examination and in reply to questions put by the Court in the form of a narrative (I). The vernacular record and not the memorandum is looked upon as the deposition of the witness, and where there is any discrepancy, the vernacular record must be followed (2).

When evidence may be but all the parties to the suit who appear in taken in English.

pleaders, do not object to have such evidence as is given in English taken down in English, the Judge may so take it down

Evidence in English —Act VIII of 1859, sect 172, sentence 4 The rule does not apply to High Courts of the Punjab Chief Court in the exertise of their original Civil jurisdiction. See note to r. 5. The former section was not in force in the Central Provinces, Act II of 1879, sect 2, modified in Oudh, 4ct XVIII of 1876, sect 19.

Any particular question and answer may be taken down objection to any special reason for so doing.

10. The Court may, of its own motion on the application and answer application and answer, or any objection to any question, if there appears to be any special reason for so doing.

Taking down of question, answer, and objection—Act VIII of 1859, sect 172 sentence 5 and sect 186 of the last Code, which applied to High Courts and was in force in a modified form in Oudh (act XVIII of 1816, sect 19) This is excepted by O XLIX r 3, post The words or cause to be taken down have been omitted

- Questions objected to a party or his pleader, and the Court allows and allowed by Court the same to be put, the Judge shall take down the question, the answer, the objection and the name of the person making it, together with the decision of the Court thereon
 - 1 12 The Court may record such remarks as it thinks
 Remarks on demeanour material respecting the demeanour of any
 witness while under examination

⁽¹⁾ Subcondent Luchmeeput 6 W R

112 in which the manner of recording out
1 no is fail down 1 Cn 0 N W 1501.

But 1 in 0 K n d, set P C.

But 1 in 0 K n d, set P C.

10015 011 III ALING OF SUIT AND LAMBIAMINATION OF WITNESSES, \$17 et 18, 17 17 11

Demeanour of witness.- Act VIII of 1852, sect 172 sentence 7, and sect 188 of 1 cl + Code which applied to High Courts, but not to PSCC and was it is al in Oal's Act XVIII of 1879 sect 19, sect 3 aste. This rule is net excepted in U. XLIX a 3, por

In cases in which an appeal is not allowed, it shall not be necessary to take down the cyrdence of Memorandum of exithe witnesses in writing at length; but the dence in unarpealable cares. Judge, as the examination of each witness proceeds, shall make a memorandum of the substance of what he deposes, and such memorandum shall be written and signed by the Indge and shall form part of the record.

Evidence in appealable cases.-This rule does not apply to High Courts or the Punjah Chiel Court in the excises of their original (and puri diction See O XLIX r 3, and note to r 5 It is not in force in the Central Provinces te Act II of 1879, sect 19 and sect 3, arte. The rule is also applicable to suns for the recovery of rent in Beneal whether an appeal is allowed or not (ect 118 (1), Act VIII of 1883) For power to direct that evidence in suits between lan flord and tenant in agricultural villages in Apincie and Merwara be taken in the form prescribed by the rule see the Apricia Courts Regulation (1 of 1877), sect 29 In Bengal there is no fixed practice but, as a rule the memorandum is written learly in the vernacular of the bulge or in Lucheli if he is sufficiently acquainted with that language, and eigued by the Judge and dated (1) A Judge of a Small Cruse Court is bound to take down in the languist of the witness the substance of what each depo es (2)

Judge unable to make such memorandum to record reasons of his inability.

14. (1) Where the Judge is imable to make a memorandum as required by this Order, he shall cause the reason of such mability to be recorded, and shall cause the memorandum to be made in writing from his dictation in

open Comt

(2) Every memorandum so made shall form part of the record.

Inability to make memorandum - 1ct VIII of 1859 sect 172 tentence 9 This rule applies to all rent suits in Bennil (Act VIII of 1885 sect 143 (2)), but not to the Charlered High Courts or the Punjab Chief Court, in the exercise of their original Civil jurisdiction (O YLIA r 3 and Act XVIII of 1884, sect 16 (2)) modified in Oudh (Act XVIII of 1876 sect 19) and in the Central Provinces (Act II of 1879 act 2) This section in the last Code, it was said, seemed to contemplate some personal mability. Press of busine a should not, unless under exceptional encumstances, be accepted as a

⁽¹⁾ O Kincaly's Civ Pr Code, s 183 Cal W N cexxix (1837), s c, 9 C W N (2) Amrita Shaha v Panchkori Shaha, I 418

ORDER XIX.

Affidavits.

Power to order any point to be proved by affidavit.

Power to order any point to be proved by affidavit, or that the affidavit of any witness may be read at the hearing, on such controlled to the controlled to

ditions as the Court thinks reasonable

Provided that where it appears to the Court that either party bona fide desires the production of a witness for closs examintion, and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit

Affidavits at the any action are examined from English O 37 r 1.

5 1

by affidavit subject to the proviso. Affidavits cannot in this case be used without an order of Court, nor at all if the opposite party desires the production of the witness for cross examination (1). It is common practice to admit affidavits at the hearing when there is no contention as to the facts, which, however, have to be proved and cannot be admitted as against minor parties to the suit. The words 'of first instance and any Appellate Court' after the words "any Court have been omitted as doubtless redundant.

- 2 (1) Upon any application evidence may be given by

 Power to order attendance of depondent for cross-examination.

 Power to order attendance of either party, order the attendance for cross-examination.

 examination of the depondent
- (2) Such attendance shall be in Court, unless the deponent is exempted from personal appearance in Court, or the Court otherwise directs
- Affidavits in interlocutory proceedings—This rule is taken from O 38, r 1. The practice here is the reverse of that which takes place at the hear mg, third wits being the rule and attendance for the loce cross examination the exception. Phere is no obligation on the Court to in the an order for cross examination upon an affidavit filed in a motion (2). As a rule in interlocutory

⁽¹⁾ Blockburn Um n r Br ks 7 (D) (2) La Iron Ltd r Browne, 36 W R 132 (1 u_b)

proceedings, cross examination is not allowed because it would defeat the whole object of such proceedings, namely, desputch The party moving has however, a right to file affidavits in reply Ordinarily these affidavits are confined to rebutting the allegations of the opposite party and should not hring forward further direct proof of the applicant's case which should have been given in the original affidavits upon which the application is made. As to persons exempted, see sects 133, 135, ante

(1) Affidavits shall be confined to such facts as the [5] Matters to which am- deponent is able of his own knowledge to davits shall be confined prove, except on interlocutory applications, on which statements of his behef may be admitted provided that the grounds thereof are stated

(2) The costs of every affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter, or copies of or extracts from documents, shall (unless the Court otherwise

directs) be paid by the party filing the same

Form and contents of affidavits -The affidavit consists firstly of the "title" Every affidavit should be constituted in the cause or matter in which it is sworn, giving the style of the Court the matter or suit in which it is made and the names of the parties as given in the proceedings. Then follow the name and place of abode of the deponents and after this the matter of the affidavit This rule states what this should be (1) Evidence on information and belief, though generally admissible on interlocutory application as a matter of necessity, is not, it has been held admissible in a proceeding which though interlocutory in form, finally decides the rights of the parties (2) But it is necessary that the grounds for this belief should he shown (3) Though in practice this is frequently not done, nevertheless a party against whom such an affidavit is made is entitled to take the objection and if it be one of substance the Court is bound to pay regard to it (4) And the English Court of Appeal has commented strongly on the irregularity of an affidavit founded upon information and helief merely without giving the source of such information and helief (5) The final part is the jurat, which states that the deponent or deponents was or were sworn and the day of the month on which the affidavit was made and should describe the person hefore whom it was sworn and show that such person was authorized to administer the eath of the declarant. As to who are such persons see sect 139

⁽¹⁾ In Gooroochurn & Goluckmoney Fulton, 164 165 (1843) an affidavit to show that the certificate of an officer of Court was wrong was refused

⁽²⁾ Per Woods VC in Bird i Lake 1 H A. M. 118 Gilbert t Endean 9 C D 209

⁽³⁾ See judgment of Jessel WR, in Quartz etc Co r Beall OC D 50s anl Damodar v Panalal 9 Bom L R 540 (1904) in which the Court Ircs attention

to the necessity of following the provisions of the rule. Ladmati t Rasik 37 C 259 (1909) the provisions of this rule should be strictly followed

⁽⁴⁾ Budder a Bridges 26 C D 1 Quartz Hill etc Co t Beall supra Bonnard r

Perryman (1891) 2 Ch 269

⁽⁵⁾ Re J L. Young Manufacturing Co (1900) 2 Ch 7.3 (II and see Lumley v Oslorne (1901) 1 k B 53'

ORDER XX.

Judgment and Decree.

1 The Court, after the case has been heard, shall pro-3] nounce judgment in open Court, either at Judgment when proonce or on some future day, of which due nounced. notice shall be given to the parties or their pleaders

Judgment —Act VIII of 1859, sect 183 It does not apply to High (ourts (1) in their original jurisdictions As to the taking of evidence, see Order XVIII The meaning of the rule is (2) that judgment must be given upon vidence duly recorded before the Judge himself, except where the Code allows of such ovidence being taken before another Judge or person, as in the case of O XVIII rr 15 16 or commissions under Order XXVI As to the meaning of the term ' judgment," see notes to sect 2, ante There is no objection to ludge at the close of the hearing stating at once orally the judgment which he intends to record and deliver but he must afterwards pronounce his written judgment in open Court (3) It was held that the pronouncing of judgment out of Court—though an irregularity—was not a good ground of appeal (4) At the same time a fullure to observe the provisions of the section in this respect has been strongly disapproved of, for apart from its being contrary to law the onnesson to pronounce judgment in open Court is highly inconvenient and deprives the Court and litigants of a valuable safeguard against error should attend when judgment is pronounced and assist the Court by pointing out any error that may occur (5)

A Judge may pronounce a judgment written but not Power to pronounce judgment written by pronounced by his predecessor.

Judge's predecessor

99 1

⁽I) 0 \L1\ r 3 (2) See Varanbhai e Varoshankar 4 B

H C R 38 102 (1867) (3) Madras H C R Rulings vin (1863) (4) Milmoney Sung t Bholany Churn

Pin h Mirsh 327 (1864), and see Venka test Iven, se v. Kamalammal, 22 M L J

^{212 (1911)} open Court refers to the place and manner of the pronouncement and a judgment delivered on a hobits is

not on that account a nullity (v) Bu Dahi : Har,or urles 30 B 455

⁽¹⁾⁽⁶⁾

Predecessor's Judgment—This rule adopts the decision in Parbutty v Higgiu,(1) which distinguished Mutty Lull Sen v. Desh Kar Roy,(2) where the written opinions were regarded as mere minutes, and not as judgments, on the ground that in order to there being a final judgment of the Court, there must have been a final meeting and consideration by all the Judges who heard the case as to what their judgment was to be (3) An objection having been raised to the legality of a judgment on the ground that the Judge wrote it after he had been transferred, it was held that this section afforded au answer.(4) It is not necessary that the judgment should have been written by the Judge before he has taken leave or left the post which he was occupying when he heard the case (3). This rulo is not mandatory (6)

3. The judgment shall be dated and signed by the Judge in open Court at the time of pronouncing it and, when once signed, shall not afterwards be altered or added to, save as provided by section 152 or on review.

"Altered."—Act VIII of 1859, sect 185 Rule does not apply to Chartered High Courts (O XLIX r 3) in their original jurisdictions. Where a party dies after hearing, but before judgment, which is reserved, entry may be made name pro tune (7). The judgment, which is reserved, entry may be made name pro tune (7). The judgment, which must be written, may be altered either before pronouncement, or after pronouncement, but before signature, provided that in such latter case the alteration is itself pronounced. This rule prohibits the Judge, subject to the exceptions stated, from adding to (or altering (8)) his judgment after he has pronounced, dated, and signed it (9). Where a Court raises several issues, and records findings on some only of them, it is not open to it subsequently to add to its judgment further findings on the remaining issues, although they may lead to the same conclusions as previously arrived at (10). In the fligh Court, where judgments are oftendeln cred orally and takendown by the Assistant Registrar, the Judgment on tof Court before signature, and their returns the judgment to the record.

174 (1884)

 ¹⁷ W R 475 (1872), as to the opinion of a Judge dying before judgment is de hiered, see R t keigh, 2 Ex D 65, 238, and 5 M H C R Rulings, vin (1869)

 ^{(2) 9} W R 1, 61 (1867)
 (3) 1nd see Khelat Chunder Ghose v
 Tara Churn Koondoo, 6 W R 269 (1866)
 Rohilchand, ctc. Bank t Row, 6 1 468,

⁽⁴⁾ Girjashankar t Gopalji, 30 B 241 (1905), Satyendra t Kastura Kumari, 35 C 756 (F B) (1908), Basant Bihari Ghoshal v Scretary of Stale, 35 A 368 (1913)

⁽⁵⁾ Sunder Kuar v. Chandreshwar Prasad, 34 C. 213 (1907)

⁽⁶⁾ Luchman v Ram, 33 1 236 (1910)

⁽⁷⁾ Chetan Charan Das : Balbudhra 21 A 314 (1899), and cases there exted

⁽⁸⁾ Kishan Kunwar z Ganga Prasad, 31 A 153 (1908)

⁽¹⁰⁾ Shedaya t Shivaya, 4 Boin L R 123 (1902), such addition being contrary to the provisions of the section.

3] 4. (1) Judgments of a Court of Small Causes need not contain more than the points for determina Judgments of Small Cause Courts. tion and the decision thereupon

(2) Judgments of other Courts shall contain a concise state ment of the case, the points for determina Judgments of other Courts tion, the decision thereon, and the reasons for such decision

Small Cause Courts -- See sect 185 of Code of 1859 The rule does not apply to Chartered High Courts (O XLIX r 3) It is in conformity with the limited summary jurisdiction of Small Cause Courts that their judgments should also be of a summary character

invested with Small Cause Court 1

reasons for the decision, and thus case has received such consideration as also that assistance which it is entitled to expect (2) As to judgments of Appellate Courts, see O XLI r 32 post and in the case of appeals to the Privy Council, sect 42 of the Charter (3) A decree founded on a judgment not in accordance with this rule is not according to law and therefore the High Court under sect 25 of the P S C C Act (IX of 1887) has jurisdiction to pass such order in the matter as it thinks fit (4) In such a case the High Court may set aside the decree and remand the case for trial upon the merits with reference to the order which it has made (5) When a judgment is defective an Appellate Court which is a Court of fact, may itself deal with the case as it appears on the record, (6) and on second appeal it should remand the case directing the Judge to record his decision and the grounds thereof (7) unless it elects to act under the new sect 103 ante

In sints in which issues have been framed, the Court Court to state its shall state its finding of decision, with the decision on each issue leasons therefor, upon each separate issue, unless the finding upon any one or more of the issues is suffi cient for the decision of the suit

Findings on issues —Act VIII of 1859 sect 186, does not apply to High

^{(1) \}trayan t Bhagu J. B J14 (1907) (2) See Khajah Mohanie I : Ashrufooniss : 9 14 1 1 492 563 (1563)

⁽³⁾ See hatchekaleyana r hackness 12 M I A 400 502 (1503) Ramisami e Bhaskasami 2 Wat p 70 (1873) Buhammad Mumtaz Ihmad : Zubarla Jan 11 1 460 170 (1853)

⁽¹⁾ Bu Jisoli i Buninsli 23 B 331 (15 (8)

⁽a) Witth Religious Shira Prisad 13 1 Ball) 11 st les onstate imint

paragraph of headnote (6) See Katchekaleyana t Kachungay 1 12

U I 1 at p 502 (1869)

⁽⁷⁾ Kamat a Kamat 8 B 368 (1934) Shurbessur Ghoso v Sael oo Churn Ghose lo W R 130 (1871) but where Judge las be a r moved see Kristina Red li e Seinn ass Reide . W H C R 174 (18"0) and led lefore giving his reasons for a decree sail !) have I en male by him S be (fund f But spee & Ish r Chan ler Vatter, 1. W R -u1 (168J)

Courts (O XLIX r 3) This rule renders it imperative upon the Court to pronounce its opinion upon such issues as may be necessary for the disposal of the suit. It does not, however, disable the Court from determining the other issues also (1) In fact, it is convenient that this should be done where evidence has been allowed to be given on all the issues, since by omitting to do so a case may have to be remanded which night otherwise have been finally decided on uppeal (2). The findings, however, on issues other than those upon the determination of which the decree is based ought not to form part of the Court's decree, and will on application for that purpose be struck out (3).

6. (1) The decree shall agree with the judgment it shall is.

contents of decree. contain the number of the suit, the names and descriptions of the parties, and particulars of the claim, and shall specify clearly the relief granted of other determination of the suit.

(2) The decree shall also state the amount of costs inclined in the suit, and by whom or out of what property and in what

proportions such costs are to be paid.

(3) The Court may direct that the costs payable to one is.

party by the other shall be set off against any sum which is admitted or found to be due from the former to the latter

Applicability of rule—Act VIII of 1859, seet 189 This rule does not apply to High Courts (4) in original jurisdiction. An opinion has been expressed that the section of the former Code, by virtue of the operation of sects 582 and 632 of that Code, was applicable to the High Courts on the appellate side, but that if that was not so the Court had an inherent jurisdiction to bring its deerees in accordance with its judgments (5). As to decrees in appeal, see O XLI r 35, post. A judgment ordering a decree to be entered up in terms of a petition of

as to amendment of judgment

Dwarakonda t Dwarakonda, 4 M 134, 136 (1881)

⁽²⁾ Ib. Tara kant Banerice t Puddo money Dossec 5 W R P C 63, 66 (1866), s c, 10M I 4 476 BaldeoSinght Dharam Kunnar, 26 1 234 (1903), and see observations of P C in Mulaummad Mumtax Humad 2 Zubuda Jan, 11 4 460, at pp 470 471 (1889), but see Barhaudeo Nazama Sing 4 Wackenner, 10 C 1003 (1884) Is regards this case, it is to be observed that the Court meed not have tried the question of occupance at all. The question referred to in the text is whether, if evidence is taken on an issue, the Judge about 1 express his initing on it. Illicase cited however, expresses an opinion in the negative.

⁽³⁾ Baldeo Singh e Dharam Kunwar 26 A 234 (1903), and see Nanda Lal Rai v Bouomah Lahiri, 11 (544 (1885), sed qu

⁽⁴⁾ O NLIV r 3 See as to amendanch by High Court Karim Mahomed r Rajooma, 12 B 174 (1887) [inherent power to rectify record], Pherozaha Postonje Randerna Sum Mills Ltd., 22 B 370 (1897), and see date cate General e Wahammad Husem 4 B H e R 293 at p 207 (1897) [ord r for substitution minutes directed t be drawn up before minutes matured into order, Court altered directions]

⁽⁵⁾ Muhammad Nam ul lah Khan e Haan Ullah Khan, 14 A. 2-6 (1832)

compromise is not such a judgment as is contemplated by this rule, there being no expression of judicial opinion on the merits of the case (1)

Contents of decree.—The decree must agree with the judgment, and under the next rule the Judge should be satisfied of such agreement before he agas it. The maternal findings in each ease should be embodied in the decree, and if they are not, it is incumbent on the parties to avoid their being bound by decisions against which they have no right of appeal, to apply to the Court which passed the decree to amend it in accordance with the judgment, (2) for evidence cannot be given in execution to clear up uncertainty in the decree (3). Decrees should be drawn up in such a way as to be certain and capable of execution (4) and as to be self contained and capable of execution without reference to any other document (5). But if on reference to the record the defect in the decree can be so far met as to render the decree capable of execution, it should be executed (6). For though Courts should be careful not to draw up imperfect decrees, it is also just that litigants should not be deprived of the fruits of their succe sowing to the carelessness of the Court or its officers in the preparation of the decree (7).

In order to see what an ambiguous decree really means, the Court may look both to the judgment, pleadings and the record, for the decree states only the relief or other determination of the suit, but not the grounds of determination, nor does it afford any information as to the matters which were in issue (8) and the Judge passing the decree being the most suitable person to construct, a Superior Court will not ordinarily feel itself justified in placing on it in different construction (9). In a recent case in the Calcutta High Court a decree of a lower Appellate Court was set aside on second appeal, not because it was crouceous but because its meaning was doubtful (10).

A person cannot get anything by execution other than that which the decree describes (11) No person takes anything under a decree unless it is siten

- Rameshwar Prosad i Chandieshwar Prosad, 7 C W N 880 (1903)
- (2) Namut Khan : Phadu Bukha, 6 C 319 (1880)
- (3) Dwarkanath Haldar & Kamalakanth Haldar, J.B. L. R. App. 128 (1869)
 - (1) Ib
- (5, Joytan i Dassec v Mahomed Mobatuck, S C 975 (1882), Lichmi Natam v Juala Auth, 18 A J44, 347 (1890) (6) Janahu Mal v Kishur Chand, 18 A
- (6) Jawahir Mal v Kishur Chand, 13 A 313 (1841)
- (7) Lachma Naram + Juala Noth 18 1 314, 317 (1896)
- (8) Luchman Sungh t Mohan 2 A 197, 193 (1579), Luchmi Aaram t Jwala Auth, 18 A 344 (1890) [dust and observing upon Muhammad Sulamanu t Muhammad Aur, 6 A 30 (1893)], Jaw thr Wiff kushur Chand, 14 A 340 (1891), Sankara e Kelu, 11 M
- 29, 31 (1859), Radha Pershad Sing t Tomb Mt, 18 (198 (1859), Kali Krishna Tagori t Sceretary of State, 16 C 173 at p 183 (188), s c 15 I A 186, Bremabri v Ammuslai 13 M 313 (1890), Jagatirt t Sorabit, 19 L 199 (1891), s c, 18 I A 165, Shrid Kahdas t Jumaklai Kathin, 18 B 542 (1893), Sr Raja Rao Lakshim t Sr Ilaj-Inu_anti, 2 I A 102 (1898), as to usa struction of judgment inconsistent in parsee Bykunt Chunder t Dhumpat Singh, 11
- W R 104 (1873)
 (9) Shaikh Bisharut the v Shah Colam
- \u00e4upf 4 W R 13 Msc (1865)
 (10) Devendra Nath Chowdhry t Annads
 Hadh, 19 C L J 515 (1914), p 548 pcf
- Jeakins, U J (II) Dwark in th Halder (Kamala Kaith Halder, 3 B. L. R. App. 124 (1863)

to him in the ordering part, even though his immers mentioned in it devolves (1) What is intended to be ordered should be expressly declared (2). For anything which the party executing the decree is to recover must be found in the decree which he is executing, and not elsewhere, and which decree must be executed as it strinds, such as costs, (3) interest, (4) mesic profits, (5) or interest on mesic profits (6). The title-deeds of an estate leaves, and other dominents of the like kind are accessory to the estate, and pass with it, whether the trinefer is made by conveyance, ceitherate of sile, or decree for possession (7).

A decree "according to the terms of the judgmant debtor's written state mant," incorporates the terms of it (8). A decree for "the plaintiff's claim with costs," was held to mean the claim is but in the plaint (9). The words "the plaintiff is to have judgment for his mosety with interest at the full legal rate and the costs of the proceedings in the Court below," have been held to give plaintiff a decree for the moiety claimed by him, i.e. the sum which he alleged to be due for principal plainterest, with interest from the date of sint up to realization (10). A decree declaring that the defendant has a right of occupancy on payment of a proper rent without defining the rent is defective.(11) and so is a decree for exclusive possession of land not in the sole possession of the judgmant-debtors, the shares of the different shareholders not having been defined, (12) as also a declaratory decree regarding the possession of an idol from time to time by contending parties which does not define the period of worship by each, and provide for the reconveyance of the idol (13). As to decrees for accounts,(11)

- (1) Nawab Synd Joynul Mideen e Phoo lash Chunder, 15 W It 126 (1871) [mistake in heading]
- (2) Krishtokishere Dutt : Reogiali Dass, 8 U 687 (1682) (3) I ide post
- (4) Musoodun Lall : Bheckarco Singh o W R 109 (1866), Sadanva Pillar e Bana Imga Pillar 2 I A. 219, 228 (1875), Seth Gokuldass : Murh 5 I A 78 (1878), Kalce Arth Paul e Nuboddeep Chunder 17 W R 175 (1872)
- (5) Musoodun Lali v Blackarco Smgh,
- (6) Mahomed Yakoob v Mahomed Zuho ord Hug, 22 W R 533 (1874)
- (7) Shri Bhawani Devi v Devrao Madhavrao, 11 B 485 (1887) As to building, see Ram Dhone v Ishane 2 W R 123 (1805), In re Paramanick, B L R (F B) 595 (1866), Juggut Mohmes v Dwarka Nath Bysack, 8 C 582 (1882) Dhuma Lal Seal v Gopi Nath Khettry 22 C 820 (1895), Ismai Kani Rowthan v Nazarahi Sahib, 27 M 211 (1903)

- (8) Ram \an km Ram Lal Dhat Ray J A 775 (1881)
- (9) Sou to harmi saju i krabinaja Itekde, 11 B 277 (1886) In Thamman Singh i Ganga Run 2 \ 342 (1870) Ito Court refused to give a riber not mentioned in the decree in favour of his claim,' though at wexa alloged at formed part of the
- (10) Gopet Kasen : Brindabun Chunder, 19 W R 41 (1872)
- (11) Kales Naram v Chunder Naram, 23
- W R 225 (1875) (12) Hurry Mohun v Dwarkanath Scm
- 18 W R 42 (1872) (13) Ram Soondur : Laruck Chunder, 13
- (13) Ram Soundur : laruck Chunder, 1. W R 28 (1872)
 - (14) Annoda Prosad Roy v Dwarkamth Gangopadhya 6 C 754 (1881), Shusheo Shekhur v Sulcem Biswas 22 W R 191 (1874), Shoshi Bhoos in Pal v Guru Churn Wikhopadhya 7 C 8) (1881) Hurimath Rai v Krishna Kumar Bakshi 14 C 147, 153 (1886) Partab Bahadur Singh v Chitpal Singh, 19 C 174 (1891)

cancellation of instrument,(1) contribution,(2) of a declaratory character (3) maintenance,(4) in mortgage,(5) and in Hindu law cases,(6) see cases cird below. Where the plaintiffs were entitled to ask for the performance of the part of a contract in which they were interested, and the defendant claimed execution of the whole, to which the plaintiffs did not object, the Court, it was held, ought to have passed a decree directing execution of the whole contact instead of rejecting the claim (7)

In a suit against a legal representative, the decree should state that it is

against the defendant in that character (8)

During the pendency of a suit brought by A for immoveable property, A died, and his only son was allowed to represent him. It was held that in the decree he should be described as "substituted appellant as representative of his father A '(9)

The relief gianted must be clearly specified. It is not within the cope of this note to discuss what relief should be granted in any particular case but certain principles of general application may be here referred to The iellef granted should be consistent with the pleadings (10). As a general rule a plaintiff should not be decreed more than, or a relief different from that

Apt Singh v Bejas Bahadur Singh 11
 61 (1884)

(2) Bhurut Panda y v Nunthoota Kooer v Z3 W R 421 (1875) Voltadeo Misser v Lahort Misser 24 W R 250 (1875) Suput Singh z Imrit Tewari 5 C 720 (1880) Rash Yunjoree v Radha Soondusee 23 W R 283 (1875) Tho Itability is several in contribution suits As to default where decrees are joint and several see Salig Ram v Ram Sawak 2 Aga Misc 14.

(3) Pirthi Pal Kunwar v Guman Kunwar, 17 C 933 (1890) Dhunput Singh r Naram Pershad 20 W R 94 (1873), Rangacharian v λegna Dikshatur, 13 W 524 (1890) Venayak Amrt v Abaji Haibatrav, 12 B 46 (1887), Ram Soondur v Taruck Chunder, 19 W R 28 (1872)

(4) Yushuu Shambhog v Manjamma 9 M.
103 (1884), Ashutosh Bannerjee v Lukhi
mont Debja, 10 C 130 (1891), Mansa
Deviv Jivan Lai 9A 33 (1896), Sathanatha
v Subha Lakshmi, 7 M 80 (1883), Abdool
lutth v Zhonessa Khatun 6 C 631 (1881)
Mullia v Viranimal, 10 M 283 (1886), Rajah
Prithee Singh v Ranto Raj Kooer, 2 A 11
(R 170 (1876))

(5) See Gour's Transfer of Property Act.
Rashbeltery Chooses Law of Mortgage A
few cross will be found collected in
O him dy's notes to s 206

(6) See some cases collected m Ohn
ealys C P C notes to s 200 on Hudu
representative, Fathers debt Kurta
'Vanager of infants estate harnarian
Urahars Hindu widow, which are not
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of the Commentary See Maynes Hindu

(7) Hari Raghunath i Arishnaji Anaut 19 B 546 (1894)

(8) Gurdharlal Krishnavalabh v Bai Shi 8 B 309 (1884), and as to decree sought to be executed against representative of joint family Gururappa v Thimma, 10 M 316 (1887) as to decree against wrong persons representative of ~ deceased dobtor, see Baswantapy Shidapa v Ram, 91 86 (1884). Moha Dada v Sakharam, id 429 (1884). Tamidro Dob Raikut v Ram Jugudshaar 14 C 316 (1887) (decree against executes acting under a will afterwards found myalid) (9) Ram Bijat v Jagatpil Siugh, 18 (

111 120 (1890)

(10) Eshan Chunder t Shamachurn II V

[Poted Parashrum : Mirarji, 20 B 565 (Ps.6) Nama : M ps., 20 B 6-7 (1865) which he asked for , (1) though rehef may be prayed for in the alternative (2). Where, however, the amount of mesne profits is directed by the decree to be ascertained in execution, the plaintiff is not limited to the amount claimed in the plaint (3). As to purchase by plaintiff during pendency of proceedings, see note (4). Where a plaintiff sued, while his lease was still running, to recover possession, and the loan expired after action brought, but before decree. held that the decree should have declared right to possession with mesne profits, but should not have declared actual possession to be given (6). The relief given must of course be one authorized by I'm. So in decreeing a claim on a simple money bond a Court has no authority to direct the realization of the money out of any named property, and thus make it a charge upon such property (6).

Where a decree of a Lower Court is confirmed on appeal, and that decree directs something to be done within a specified time, the time is to be counted from the date of the appellate decree (7) But the rule does not apply if the appeal is withdrawn, (8) and the fret that an appeal has been presented does not enlarge the time for payment of the sum decreed, or prevent the decree from being executed (9) The mention in a decree of a term when a particular right is to become enforceable is not a condition precedent, but indicates a

term from which limitation runs (10)

If the decree is not accurately and properly drawn up the party should apply to amend (vide nost)

Costs —The actual amount of costs may not be settled in the judgment, but, under the second paragraph of the rule, have to be determined subsequent to judgment for entry in the decree. An order passed by the Copit determining such amount must be treated as a continuation or completion of the judgment (11). The decree must state the amount of costs, and by whom, and in what proportions, they are to be paid. No costs nor interest on costs, can be recovered unless they

⁽¹⁾ Ghyrullah v Kushozenath, 5 W R . Act A. 60 (1866). Samat v Amra 6 B 394 (1882). Narasumba Charvalu v Appa Rau 18 M 122 at p 124 (1894) Sambayya : Gonala Krishnamma, 15 VI 489 (1892). Krishna Pillai v Rangasami Pillai, 18 M 462 (1895), Madaya Naikan v Appaya Nat kan, 2 M H C R 394 (1865), Palamyanda v. Muttusamı, 2 M H C R 441 (1865) as to whether in a suit for exclusive possession joint possession may be given, see Antu Singh t Mandil Singh 15 A 412 (1893), as to accessory right, see Hayagreeva v Samt, 15 VI 256 (1831), in Parshotam Bhaishankar t Runial Zunjar 20 B 196 (1896) a aust for ejectment was turned into a redemplion

⁽²⁾ Permual t Baveri, 16 M 121 (1852), Nana t Appa, 20 B C27 (1895)

⁽³⁾ Jadoomoney Dabeo r Hafez Mahomed 8 C 235 (1881), Gauri Prosad Koondo r Reilly, 9 C 112 (1882) Under the present

Code, however, mesne profits are determined

⁽⁴⁾ Wamanrao e Rustoruji, 21 B 701

⁽⁵⁾ Umanund Roy t Szeckishen Bannerjee, 7 W R 248 (1867)

⁽⁶⁾ Omrito Lall Sircar v Ramdhun Cha Lee, 18 W R 503 (1872)

⁽²⁾ Daulat v Bhukandas 11 B 172 174 (1886) [lime to redeem] Rupchand v Shansh ul Jehan 11 A 346 (1889), kodal Singh v Jaisri 13 \ 370 (1889) [precippion], confra as to redemption, Bibda Naih Bhuttacharjec v Kanti Chundra Bhuttacharjec 25 C 311 (1897)

⁽⁸⁾ Patloji t Ganu 15 B 370 (1890), Chudasama t Manabhai, 16 B 243 (1891)

⁽⁹⁾ Amanabi e Sidu, 17 B 547 (1832)

⁽¹⁰⁾ Narayan Chitko i Vithul Parahotam, 12 B 23 (1887)

⁽¹¹⁾ Venkata Josayya r Venkatasımladrı, 24 VI 25, 26 (1900)

concellation of instrument, (1) contribution (2) of a declaratory character (3) montenance (4) in mortgage (5) and in Hindu law cases (6) see cases a below. Where the plaintiffs were entitled to ask for the performance of the part of a contract in which they were interested, and the defendant claim accountion of the whole to which the plaintiffs did not object the Court it was held, ought to have passed a decree directing execution of the whole contract instead of rejecting the claim (7)

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Manager of infants estate harner sa Uralars Hindu wi low which are not here dealt with as being beyond the sope of the Commentary Seo Vaynos Hinda Law

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⁽¹⁾ Ghyrullah t hishorenath, 5 W R . Act X. 60 (1866), Samat v Amra 6 B 394 (1882), Narasiniha Charyalu e Appa Rau 18 W 122 at p 124 (1894) Sambayya : Gopala Krishnamma, 15 M 489 (1892), hrishna Pillat v Rangasami Pillat, 18 M 462 (1895), Madaya Nathan v Appava Nat kan, 2 M H C R 391 (1865), Palamyandi v. Muttusami, ? M H C R 441 (1865) as to whether in a suit for exclusive possession joint possession may be given, see Anta Singh Mandil Singh, 15 A 412 (1893), as to accessory right, see Hayagreeva v Sami, 15 M 286 (1801), in Parshotam Bhaishankar v Rumal Zunjar, 20 B 196 (1896) a suit for ejectment was turned into a redemption

⁽²⁾ Perumal v Kaveri, 16 M 121 (18J2) Nana v Appa, 20 B 627 (1895)

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<sup>(1896)
(5)</sup> Umanund Roy : Srockishen Bannerper,

⁷ W R 248 (1807)

⁽b) Omrito Lall Sucar v Raindhun Cha Let, 18 W R 503 (1872)

⁽²⁾ Daniak I. Bhakandas II. B. 122, 173 (1886) [tune to redoom]. Rupchand v Shamah ul Jehru II. A. 346 (1889), Kodai Sangh v Jaart II. A. 346 (1889), Kodai Gangtion J. contra as to redomption, Phola Nath. Bhuttacharyov v Kanti Chundra Bhuttacharyoz 25 C. 311 (1897)

 ⁽⁸⁾ Patloji v Ganu, 15 B 370 (1890).
 Chudasama v Manabhai, 16 B 243 (1891)
 (9) Ammabi v Sidu, 17 B 547 (1892)

⁽¹⁰⁾ Narayan Chitko v Vithul Parshotani, 12 B 23 (1857)

⁽¹¹⁾ Venkata Jogayya v Venkatasımlıdı, 21 V 2., 26 (1900)

are mentioned in the decree, though the judgment says they should be given (1) The mere specification of costs without an allotment of responsibility for them is not sufficient (2) But it was said to be not necessary that the specific sums which go to make up the costs should be set forth (3) Where an order denotes generally that costs should be paid, and then afterwards specifies a particular sum in respect of those costs, the specified sum comprises all the costs to which the party will be entitled (4) It is not the practice, where costs of an inter locutory proceeding have been disposed of, to consider that an award of the general costs of the suit interferes with the order disposing of those partial costs (5) If there is a set off on account of costs, interest should only run after the set off has been deducted (6) The third clause is taken from sect 221 of the last Code It has been held that a decree for the payment of money and for eosts in the suit is indivisible, so that its benefit as regards costs cannot be transferred apart from the rest (7) See notes to sect 35, ante

Amendment of decree - Every Court has suherent power over its own records so long as those records are in its power, and it can set right any mistake in them (8) A decree is the decree of the Court and not of the parties It is the bounden duty of a Court, of its own motion, to see that its decrees are in accordance with the judgments, and to correct them if necessary There is, therefore, no limitation for an application to amend the decree (9) R 3 pro hibits the alteration of a signed and dated judgment save (except in the case of clerical errors) by review Sect 152, which embodies the third paragraph of the former sect 206 gives a power to amend the decree, it being a right medent

⁽¹⁾ Nobo Kaisto Mookerjee v Perbutty Chuin Bhuttacharjee, 13 W R 23 (1870), Chowdhry Coluck Chunder v Chowdhry Gun Nirum 18 W R 111 (1872) Muddun Phakoor : Morrison 18 W R 253 (1872) Rajah Leel mund Singh v Court of Wards, 14 W R 387 (1870), I orester : Sceretary of State, 4 I A 137 (1877), but see Rajah Rughoonundun : Arcott, 19 W R 46 (1872), where the rate was not specified in the decree and the executing Court estimated the rate. foll Madhub Lall Khan t Noyan Ghose 6 C L R 231 (1880), Syud Shah v Vecr Ressut, 17 W R 414 (1872)

⁽²⁾ Janokee Nath Mookerjee 1 Joy Kishen Mookerjee, 15 W R 4 (1871)

⁽⁴⁾ Mothoora Mchun r Hury Kashore, 18 W R 286 (1872), Raghu v Rajendra, 14 C W N 556 (1003)

⁽⁴⁾ Sharoda Pershad t Luchmeeput Singh 18 W R 5J (15J2), but as to costs of trans lation in appeals to P. C., see ib., Asour Ali Nu_codr) Chunder, 23 W R 163 (1875) . William Ibiker : Merrison, saira, Ram Comar Ches e Prosumo Coomer Sanny de 10 (Ro (1881), Minadhub Doss e Bis-

sumbhur Doss, 21 W R 411 (1874), where even interest on these costs was alven

⁽⁵⁾ Radha Pershad Suigh & Ram Purme swar Singh 10 I A 113 (1892)

⁽⁶⁾ Amanat Ali v Mt Bundho 1 13 W R 138 (1870)

Abdul Hakim, 30 (7) Ram Chandra t

A 204 (1913)

⁽⁸⁾ Karım Mahomed t Rajooma, 12 B 174 (1887), and this power causts independent of the provisions of the Code Muhamma Nam ul lah v 1hsan ul lah 14 A 226, 223 237 (1892) See eases cited in Ann Pr notes to O 28, r 11

⁽⁹⁾ Kalu v Latu, 21 C 253 (1833) , Jivrajt Praol, 10 V 51 (1886), Shuapa r Shivpanch, H B 284 (1886), Righinath Dis Raj Kumar, 7 A 276 250 (1884). farst Rim e Man Singh, 8 1 112 (1886), Darbo v Acabo Kai, 9 1 301 (1887), Muhammad Sulaman Khan e Muhammad Yar Khan, II 1 267, 230 (1888) , contra Gay i Prisad i Sikri Prisad, 1 1 23 (1881) which is over ruled, Langit & Jinki, 14 C L J isl (1111)

to any Court to correct its formal records in such way of needed as will make them repre ent trals the decision which was intended to be judicially expressed when the judgment was delivered (1) This may be done where there is clerical or arithmetical error, (2) or a variance with the judgment (3). The power is, however, limited to this, and should not be exercised except in accordance with the terms of r 3 or sect 152 arte (1) When a decree is in perfect accordance with the judgment, it cannot, subject to the provisions of sect 152, ante be altered, however erroneous the latter may be (5) The Code gives no power to alter or vary the decree. A review of judgment or an appeal can alone do this (6) The High Court has no power to after its own decrees except under the provisions of this rule or seet 111, ante (7) It has, however been recently held that a party is not limited to the remedy given by these provisions, and that a suit will be to rectify a mustake in a decree, (8) but in another case it has been stated that this can only be in special circumstances, and that as a general rule such a suit is not maintainable (9) An application to amend may be refused if made a long time after the date of the decree, and the latter should not be amended after execution is barred (10) A decree however has been amended subsequently to a Court sale (11)

Apparently according to one view under the list Code a decree might have been altered eith r by way of application under sect. 205 or under sect. 623 (12) If an application for review was made on several grounds and one of them referred to a charted mist the und if the other grounds were held to be untenable, the Court might reject the application and refer the applicant to his remedy under sect. 206. If it did not do so but on the application for a review amended the derical mistake the decree drawn up became the final decree and an appeal by it it was brought within the prescribed time from such final decree (13).

Proceedings under sect 206 could not it has been and be regarded as of the same nature in any respect as proceedings under sect 623 corresponding with sect 111. In the former case the correctness of the judgment is not questioned,

⁽¹⁾ I ucas i Stephen i W. R. 301 (1888) Di an Singh v. Basant Singh 9 V. 519 534 (1880) but see Raghuiuth Das v. Raj Kii mar 7 V. 276 278 (1884)

⁽²⁾ See f rinstance Dhan Sigh Basant Singh 8 1 519 at p 734 (1886)

⁽³⁾ Even after the lecree has been aigned by the Judge and even if it does not fall within sect 152 Brijfatan & Jayraram 37 C 649 (1919)

⁽⁴⁾ See Abdul Hayai Khan t Chuna Kuar 8 A 377 (1887) where the autendment was illegal the decree being in conformity with the judgment and Farameshraya t Seshagurappa 22 M 364 (1899) where this being the case the added words were expunged Raghunth Das v Raj Kumar 7 A 276 at p 231 (1884) s e at p 876

⁽⁵⁾ Lakho Bibi t Salamat Ali, 20 A 337 (1898)

⁽⁴⁾ tachman Smgh : Molan 2 A 497 at p 505(1879) B tisecalso nowsect 152 ante (7) Kotagur Venkata v Vellanki Venka t rama 4 C W N 725 (1900) s c 24

M l Laugat: Janki 14 (L J 481 (1911) (8) logerwar Atha : Ganga Bishan 8

C W N 473 (1904)

(9) Bhandi S ngh Dowlat Ray 17

C W N 82 (1912)

⁽¹⁰⁾ Golnek Chunder v Gunga Natam 20 W R 111 (1873) farst Ram v Man Singh, 8 1 492 495 (1886)

⁽¹¹⁾ Pydel 1 (hathappin 14 M 150 (1890) (12) See Kali Prosanna Basu Roy v Lai

Mohun Guha Roj. 2 C. W. N. 219 at p. 222 (1897). dissented from in Ahsan ul Lah i. Dakkhun Din. 27 A. 575 (1904).

⁽¹³⁾ Joy Kishen Mookerjee v Ataoor Ro homan 0 C 22 (1880)

It is assumed, but the jurisdiction arises from the fact that the decree as drawn up and signed is not in accordance with the judgment. In the latter case, not only the correctness of the decree but the correctness of the judgment is questioned, and if the application under sect 623 (now 114) is allowed, are hearing of the suit or appeal becomes necessary. In the former case there is no rohearing (1). It has, however, also been held that there may be a review not only when there is something faulty in the judgment itself, but in cases of amend ment of decree which do not necessitate any alteration in the judgment, and that therefore an order passed on an application under the former section was substantially an order passed on review within the meaning of Art 179 of the Limitation Act (2)

There is a distinction between a case of amendment and one of novation or substitution. Where an instrument is amended so as to express the real intention which it was intended to express, but which it did not completely express, the transaction is not in substance varied but its maccurate description is only rectified Except, therefore, as specially provided for in sect 32 of the last Code (now O I rr 8-10, 11), an amended decree is operative from the date of the original decree (3) Assuming however, that the date of the decree is the date of the judgment, and therefore the date of the decree is not the date of amendment when the date of the judgment remains unaltered, the question arises whether an application for execution of a decree is affected by an applica tion under this rule. It has been held that such an application is not a step in aid of execution (4) and therefore as such does not save limitation. It has however also heen held that an order passed upon an application under the former section was substantially an order passed upon review of judgment within the meaning of the third clause of Art 179 of the Limitation Act, and that such an application saved limitation (5) A decree, morcover, is not operative until the amount fo

Court (6) It was l

tion of the time in which any appeal may be preferred against such decree But where a decree is wrongly varied a party affected by such variation is entitled to calculate the time during which an appeal may be preferred as commencing

⁽¹⁾ Daya Kishau v Nanhi Begam, 20 A 304, 305, 306 (1898)

⁽²⁾ Nuli Prosamu Basu Roy t Lal Mohun Guha, 2 C W. N. 219 (1897), s. o., 25 C 258 [though not for all jurposes as explained in Nalmakshya Ghosal t Mafakshar Hossam 28 C 177, 179 (1909)], and see Venkata Joonyy t Venkutasunhadri 24 M 25 26 (1990)

⁽³⁾ Py left Chathappan, 14 M 150 (1890) where a decree was amended after sale in execution, and was held to bind the party against whom the amendment was directed.

⁽⁴⁾ Dava Kuhan v Nanhi Begam, 20 A

 ^{304 (1898),} Muhammad Umayan t Zaat
 Begam 25 A 385 (1903), Kali Prosanas
 Basu Roy v Lal Wohun Guha 2 C W N
 219 221 (1897)

⁽⁵⁾ Kali Prosanna Basu Roy t Lal Mohan Guha 2 C W N 210 (1897), s c, 25 (258, Venkata Joyayya t Venkatasımladır 21 M 25 (1900) Kıshen Salau t Collect r of Allahabad, 4 A 137 (1881)

⁽⁶⁾ Muhammad Umarjan Khan i /mat Begam, 25 A 385 (1903) [de 100 for mess e profits to be subsequently assessed—applied tion for accessment apply attourn the suit and in the execution.]

from the date of the variation (1) The rest of the Court, however, apparently held that the time for appealing must be reckeded from the date of the original decree and not from the date of the amendment, but that it could strike out the improper amendment, no petition for revision being necessary (2)

What Court may amend -Where a decree requires amendment, the party aggreed should apply to the Court in which it was granted, and should not appeal on this ground, as in default of such application an appeal is un necessary (3) Where the decree was imperfect and could not he drawn up from the judgment, and the Judge who gave the judgment was no longer Judge of the district, the High Court ordered a fresh trial (4) The decree of an Appellate Court supersedes the decree of the first Court, even where the appellate decree merely affirms the original decree and does not reverse or modify it. Where a decree has been affirmed on appeal, the only decree which can be amended is the decree to be executed, viz that of the Appellate Court, and the only Court which has jurisdiction to amend the appellate deeree is the Court of Appeal If, therefore, the Appellate Court reverses modifies or affirms by dismissal of the appeal the decree of the first Court, the Lower Court has after the appellato decree, no power to amend (5) The Bombay High Court has held (6) that an exception exists to this rule in the case of appeals dismissed under sect 551 (now O XLI r 11), it being said that such a dismissal leaves the decree of the Lower Court untouched, neither confirmed nor varied nor reversed with the result that it remains the decree of the Lower Court, which can amend it Practi cally however, the effect of such disjuissal is to confirm the decree and it has also been held that the Lower Court cannot amend either in the case of appeals dismissed under sect 551 (now O XLI r 11) or tried after notice to the respon dent (7) Where a decree after being affirmed on appeal is amended by the original Court and no step is taken to set aside the amended decree the latter is hinding hetween the parties and its validity cannot be challenged in execution proceed ings on the ground that the original Court had no jurisdiction to make the

Parameshraya r Seshugitini pa 22 M
 (1889)

⁽²⁾ See ib, at p 371

⁽³⁾ Bunwaree (hand Thakoor t Mulden Mohun Chuttoraj, 21 W R 41 (1874) (4) Kushen Dyal Lall t Ablool Later (1)

W R 267 (1873)

⁽⁶⁾ Yuliammad Sulaman khan; Yuliam mul'yar khan 11 A 267, F B (1888) [aver ruling in offect Raiu Saran; Persidhar Ra; 10 \ 5 f (1857)] Taru Ram; Yan Suigh 8 \ 492, 494 (1886), Wilammad Sulaman khan; Fatuna 11 \ 314 (1889) Baya kishan; Nauhi Begam; D. 3 304, 307 (1888), Pichu sayangar; Isabayrangar, Is V 214 (1892) [overruling Sundara; Sub lamu; 9 W 7-4 (1889) which had been

previously followed in Rain Saian c Persid har Rai, 10 Å 51 (1887) but doublet in 1891 in Chathappan e Pydel 17 M 403] Shirkil Ashdwa i Jumaklal Nathipi 18 B 542 (1803) Onraet e Sunkur Dutt, 14 W R 26 (1870) see 5 B 1 R 19 p0 6 (how life Wahil Ali e Wollick Fract Ali 14 W R 288 (1870) Rain Churn Bysack e Lucklee kant Botnick 16 W R (F B) 1 3 (1871) [no distinction between decree of altimatance and of modification]

⁽⁶⁾ Bapu t Valir 21 B 548 (18 %)

⁽⁷⁾ Munisami Varla i Munisami Reddi, 22 M 293 (1598) Isma Sundari Devi i Binlu Bashini Chowdhram, 24 C 753 (1837)

amendment (1) The Court of first instance has no jurisdiction to amend a decree on the application of a non appealing defendant, when the decree has been confirmed on an appeal by the other defendants (2)

In executing a decree the Court of execution must take the decree as it finds it. It cannot amend the decree or alter it in any way, though it is bound, of course, to construe the decree. The decree in execution may be the decree of the High Court, and the proper Court to execute that decree may be the Court of the Munsif by whom the suit was first decided. The Munsif in respect of a decree made by an Appellate Court would be hound, as the Court executing the decree, to execute the decree whether he approved of it or not, even if the decree had been one made by bimself (3). And no evidence can be given in execution to amend uncertainty in the decree sought to be executed (4)

Notice—The Court can only amend the decree after such notice as may enable either party to prefer objections (5)

Erroneous order of amendment, how to be attacked —An order passed amending a decree is a separato adjudication and is not merely a part of the original decree (6) Such an order is not appealable (7) It may, however, be revised under sect 622 (now s 115) (8) or, it has been held, sect 15, of the Charter (9) As already observed, the decisions are not entirely agreed upon the point whether a wrong order should be attacked by way of appeal from the decree as amended or by way of revision of the order of amendment. It is plain that if a decree is properly amended and exception is taken to the decree and not to the amendment, then an appeal should be brought against the amended decree If no objection is taken to the decree as originally framed, but it is alleged that it has heen improperly amended, then, as what is complained of is the order of amendment, the reinedy should be according to the weight of authority by way of revision of the order of amendment, and not by way of appeal against the

⁽I) Menat Ah : Amdar Ah 9 C W N 605 (1905) foll on the question of the appealable character of an amended decree in Brojo Lal Ru Chowdhury: Tara Prasanna Bhallachary: 3 C L J 188 (1905)

⁽²⁾ Str Cobind Sing r Gangata Pershad Shigh, 6 C. T. 7-542 (1907)

⁽³⁾ Days Kishuu r Nanhi Begjin 20 A 304, 307 (1898) and see Pillia r Pillia 2 1 A 211 (1875) Forester r Secretary af Stale, 41 A 137 (1877), Seth Cokuldws a Wurh, 51 A 78 (1878), s e., 3 C 602

⁽⁴⁾ Dwarkanath Haldar r Kamalakanth Haldar, 3 B L R Alp 125 (1863) as to imperfect decrees muching necessity for further suit, see Kalee Narain r Chind r Narun 23W R 228 (1875)

⁽⁵⁾ Raghunath Disa. Raj Kumar, 7 A 27, at p. 27 (1885) and see Abdul Hayar khan a chuma Kuar 8 A 377 (1886) where the proceeding was held to 1. had for want of

⁽⁶⁾ Raghunath Days Ray Kumar, 7 A 876

⁽¹⁸⁸⁷⁾ s c, at p 276
(7) Under O VLIII + I, Raghmath Das

"Ray Kumar, si pra, Nahnakshya Ghosal t
Mafakshar Hosvan 28 C 177 (1900), s c,

76 W N 192 Nu yanramu t Nates, 1

N 424 425 (1802) per Best I, but see
Vesanathan Chetti - Rumanthin Chetti,

24 W 646 (1901) whin et was held that ui
sppeal would be against the amended diere
more to the Privi Conned, Sunder Keer
Chimbishwa Prosa I 10 C 679 (1903), in a
under the Charter, Wahminmad Amin all hit
Khur i Bram ullah khun, 14 V 236 (1852)

⁽⁸⁾ Raghinath Disi, Raj Kimar, supra, Dhan Singha Basant Sugh, 8 & 519 (1887), Bilmed and a Sheo Jatin Jad, 6 & 125 (1882), Hasan Shith a Sheo Prasa I 15 & 121 (1882)

⁽⁹⁾ Muhammud Salamorn Ishan i Tatina,i A 101 (1886)

amended decree The third ease is where there is objection both to the original decree and to the amendment on the ground that it was not warranted, there heing no variance or clerical error. It is not clear on the authorities what course should be taken, but it would appear reasonable to allow all questions in such a case to be raised in an appeal from the amended decree. An order amending can be objected to in execution of the decree (1) and an appeal lies from an order pussed in execution (2)

High Court -Rules 1-8 of this Order do not apply Sec O XLIX r 3

Revision —It was held that proceedings under sect 206 of the last Code terminated in an order which could be dealt with on revision, as where the Court acted hey and its jurisdiction in making an addition to the decree not warranted by the judgment (3)

7. The decree shall bear date the day on which the pudgment was pronounced, and, when the Judge has satisfied himself that the decree has been drawn up in recordance with the judgment, he shall sign the decree

Decree - This rule does not apply to High Courts' in exercise of original purisdiction, O XLIX r 3 When a person has the judgment of the Court that he shall have a decree at may be said that he then obtains his decree decree when it is drawn up afterwards relates back to that time (4). But a formal decree must follow judgment, and is a necessary part of the ultimate procedure in all suits though madvertently it is not in so many terms required by the Code as a necessary proceeding after judgment. Without a decree a judicial record does not speak and wanting it no proceeding subsequent to the judgment can with any certainty be taken. It is in substance as well as form the mouthpiece of the suit in its immediate result (5) Whatever be the form of decret a separate formal decret should be drawn up. A copy of the judgment with the schedule of costs appended is insufficient (6). A decree must be in a civil suit (7) and differs from an order in that the former expresses the result of the judicial proceeding by way of suit or appeal and so far as suits and appeals are concerned, the latter are confined to such orders as are given in the course of proceedings and do not finally dispose of them. See generally notes to sect 2 ante

Abdul Hayar Kuan r Chunis Knar 3
 377 (1886), Muhammad Sulaman Klish
 Fatima II A. 314 (1883)

^{(2) 1}b \alimalshya Ghosal e \landshafal\ shar Hossain 28 (177 (1900) s e o (\mathbb{H} \) 192

⁽³⁾ Bai Shri Vaktuba r Agarsai gji 31 B 447 (1907)

⁽⁴⁾ Vunguram Varuari e Gursahas \and 17 (347, a) p. 3-7 (1854)

⁽⁵⁾ Ranjit Singh r Hahi Baksh, 5 A 520 520 (1983) but as to applications for partition under the V W P Land Revenue let, see Nizz Begam v Abdool Karun Khan 14 A 500 (1932)

⁽⁶⁾ Purmissuree Dutt e Joynath Thakes r

¹⁵ W. R. 3.6 (1871)
(7) Minalahi Naidu e Subramanya, H. M.

^{20 3. (1997) . 14 1 4 100}

Date —The decree must bear the date on which judgment is delivered, and not the date on which it is drawn up,(1) and a decree operates from this date and not from that or which it may be subsequently amended (2) Limitation thus runs from the date the decree bears, that is, the date of the judgment, (3) though a suitor is entitled, in computing the period within which he can appeal, to deduct the time between the delivery of the judgment and the actual issuing of the decree (4)

"Satisfied himself."—It is the duty of the parties, or rather, of their pleaders, to see that a dec ce is drawn up in the proper form, and the signatures of the pleaders are generally obtained before the decree is finally signed (5) But though the duties of the pleaders remain as they were the Judge is not relieved by any action on their part from satisfying himself personally as to the correctness of his decree

"Sign."—After the decree has been duly signed it becomes and must be regurded as a decree of that date. Once a judgment is pronounced and the decree signed, it becomes a final decree, which may become the subject matter of appeal or leview. It cannot be altered except under the provisions of sect 152 or O XX r 3, or those relating to review (6)

- 8. Where a Judge has racated office after pronouncing procedure where Judge judgment but without signing the decree, has vacated office before a decree drawn up in accordance with such judgment may be signed by his successor or, of the Court has ceased to exist, by the Judge of any Court to which such Court was subordinate.
- 9. Where the subject-matter of the suit is immoveable property, the decree shall contain a description of such property sufficient to identify the same, and where such property can be identified by boundaries or by minibers in a accord of settlement or survey, the decree shall specify such boundaries or numbers.

15 W R 3(3 (1572)

⁽I) St. Afril II sain v. Umli Bila, I C.W.N. (I (IS 6) Beni Wallich Mitter i Matrix in Dissi I (C. 104 (ISS)). Ranny v.

Br. (Sten, Dr.C. to 2 (1881) (a) Regl math Dece Eag Komar, 7 V 270, 27 (1881) - and so notes to O. Nor to

⁽³⁾ Clary Catter Mandal & Clary Bills, or Clary (1847) Afrid Hossam & Umda Bill W. N. at (1833)

⁽⁴⁾ Bere Well als Matter e Maturaul Description of the ports Live to

applied fra ceps, Yamapir Antipir 3 B 142 (1898), Berhire Ah an ullah Khan 12 A 461 (1890)

⁽a) Rum Lechun Doser Minisoer Mi, 10 W. R. 93 (1808) - Golick Chunder - Gunga Naram 20 W. R. 111 (1873) - Lard Rum Mari Singh 3 A. 192, 115 (1893) - Prince Mali mine I Rubir e Heer e Rey Poetal,

⁽⁶⁾ Radimath Divid Raj Korar, 7 A 27 - 29 - 80 (1881)

Decree for immoveable property.—Act VIII of 1859, seet 190 Sect 207 of Inst Code I he words "can be "have been substituted for "to identified". The decree should show distinctly and accurately what property it deals with giving the boundaries and details of the property which the Court intends shall be covered by the decree, for if these are not given the decree may be impossible of execution (1). Where this is not done the decree holder's remedy hes in an immediate application to the Court which made the decree to have it rectified (2). Evidence cannot however, be given in the execution department to amend any uncertainty in the decree (3). Where a Judge decreed possession with reasilar without declaring specifically that plaintiffs were to recover the share which they have plaintiffs were held not entitled to be put in possession of any specific lands (4).

10 Where the suit is for moveable property, and the decree

Decree for delivery of such property, the
moveable property, the delivery of such property, the
to be paid as an alternative if delivery cannot be had

Suit for moveable property — let VIII of 1859, set 191. If there is a dispersion as to the movable property claimed the Court must of course determine it before passing its decree. It cannot let we the matter to be settled in evention (3). If it then passes a decree for deliver, it must state the amount to be paid as an alternative. This is reducinfly the value of the property in question (6). The Court may also pass a decree for damages (7). This section is in accordance with English law when took away from the defendant the option to return the goods or pay their value. Now priment can only be made if delivery cannot be had. If the goods are capable of delivery they must be delivered (8). An alternative praver for value of goods as compensation does not after the character of a suit (9).

⁽¹⁾ Sushtetchur Bhuttacharjee t Kalet Dosa Dey, 24 W R 479 (1875), Mahomed Ismail t Lalla Dhundur, 25 W R 39 (1876), Dwatkanath Roy v Januobee (houdhrau 19 W R 81 (1873), Darbaree Sayalt Fatu Dhaice 23 W R 285 (1875) Kungal Chandra Ruj t kanyo Lall Ruj 4 C 69 (1878), see Ram Lochun t Unusoen Ali 10 W R 96 (1868), though where a question arises in a subsequent suit as to what was decreed in unarlier one vin meffective definition may be cured by the acts of the patters becretary of State t Durboy Singh 19 (312 (1891))

⁽²⁾ Darbarco Sayal v Fatu Dhalce supra (3) Dwarkanath Haldar t Kamalakanth

Haldar 3 B L R App 128 (1869)
(4) Ram Lochun t Munsoor Alt 10 W R

<sup>96 (1888)
(5)</sup> Sheo Gobind v Sham Naram 7 A
II C R 75 (1875), acc observations on this

point of Sir B wines Peacock, (J. in Dwarks) nath. Hallar v. Kamalakanth. Haldar. 3 B. L. R. App. 128 at p. 130 (1869)

⁽⁶⁾ Bond ay Burmth Trading, Corp. it Unra Malponed 19 W. R 123 (1873) where the defor lants ha in at their own rush removed the tumber and the Court held that the plaintiff was entitled to its delivery or its value will out de luction of charges of removal, Asabee vith Acore v. Deb Aristo Ramanooy 16 W. R. 240 (1871) [in this case the H. C. took the except toomal course of calling a case to its file and tried it as a regular appacal].

⁽⁷⁾ Kasheo Nath Kooer 1 Deb Kristo Ramanooj suj ra

^{(8) 1}b at pp 243, 244

⁽⁹⁾ Murugesa t Jotharam, 22 M 478

⁽¹⁸⁸⁹⁾

11. (1) Where and in so far as a decree is for the payment of money, the Court may for any sufficient Decree may direct payment of instalments. reason at the time of passing the decree order that payment of the amount decreed shall be postponed or shall be made by instalments, with or without interest, notwithstanding anything contained in the contract under which the money is payable

Order, atter decree. for payment by instal-

wise, as it thinks fit

(2) After the passing of any such decree the Court may, on the application of the judgment-debtor and with the consent of the decree holder, order that payment of the amount decreed shall be postponed or shall be made by instalments on such terms as to the payment of interest, the attachment of the property of the judgment-debtor, or the taking of security from him, or other

Decree for payment of money -Act VII of 1859, sect 194 Ordinally, if a party is cutified to relief he is also entitled to a decree awarding it to him at once. Therefore it was held that a Court in making a decree could not allow the defendant a period for payment of the amount decreed for the effect of such an order is that the decree holder is debarred from executing his decree until the expiration of such period (1) This rule however, authorizes the Court in a particular class of cases, viz decrees for money, to give the debtor time to dis charge the amount awarded by directing payment in instalments. But the authority given is strictly limited to these cases. Therefore the section is not applicable in a suit for the recovery of the amount of a bond debt by the sile of property hypothecated by such bond, such a suit not being merely one for money, (2) nor to a suit to enforce a hen or an annuity called nunlar (3) It was, however, held to apply to cases referred to m sect 58 of Act VII of 1869 and to

give the Courts powers to make rent decrees payable by instalments (1) The former section it was held did not confer any anthority on the Courts to reheve contracting party from an express stipulation, in a bond payment by nest il ments, as to the consequence of default in punctual payment of the instalments (5) In the case cited the decree did not in compliance with the Code cout on line direction as to the agreement to pix by instalments (6) It has been held that a decree for payment of money includes a decree made under O XXXIV r 6 (7)

(I) Bachchu i Madad Mi, 2 \ 619 (1880) See Late t Ramachandra, 7 M Lo2 (1883) where, however, the decree helder took no steps to remedy what was alliged to be an illegal order in this respect Agreements to give time were dealt with in a 2574 of the last Code, which is now omitted

⁽²⁾ Hardeo Dur r Hukam Singh, 2 \ 320 (1871), Shankaripa e Dinapa, 5 B 601 (1881) [Dekklian Agriculturists' Relief Act]. Mahalan Karanl kar e Chikm 7 B 132 (1223).

⁽³⁾ Backehu t Madad Mr 2 1 blJ (1850) (4) Gurecbullah Sirkar : Mohun Lall

Shaha, 7 C 137 (1581) (5) Ragho Govin I t Dipchan I, 4 B 16

⁽b) Kedar Nath Bancipeo i

Sardar, 5 t 1 J 25 (1506)

⁽⁷⁾ Bilka Sudhury 1 Mahatabu f im 16 C W N 44 (1911), and see Datto Atmaram e Shankar Diffatrya, 38 B 32 (1313) (consent decree I r matalm nta)

"The Court."—That is to say the Court which passed the decree (I) The order may be nade in or at the time of passing the decree, or subject to consent after the decree. If the case is one in which the Court itself could not have made a decree for payment by instalments, much less can the Court of execution vary that decree so as to give it an illegal effect in carrying it into execution (2). On the other hand, an order under this rule alters the decree, which can only be executed subject to such after it in of corrected minst be executed as passed (4).

"Sufficient reason "—The existence of this will depend upon the facts of the particular case. The Court will consider the circumstances under which the debt is so contracted, the conduct of the debtor his financial position, and so forth, and instalments should be directed where the defendant shows his bone fides by offering to pay anything like a fair proportion of his debt at once (5)

"Postponed" "Instalments"-Payment by instalments means that the defendant is to be directed to pay the amount decreed by partial payments to be made at specified periods. The former section did not authorize a Court to say that the defendant has the option of paying the amount decreed within a particular period after the deeree (6) Now the rule expressly provides for an order nostponing payment of the decretal amount. A temporary postpone ment is a smaller concession than a scheme of instalments, and in many cases such a discretion might be fifth exercised without writing as under the former Code for a judgment dehtor's arrest under sect 337A of that Code The powers given should be exercised with a due consideration for the interests of the creditor is well is those of the debtor Thus an order allowing nine years to pay a debt of Rs 110 was reversed and the period reduced by half (7) The rule gives the Court a discretion and it is not unusual to state in the order for payment by instillments that in default of payment of one instalment the whole debt shall become payable (8) The Court has a discretion to order or refuse interest but if it be the intention to give interest this should be expressly declared (9)

⁽I) See Gandharap : Sheedarshan 12 1 571 (1890) which may be the High Court, Pema Dongra : Gillespie 31 B 348 (1907), as to orders under s 15B of the Dekkan Agriculturists Rehef Act see Bhagi

rathibai r. Hari Ravji, 19 B. 318 (1894) (2) Mahadaji Karandakar t. Chikne. 7 B. 332, 335 (1883)

⁽³⁾ Tata t Ramachandra 7 M 152 154 (1883) see Guidharap t Sheodarshan 12 A 571 (1850)

⁽⁴⁾ Tate t Ramachandra o pra (5) See Sabatollah Sircar t Thompson, I

Hyde 98 (1862-3), Jafree Begum : Ahmed Ameen I Agra, 2:0 Ahoda Bulsh : Abdo I Rahman S D \ W 1863, p 483, ented in

Ohmeals (P (

⁽⁶⁾ Bachchu t Vidad ih ~ A 043 651 (1850)

^{(&}quot;) Koowersaint Alsh in Lall S D N W (1861) p 655 cited in O Amealy (P (and see Hur Gobind : 1] irkho 1 1 ara 116

⁽⁸⁾ See as to extention of such decrees thou Mohan Roy v Durg v Chura Good. 15 (502 (1888) Satab Chand Hyder Walla 24 C 231 (1856), and as to wave of right to execute entire decree see Bir Asaran i Paral Narian 29 C 74 (1892) Kashiram v Pandu 27 B 1 (1992).

⁽⁹⁾ See Surno Moyer Dasser r Kishen Co omarce Biber 14 W R 324 (1870)

"Interest" in sect 20 of the Limit ition Act of 1908 means the interest, or my part of the interest, die (1)

Order after decree—As the effect of such in order is to alter the decree, this can only be done with the consent (2) of both parties. Where a debtor applied for time to pay and notice was served on the decree bolder, who did not object, the order was made absolute (3). In the under mentioned cases the question was considered whether the order passed was (4) or was not (5) an order under the second clause of this rule. The limitation for an application to pay in instalments by consent is say months from the date of the decree (6)

12 (1) Where a suit is for the recovery of possession of immoveable property and for rent or mesne profits profits, the Court may pass a decree—

(a) for the possession of the property,

(b) for the ient or mesne profits which have accounted on the property during a period piror to the institution of the suit or directing an inquiry as to such rent or mesne profits,

(c) directing an inquiry as to rent or mesne profits from

the justitution of the smt mitil-

(1) the delivery of possession to the deere holder,

(ii) the relinquishment of possession by the judgment debtor with notice to the decree holder through the Court, or

(iii) the expitation of three years from the date of the decree,

whichever event first ocems

(2) Where an inquiry is directed under clause (b) or clause (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry

Application of rule—Hinsride embodies with alterations the substance of sects 211 and 212 of the last Code—The corresponding sections of the Vet VIII of 1800 were sects 190-197—The rule only a place to said so the nature described where the plaintiff has a specific interest and not to a suit for partition where

the plaintiff has no specific interest until decree (1) A suit for mesne profits only is not within the section (2)

- "Recovery of possession of immoveable property."—The section does not apply to other suits for damages, in which suits the question of damages must ordinarily be determined at the trial (3) O XXVI r 9, however, allows a commission to issue to ascertain the amount both of any mesne profits or damages (1)
- "Mesne profits."—The Code of 1859 did not contain any definition of this term. The Code of 1877 added an Explanation, which was the same as that attached to sect 211 of the last Code down to the word "thereupon." That section repeated that explanation with an addition, viz "together with interest on such profits" (3). The definition of mesne profits has now been removed to soct. 2, clause (12)

Mesne profits are in the nature of damages, which the Court may mould according to the justice of the case (6) There is no analogy between interest awarded under sect 34 and mesne profits claimed and awarded under this rule (7)

The object of a suit for mesne profits is to compensate the owner of laind for being kept out of possession and deprived of the profits of the laind. The measure of the compensation is ordinarily the loss which he has suffered (8) Where a party is dispossessed of immoreable property, the cause of action as to usulat accrues to him ou the date on which he would, but for the fact of dispossession, have received such usulat (9). Parties in possession are liable for usulat to the legal owners whom they kep out of possession, even though there was no mala facts on their part, (10) and whether the wrongdoer derived any profit himself from the possession of the land or not, (11) though, as the

- (1) Purthi Pal t Thakur Janahur, 14 I A 37, at p 50 (1880), dist in Shankar Buksh; at Hardco Buksh, lo I A 71, at p 53, where the parties though joint were entitled to specific shares. As to inside profits in partition cases see Bhavryv i Siturani, 19 B 532 (1894). For effect of this rule, see Ramana t Babu, 37 M 186 (1914).
- (2) Chaku v Dullahli, 9 B 11 C R 7 (1872)
- (3) Bluenuk Singh e Jogher Singh, 10 W R 299 (1869) Ramtinhal Lall e Sheo math Singh 1 A II C R 22 (1869), and see Dina Nath Chiekerbutty e Protap Chunder Goswami, 4 C W N 79 (1899)
- (4) In Indurject Singh e Radhev Singh, 21 W R 209 (1874) the deputation of inquiry to an Ameen was held, under the circumstances, unnecessary.
- (5) See Grish Chunder Lahiri e Sashi Shikhari shwar, 2 Rom L. R. 702, 713 (1999), s.c., 4 C. W. A. Gall, 27 C. 951, Radha Raman e Surnamovi B.D., 7 C. W. X. 473 (1993), s.c., a0 C. and.

- (6) Grish Chunder Lahiri t Soshi Shikha reshwar Roy, 27 I A 110, 124 (1960), Adbul Ghafur t Raja Rain, 23 A 252, 255 (1961) (7) Dwarka Nath Biswast Debendro Nath Tagore, 33 C 1232 (1966)
- (8) Abdul Ghriur t. Raja Ram, 23 A. 525-(1901), Mobarak Ah t. Boistub Churn. 11 W. R. 25 (1809). A suit for mesne profits is in the nature of an action of trespass for damages. Radha Churn t. Zumurronnissa. 11 W. R. 83, 54 (1848).
- (9) Luckhee Kant Doss: Deen Dyal Doss, 14 W. R. 52 (1870). See Thakoor Doss: Shoshee Bhogsun, 17 W. R. 208 (1872).
- (19) Byjnath Pershad t Badhoo Smah 10 W. R 480 (1865)
- (11) Ghorghy Sahoo et hander Pershad, 21 W.R. 246 (1874), and see Bheckambhart Single e Roy Chander, 15 W. R. 196 (1871) Hessor preventing roots from paying reat to hassed, Saurop Chander Box et Maha Fer Chander, 22 W.R. 333(1874) [mortpage after foreclower].

principle is that the defendant should make up to the plaintiff what he has lost, a Court is right in excluding lands of such a nature as would under ordinary circumstances yield no profit (1)

All persons in wrongful possession, irrespective of how they got in, are liable, (2) such as a mortgagor from date of foreclosure, (3) an auction purchaser whose purchase is declared invalid, (4) a person in bona fide possession without knowledge of defect in his title , (5) an maradar together with his zemindar, (6) a body of intermediate holders combining to keep the true owner out of posses sion, (7) a sebait claiming the land as such (8) In the under mentioned case the defendants were not all in possession, yet as they had all combined to oppose the plaintiff's possession they were held all jointly liable for the uasilat (9) But where a person is in rightful possession until a sale or decree is set aside, though he is bound to account for mesne profits the calculation of which is to he based on a proper discharge of the stewardship of the property, he is not a trespasser, and as such hable to make good any loss sustained by the rightful owner being kept out of possession (10) In the case, moreover, of any wrong, the liability of a defendant is limited to damages for the wrong which he has himself done, and if the defendant was excluded from possession he cannot be said to have actually or even impliedly received the profits, nor could be with diligence have received them (11) So the Prixy Council have held that a person who had not himself received the mesne profits having come into possession of a taluq upon its heing released from management under the Oudh Tiluqdar's Relief Act, 1870, would not be chargeable with sums which as it was alleged, might have been received by way of mesne profits but had not been received in consequence of the manager's wilful default. Whatever case might have been made against the manager of the estate, the talugdar could not be charged with anything noro than was actually received by him (12) Mesne profits ought not to be estimated for any period during which the defendant who is to be made responsible for them was not active in keeping the pluntiff out of possession Therefore a defendant cannot be made to pay in respect of years when possession was in the hands of an officer of the Court (13) But where a defend int who had

⁽¹⁾ Becharam Doss : Brojonath Pal 9 W R 369 (1868)

⁽²⁾ Bebee Pearun : Ahmed Ali Khan, 1 W R 7 (1865), Suttys Nunds t Suroop

Chunder, 14 W R 76 (1870)

⁽³⁾ Suroop Chunder : Mohender Chunder, 22 W R 513 (1874), but where the mort augen was the tenant, see Rassud lin Chaw dhry : Khoda Newaz, 12 C I R 479 (1883) Woomesh Chunder Roy : Markun I Mooker ice 12 W R 35 (15(3)

⁽⁴⁾ Joy Naram : 1 ribun 1 1gra, 216 (5) Mugun Chun her e Surlessur Chucker 1 atts, 8 W. R. 479 (1867) . Byjasth Pershad t Badhoo Sungh, 10 W R 156 (1515)

⁽⁶⁾ Billia M vee i Run Lall Misser 17 W 1. 118 (157-)

⁽⁷⁾ Ram Chunder Surmah t Ram Chun

der Pal, 23 W R 226 (1875) (8) Ranco Shibeshure : Mothocranath Yeharice, 5 W R 202 (1860)

⁽⁹⁾ Shama Sunkur Chowdhry : Seconath

Bancrice, 12 W R 3.4 (1964)

⁽¹⁰⁾ Foremalidiyar : Krishnama Chet tyar, 17 M 251 (1891), and see Dakhma

Mohun Roy t Saro L Mohun Roy 201 A 160 (11) Abi as a Tassah ad Im, 24 (113 (1637), and see Haradhun Dutta 1 3 Kisto Binery , II W R 114 (1865), In largest Smalt : Ridhey Smalt 21 W R = 3 (1871)

⁽¹²⁾ Kishnanan Li Kunwar Partal Na run, 10 (7.8 (1881) s | 11 I A 8%

⁽¹³⁾ In lury of Smale : Radicy Smale -1 W R _ + (1874)

been in wrongful possession abandoned the fand without notice to the decreeholder, it was held that the land must be held to have continued in the judicial possession of the judgment-debtor, who was hable for mesne profits (1). In a suit for damages against several persons for jointly combining to keep plaintiff out of possession they are all equally hable to him, and none of them can restrict their hablity for mesne profits to that portion only of which by their joint agreement, they were in possession (2). In some cases, however, the hablity has been decided in proportion to the amount of profits that each bas derived from his own individual wrongful possession (3). The Court is competent to apportion the dumages in respect of the portions of land held by the defendants, alter where the defendants have jointly taken possession of a particular portion of such land (1). It was held that a plaintiff must bring a sint against joint wrongdoers, though what he does in execution of his decree is another matter (5). If the Court finds that a plaintiff has been dispossessed he is prival fines.

entitled to mesne profits in respect of the period of dispossession, and it is not necessary for him to prove the actual collections made during this period, for this is proof which be would possibly be unable to supply. It is sufficient to show what is the annual profit which in ordinary years can be collected, as, for instance, the profits for the years preceding or subsequent to the period of

dispossession (6)

Meane profits include profits actually received, or which might have been received. In other words, if the mesne profits actually received are those which ought to have been received, the planniff gets them. If however, they are less than what the planniff could have got, they must be assessed on the basis of his possible profits. The Court has to ascertain what the person in wrongful possession could have realized by ordinary diligence and not increly what he actually received (7). This really means what the planniff could have realized, for the person in wrongful possession may place himself in the position of, and for this purpose is taken to be in the position of the true holder, so as to charge, him with the profits which might have been made by the true owner (8).

(2) Ajoodhja Doss t Lilljee l'autes, 19

W R 218 (1873)

reshwar 4 (W N 631 (1900), s c, 2 Bom

⁽¹⁾ Rajah Padmanund i Vadhu Singh, 3 C. W. N. clxxxvn (1899)

⁽³⁾ Nawab Nazun: Raj Coomarco Debee, 6 W R 113 (1869), Bulwant Smgh v Shoo Sahoye, 2 W R Visc 52 (1864), Gunesh Dutt v Bulwant Smgh, 14 W R 175 (1870) (4) Krishna Vohun Basak t Kunjo Behari

Basak, 9 C L R 4 (1881)

(5) Suttya Nundo t Suroop Chunder 14

W R 76 (1870)

⁽⁶⁾ Bhawaneo Decu t Mohun Sahoo, 1 A H C R 273 (1869), and see post, 'Proof neces art'

⁽⁷⁾ Grish Chunder Labori t Soshi Shikli t

L R 709, 27 C 931 Thakoor Does Roy t Nobin Kristo Chose, 22 W R 126 (1874) [the Court must see what it may reasonably be supposed the plaintiff could have collected]. Lackby Narian t Asily Puddo, 4 C 882 (1879) s C, 4 C L R 60, Do Silva Synd Febarance, 9 W R 374 (1868), Doegy Soonduree t Shibeshuree Debia, 8 W R 101 (1875) for at them will be accused.

Dougs Soonduree: Shibeshuree Debas, 8 W R 101 [1867] [everything will be assumed against the wrongdoer] As to the meaning of ordinary care and diligence, see Dwarka math Mitter v Ram Dhun Biswas, 8 W. R. 103 (1867)

⁽b) Ib , Lallyce Shahay Singh t Walker, 6 C W A 732, at p 734 (1902).

It was said to be not clear whether a Court of Equity would ear-mark the profits of a trespasser invested in real property and follow them (1)

Wiful default is charged against persons in rightful possession, though accountable for their dealings with the property against those wrongfully (2) in possession. Indeed, the adoption of the principle of wilful default would be more favourable to the defendant than the principle of the Code, for there may be values recoverable by ordinary diffigure which yet it would not be wilful default not to recover (3)

Mesne profits, how calculated .- There is no abstract principle independeut of the particular facts which determines the assessment of mesne profits in every case The Court ought first to ascertain the facts and the nature of the plaintiff's possession of the land before ouster, and then determine the principle applicable in the particular case (4) When the facts are disclosed, the determining principle is this-What was the character of the possession of the plaintiff before he was ousted? and what has the owner lost? (5) Mesne profits are thus whatever profits the wrongdoer might with ordinary diligence have received from an occupation or position similar to that of the party wrongfully dispossessed, whether it he that of a cultivating ryot, landlord or zemindar (6) or talookdar (7) Where a person claiming mesne profits was himself the cultivator before dispossession, he is entitled to the profits which he would have made cultivating the laud if he had not been dispossessed The measure of damages is the value of the crops (8) And there is no distinction in respect of assessment of mesne profits between raight land held by a raight and the proprietor's cerait, or private land ordinarily cultivated by him, except as to the costs of cultivation (9) Where land is rangel, and the true owner is a rent receiver, assessment of mesne profits should be made on the hasis of fair and reasonable rent (10) Prima facie it is fair to infer that a

⁽¹⁾ Run Bij ii Bahadur i 3 igalpal Smgh, 18 C 411, 119 (1890)

⁽²⁾ See Grish Chunder Lahri e Shik hireshwar, ante, and Dma Nith Chucker butty e Protap Chunder Goswann, 1 C W N 70, 81 (1833)

⁽³⁾ Grish Chunder Labirit Shikhari Shwar, 2 Boni L R 709, 714 (1900), s c, I C W N 631, 27 C 951.

⁽¹⁾ Surp Pershad Namuri Reid, 6 C W N. 409 (1902)

⁽⁵⁾ Lally o Shahay Singh e Walker, 6 C W N 732, 731 (1902); Chardon: Vect Singh, 12 W R 72 (1863)

⁽b) life post.

 ⁽⁷⁾ Bhyrub Chun ler r Huro Pr sanno, 17
 W. R. 257 (1872) , Bireshur r Baro L,
 15 C. W. N. 503 (1996)

⁽⁸⁾ Lally C. Shahay, Singh e. Walker, 6. C. W. N. 732, 733 (1902). Nursingh B. y e. And roon, 10 W. E. 21 (1871). Surfamin e.

Dates Anond Chember, U.W. R. W(1870), Shatte Pershul Chuckerbutty i Kundi Kant Roy, 17 W. R. 348 (1872), Watson i Pyari Lal Shahi, 7 B. L. R. 177 (1870), Harruck Lall e Secunbash Kurmokar, 15 W. R. 128 (1871), Gooroo Dyal Mundur i Baboo Gopal Sungh, 21 W. R. 271 (1877) See Bhiro Chandra i Banundus, 3 B. L. R. A. C. Sa (1869), s. c., 11 W. R. 401, and contra, Wallind Chandra i Havalhon Pini, 14

W. R. 234 (1870)
(9) Lallieo Shahay Singh i Walker, 6
C.W. N. 732 (1902), Mt. Rookumee Koocet
Rum Fubul Roy, 17 W. R. 156 (1872)

⁽¹⁰⁾ Lallyce Shahay Suight Walker, 6 C. W. S. 732, 743 (1992). Rame Jamil L. Keccer Induryct Koor, 9W. R. 147(1889). P. R., R. L. R. P. B. 1993. Matherist Lackmeasur Suight Chamana Dathana, Manapality, 17, 1, v. 20, et. p. 57 (1889). Rught Nurten Blat et Julya Lallaja, J.

person in possession of land may be ordinary diligence get rent for it according to the prevailing rates for such land, and that the true owner wrongfully dispossessed has been a lost by that amount (1)

If the true owner is placed in the same position as if he bad all along been in possession that is all that he is ordinarily entitled to, and it is not reasonable that he should receive any additional benefit, or that the person in wrongful possession should not only make compensation but he fined as well. On this principle it has been held that ordinarily the collection and other expenses incurred by the trespasser will be allowed and that it is only when the trespass is of a very aggravated character (2) that the Court in its discretion may refuse such expenses (3) The principle has been stated in another form, namely, that costs of collection and expenses should only he allowed when the trespasser entered the land in the exercise of a bona fide claim of right, but that when the trespass is malicious and without bona fides, though the trespasser may still claim all necessary payments, such as Government revenue or ground rent, it is not imperative on the Court to allow him even such charges as would ordinarily but voluntarily be incurred by an owner in possession (4) But though a person, when sued may be entitled to a deduction he has no right to sue to recoup himself for his losses against the true owner and must bear the burthen of his own wrong (5)

C. W. N. 748 (1897); Rugho Nath Dobs 1. Agra Masc. 17. Chardon + Aject Singh, 12 W. R. 52 (1869). Thakoor Doss + Nobin Kristo, 22 W. R. 126 (1874); De Silva + Syud Tcharance. 9 W. R. 374 (1868).

(1) Grish Chunder Lahiri t Soshi Shik harishwar, 4 C W N 631 (1900), 27 C 951. 2 Bom J. R 70.)

(2) See Altaf Ah : Lalp Mal 1 A 515 (1977), where the treapass was 'tortious und mulcious', lungar Mal : Jai Ram 24 A 376 (1902)

(3) Ab lul Ghafur c Raja Ram, 23 A 252 (1901) dissenting from Shitab Dert Apadhia Privad 10 1 13 (1997) of that doesn n means that a tort feasor should n ver be allowed a d duction and det in Dun_ar Mali Jar Ram 24 1 376 (1902) Sec also Gooroo Des Amand Moyee 15 W R 203 (1571) Durchandh w Nunder r Keshub (hunder 3 W R Mase 25 (1865) Rams Dhul Smah : Purme surce Pershal ? W R 75(15(5) See haf a most Chowdramer Lukes because por [nesie] whis are assets of estate minus cests of cellects in Government revenue, I see by distributed district racts, la draught etc] Thaker Pass t Shahee Bhasin 17 W R 205 (1572) ford wed lands, dedu to n of expenses of wership) Pale er e M hunt Ral to 1 ... L ?

W R 230 (1867) fjudgment debtor left to recover Government revenuel, Lifoomissa Chowdhrain : Rukceboonissa, 9 W R 457 (1865) [Surunyamee allowed, and it was pointed out it was increasonable that de fendant should pay what the plaintill could not possibly have collected). Becharam Doss t Brounath Pal 9 W R 30J (1505). Filuck Chand v Soudamini Dasi 4 C 500. 509 (1878) Dakhuna Mohan Roy r Saruda Mohan Res. 21 (142 (1843) fallowance of resenue paid by claimant of estate helding ander decree subsequently reversed | 5 c. 201 1 60 Sharf ud din Kahn e Fatchyab Khan 20 1 205 (1897) [expenses of decrees for rent under curumstances deallowed) hathar Ma (Sha O hadha), 17 B 35 (1842) [menn prefits can all be ascertained after making d ductions from the gross carmina of all su h pasments made by the defeutant as the plaintid would have been bound to make if at procession)

(4) Dungar Mal e Jai Itam 24 A 376 (1902) see also Melal (chaffer e Itaja bam, 22 A 202 (190) where it was hell there was no loos fates. See it wever latter case in appeal in 23 A 252 (191).

(5) The k Chapter > whom Date & C. Follows

The mode of calculation in cases of decrees for and against each of the parties, is to calculate and raterally divide them, and then to allow a set off to the extent of the profits actually received by each sharer, the deficit in each year being made good by the party who received in excess of his share (1)

Proof necessary.—In a sunt for meane profits it is, as in other cases in cumbent on the plaintiff to establish not only the existence of his right but also the extent of it. The first he does by proof that the defendant has wrongfully deprived hun of enjoyment, (2) and the second by proof of the duration of the wrongfull possession, and it is for that period only that damages are claimable (3). Where, however, it is shown that a particular jama is payable in respect of a property, it has upon the wrongdoer to show that the sum has not been realized (4). On him, as the party in possession and having the means of information, hes the onus of proving what is the actual amount of meane profits (5). It cannot be laid down however, as a general proposition that the burden of proof in this respect is always on the defendant. It depends on the circumstances, according to which presumptions may or may not arise in fivour of the plumtiff (6).

In calculating uasilat, evidence is usually taken of the rent paid. The party in possession is called on to produce his accounts, which are compared with the pottahs and dakhidas in the ryot's possession. Jummabunds payers filed by paticaris under the zenindar's supervision have been accepted as prima factor evidence of the profits of the estate (7). But settlement papers thirty yours old without inquity into the actual proceeds of the estate during the period of dispossession we useless is a basis to work on (8). When the amount of masne profits demanded is merely approximately given, the plaintiff is not bound by whith he has said in the plaint, but may be given more, though, of course such at tenent may be used as evidence against him (9). The ordinary risk, however bring that a plaintiff cannot recover more than he claims in the plaint

⁽¹⁾ Bijoy Gobind & Kilce Presume, 16

M. R. 204 (1871)
(2) Ishan Chaddri Burdhin e. Amad hii
Mai, 5 C. W. N. 720 (1904), as to possession
and dispossession. Dwatkerum Masar e.
logissur Lall, 21 W. R. 276 (1874), Rodhi
Churit e Zumuroomssa. H. W. R. 52 (1815),
Lep Singh Khasate Amaar Khasat. 241, 243
(1853), Kaladase V. Millafidas dB 77 (1884)
(5) Ishan Chardra Burdhan e. Amal Im

Ma, 5 (W N 7-0 (1301)

(4) Brojen by Countr Roy r My High Chair le Ghost, 8 C 343, 251 (1854) exerthing being assumed against the with J. I of Doct, a Soondure (Myharane Shibeshuree

S.W. R. 101 (1867) (*) D. Cuillion Sundson Checker Charles T.W. R. May 25 (1893)

ha 17 3 W. R. May 25 (1975) (6) Kalafina W. Lui Basaka Kunja Rehari

BL 1 C I R 1 (1881)

⁽⁷⁾ Rajah Deonaram Sungh a Nack Personal 2 A H C R 217 (1870)

⁽⁵⁾ Puren Chun1 r Roy e Juggessur Wolkerjee, 17 W R 205 (1872)

⁽b) Pires Soculare e F-han Chunler 10 W. P. 502 (1871). Hirs C. bud Blacket e Degandure Delta o W. R. 217 (1868). Indersony Dalace Highe Mahmed M. Khim S.C. - 5a (1881). Curre Pres I Nood does I vide V. H. 2 (1888). e c. 12 C. b. 11. surf. s. Fakharutha Malmed a Off tal France S. J. v. 17 (1884) salvier the Stellaket the Javat sat rated the care but them. It is that was given up to the state of presence in North Court Free Lankender a Blackape Hire Alback Lo II (1884). I M. J. Sci (1880).

he will be limited to it where the rate or amount is not stated approximately (1)

As regards mesne profits before suit as these have accrued due and the plaintiff has a cause of action in respect thereof a plaintiff sning for mesne profits is bound to put forward his whole claim. If he does not a subsequent suit for mesne profits prior to the first suit will not be (2)

Mesne profits are demandable from the date upon which they become annually due (3) But a purchaser for valuable consideration without notice of plaintiff s title has been held not hable for mesne profits from any date earlier than the institution of the suit where the plaintiff has been guilty of laches (4) and mesne profits were only allowed from the date of suit in other cases (5) Under Art 109 of the Limitation Act a defendant is hable for mesne profits received or which might have been with due diligence received during the three years before date of suit and not before. This period has no reference to the time when reuts fall due (6)

Accruing before suit -The assessment of mesne profits was held to be an essential part of the decree in the suit and not a proceeding in execution and therefore something which must be done by the Court trying the case which was authorized to male a decree in it It cannot be left to another Court which when the final decree is made may have to execute it (7). In a sint for recovery of possession and for mesne profits from the date of suit it was held that a Munsif could ascertain and award mesne profits even though they were in excess of the pecuniary jurisdiction of the Court (8) The Court had either to determine the matter itself or direct an inquiry. But it must have done one or the other. Thus a decree swarding immediate mesne profits at the late admitted by the defendant and larger mesne profits contingently on a higher rate hemz proved at the time of execution was held to be irregular (9)

- (1) Baboojan Jha t Byjnath Ditt Jl 2 6 C 472 (1880) and see Cooroo Doss Roy Bungshee Dl ur 15 W R 61 (1871) wl ere the party was held to be setting ap 3 a w mu distinct claim
- (2) Sec O II r 2 Ram Rittun Ando t Ram Chunder Pal 25 W R 113 (1876) As to whether a claim for possession and for mesue profits are dutinct causes of action see notes to same rule and order Meaning of cause of action Tort In Rama bhadra v Jagannatha 14 M 283 the mesne profits accrued since the decree in the former
- (3) Maharaj Koer Ramaput t Furlong 3 W R 38 (1865)
- (4) Juggurnath Sahoo t Syud Shah Ma homed 14 B I R 386 (1874) Slight delay will be of no account haleenath Doss t Rajah Meah 22 W R 406 (1874)
- (5) Thakur Shere Bahadur : Thakuram Duriao 3 C 645 (1877) Sri Raghuna tha t

- Str Brozo Kishoro 3 I A 154 193 194 (1876). Sarkers : Prosonnomoyee Dossee 6 C "94 (1831) or from notice of claim Sumbhoo Chunder Surn ah t Iss ir Chunder 2 Stv 4
- (6) lbbas t Farsih ud din 24 (41) (18)4) Lishnanand a hannar lartab Naram 10 C 785 (1884)
 - (7) Mt Bibec Meher Jan t Mt B bec
- Gerda 25 W R 270 (1876) (8) Ran es sar Mahton t Dilu Mal ton 21
- (3.0 (1534) In this case to cause of action for m sac profits had arisen on the late of ant distinguished in Bhupendra i Purna 15 C W Y 506 (1910)
- (9) Syud Lotfoolah : Vit Vuscebun 10 W R 24 (1868) In Hurechur Mookerjee r Mollah Abdulhur 17 W R 209 (1872), if was held that the decree had left the matter to be determined in execution and see Ishari Pershad v Ram Varain Saha 6 (W N 6"2 (1902)

Decree.—A decree declaring the liability for mesne profits, but not determining the amount if worked out after the death of a defendant, did not, it was held, bind the heirs not parties (1)

Under the Code of 1859, the Court might reserve the inquiry "for the execution of the decree," a phrase which gave rise to difficulty (2) The Court under the last Code might "direct an inquiry." The proceedings were part of and a continuation of the suit, and no final decree existed to execute or appeal from until they were closed That part of the decree which denoted possession to be given was final, but the other part was interlocutory, and became final when the amount payable was fixed. An application to ascertain the amount of mosne profits was not an application for execution, but an application by which the decree holder moved the Court in a pending suit to make a final decree regarding mesne profits (3) And for this reason an application to ascertain the amount of mesne profits anarded by a decree was not affected by limit; tion (4) The Bombay High Court, however, held that a decree under sect 212 of the last Code was necessarily subject to the limitation had down in sect 211 of the same Code, and that meane profits for more than three years from the date of the decree should not be awarded, even though possession was not delivered during that period (5) The investigation into mesne profits, directed by the decree, was nothing more than a continuation of the inquiry which was set on foot at the trial into the merits of the plaintiff a case against the defendant,

iirst chut lant

was not called upon to answer the plaintiff sease until the plaintiff had given some evidence in support of it (6). The direction as to the inquiry into the amount of mesus profits need not it was held necessarily be contained in the decree, (7) as to the form of which, see case ened below (8). Once the hability of a party was fixed in the Appellate Court the Lower Court had to confine its inquiry to the assessment of the amount of dimages (9).

ury to the assessment of the amount of damages (9)

The language of the amended section makes the procedure plan. The

⁽¹⁾ Radha Prasad Singh t Lal Sahab Rai 13 A 53, at p 65 (1890), s c, 17 I A 150 (2) Dadar Rossem t Majerdann si 4 C

<sup>(29) (1878)
(3)</sup> Ib. Mt Tarzelmu i Karamut Hossem
2) W. R. 212 (1874), Krishman a
N. W. R. 212 (1874), Krishman a
Nikamlan, S. M. 137 (1884), Annado
Kashore a Iman lo Kish at 14 (29 53
44 (1884), Raha Prasad Sungh a La
Salub Ras, 15 A 53 at p. 05 (1889) ac
Krishman, 15 C. 112, at p. 130, 137 (1884)
1 B. Darzika Nah Wesser a Barmit
Nath Wasser, 2 (44) 132, 133 (1884)
Pryag Sungh a Raju Sungh a C. (20) (20)
(1874), (1675), Gopal Claudra Chakravatta
1 ra nath Dutt, 12 (17) (1884). Null
Krishman and C. (20) (1884).

nipur Jemindary to Jtl i lansh

Aarun 39 C 2-0 (1911), 16 C W \ 103 (4) Puran Chint : Roy Radhi Aishin, 19 C 132 (1631), 1 B Pryag Singhi Riji Singh, sujin Waliyi Biliji Nazir Bosh 26 A (23 (1904)

⁽a) Narayan (rim 1 Manika 8 10 Sela shin 24 B 315 (1840) | Lifamrini 1 ku

ship 24 B 345 (1859) Citamrun i ku 1 rlas 4 B 143 (1859) (c) In Expect Sundi i Ralley Sundi 41

⁽f) in tuper sugar 1 24 27 3 22 2

⁽⁷⁾ I stm a Ribin All Id Majni I I A. Il (18 a.) All Idamenta I All Id Majni a Mulana mat Abdul Azze 10 A. Lee (1806)

⁽⁸⁾ In age : First pt 1 (C 15) 171 18 I A 163

⁽¹⁾ Daatka Lall (Niripl'r Sara n =2 W R 4 I (1574)

Court may either determine the amount in the decree or may give a decree for possession, and then direct an inquiry into mesme profits, etc., and dispose thereof in the final decree. In a recent case where a plaintiff had brought a suit for recovery of possession on declaration of his title, which was granted, and for mesne profits, which were disallowed, it was held that sub-sect (2) of this rule implies that the decision with regard to possession is a preliminary decree within the meanine of sect 2(1).

Accruing after suit .- Sect 211 of the last Code, which referred to mesne profits accruing subsequent to institution of suit, was held to be an enabling one, and it would, it was said,(2) be neither unreasonable nor illegal to refuse subsequent profits up to date of decree and decree immediate possession . leaving the party in whose favour the decree was made to his remedy by a regular suit if immediate possession was not had The mere abstention therefore of the Court to award mesne profits after date of suit was held not to be a bar to any suit in respect thereof (3) A claim for mesne profits was held distinct from a claim for recovery of possession, and it was only under sect 41, rule A, of the last Code that such claims might be joined in one suit (4) In order to avoid multiplicity of suits the Court was empowered to assess damages not only so far as they accrued up to the commencement of the suit, but also those accruing after suit and during the continuance of the trespass But the section was not important or obligatory but discretionary (5) Where the decree was silent touching interest or mesne profits subsequent to the institution of the suit they could not be given in execution , but the plaintiff was still at liberty to assert his right to such mesne profits in a separale suit (6) Apart from the decisions cited the

⁽¹⁾ Kumid Lal i Ramani Valion 19 C. L. 1 346 (1914)

⁽²⁾ Ramabhadra + Jagannatha, 14 V 328, 337 (1800)

⁽³⁾ Mon Mohan Sukir + Seculars of State 17 C 968 971 (1890)

State 17 C 968 951 (1890) (4) The 15 C 968 950 951 (1880) I rithe appoint view holding that the claims are not

appoints view holding that the claims are not distinct emission for their second sector 0.11, r/2.

⁽⁵⁾ H at p. 970

⁽a) Sadova, 1941a. (Rumaling, Pullar, 21 A. 219, 228 (1875) | a c. 24 W. R. 197, 1 akharu Him Mish mod (a. 6th all Trustee 8 1 A. 197, 207 (1881) | a c. 5 C. 178, 1 akharu Him Mish mod (b. 6th all Trustee 8 1 A. 197, 207 (1881) | Mir W. Lan Sukar (a. 8c) A. 17 C. 188 (1881) | Mir W. Lan Sukar (a. 8c) A. 17 C. 188 (1881) | a c. 18 C. 18 (1884) | a c. 22 1 A. 18 C. 18 T. 18 (1884) | a c. 22 1 A. 18 C. Ultar range (1884) | a c. 22 1 A. 18 C. Ultar range (1884) | a c. 22 1 A. 18 C. Ultar range (1884) | a c. 22 1 A. 18 C. Ultar range (1884) | a c. 22 1 A. 18 C. Ultar range (1884) | a c. 22 1 A. 18 C. Ultar range (1884) | a c. 18 G. 1

were claimed1, and for earlier cases, see II we Rajendur (comar, 11 W R 200 (1869) fand the Court must by the period in respect of whi k such profits are to be assessed). L'Aourie Singh : Bijoynath Chalterree, 13 W R H (1870) , a c , I B L R A (111 Sand Shah Amer'r Saul Shah Zameer, IS W. R. 122 (1872). Broughten t. Perblad Sen, 19 W R (51 (1573), Rhoobungssare Chowdhrain v Manson 22 W R 100 (1974). Ram Ghulam r Dwarka Ru 7 3 170 (1994) tianno Lal e Ram Salat, 7 3 107 (1991). Remath Pershad r Bath a Small 10 W R (No. (1808) Shaikh Malada Mi Aruffun, 25 W R 215 (187) Rate Bay Stab . Shee to lam St al 25 W 11 327 (1571) lan bee Nath Makerya Laphro Sugh 15 W. R. 202 (1871) fand if concept. Base menujet a jurte ufart me 1 urt 11 neu tan attet gireant les illi lattilection · Wilcon th 11 W R 222 Iv 0 Late ور المرام فالمستمل والمواقد المنافضوا 15" I tare ha culti fame e Iajah West and street a street to the tieds to each telling along the erge to. that sires and

matter was made clear by pars 2 of sect 241 of the last Code (See, however, now post) But it had to be ascertamed on a proper construction whether the judgment and decree was silent on the point Wasilat by law is demandable up to possession, and therefore a decree for "possession with uasilat" was held to give uasilat up to the date of possession and not merely up to the date of suit (1)

A judgment dramssing an appeal is in reality an informal mode of confirming the decree appealed against. Where, therefore, mesne profits were warded from the institution of the suit until decree only, and the Appellite Court simply dismissed the appeal without providing for subsequent mesne profits it was held that these could not be recovered in execution (2). But where the original Court granted a decree for possession with "future mesne profits" and the Appellite Court approved that decree infloring mesne profits, it was held that mesne profits were granted by reference to the original decree (3). Where a decree was given for certain of the properties claimed and mesne profits, and the suit was dispussed as regards the other properties, and on appeal the Appellite Court revered the decree of dismissif, it was held that the appellite decree imported in ward of mesne profits on all moretty, the possession of which was decreed to the plantiffs (4)

is to Court fees (5) and form of decree under sect 211 of the last (ode (6)

see cases cited below

Under sect 244 clauses (a) and (b) of the last Code, the Come of evention determined questions relating to the execution. This is not so now under sect 47 of the present Code. The present rule enters that the Court of finil shall in continuation of the suit inquine into the question (c) notes to sect. 17). The panultimate section of sect. 241 of the last Code has not been removed, and probably any clum made and not expressly fainted in the decree will be deemed to have been refused within the meaning of Explanation V of sect. 11

"Relinquishment of possession"—This clause is new With a view to the curtailment of delay and expense, it is enreted that the claim for me ne profits should not continue till actual delivery of possession if the defendant prefers to relinquish the land with notice to the pluntiff

"Three years"-In the Code of 1859 there was no time sperified down

give me sne ; rofits

⁽¹⁾ Fakharud Im Mahomed r Oheral Prustee, 8 I A 197 (1881), z c, 8 C, 178, Int see Ram Manickya r Jagannath tope, 5 C 500 (1879), and see for other cases. Buns o bingh r Mirza Austi Mi, 22 W R 324 (1874), Ratsoonissa Beguma bharo Ia Soon dare, 16 W R 25 (1871) (decre for pesses aon construct to include means protest, Bijai Bahadur r Bhup In Lin, 19 4 2, 56(37). (2) Synd Sinth turer r Sjad Slah

Zameer, 18 W. R. 122 (1872) (1) Rajah Bhop In lar : Bijai Baha lur, 5

C W > 52 (1000), x c, 23 1 1 20%

⁽¹⁾ Wilna libre Sarie Brain -1 1 1-3,

^{6,24 (1.01),} but set l'ekown Snoh e Bijognath Chatterjee, 13 W. R. 11 (1870), where appeal berred was hill not to

⁽⁵⁾ Bam Krahna Bhikaji i Bhimal Isa, 17 B HB (18 89), Marden i Janakiramnya ya M 371 (1839), Mohan Mohan Disa i Satu Chandra Rey, 17 C 701 (1830), Kewal Ku han bingh i Soukhiri at C 173 (1830), c 1 C W N 243

⁽⁶⁾ Kali Kradna 1 v. ic v Scretary (1 State, 16 (173 at p. 183 (1888), a c., 15

^{1 1 150}

to which mesne profits could be awarded short of that of obtaining possession. The Code of 1877 introduced the further limitation which now exists, and the rule thus restricts the time for which mesno profits can be allowed in a decree to three years from the date of the deerce. Consequently where no period is mentioned the decree cannot be construed as giving the plaintiffs profits for a period longer than what the law allows the Court to give (1) So proceedings for the purpose of a-certaining me-ne profits were held to be a continuance of the original suit, and the Court was bound by these provisions. Where, therefore, a decree directed that planitiffs should get mesne profits from a certain date until delivery of possession, the amount to be fixed in execution held that the decree was necessarily subject to the limitation laid down in sect 211 of the former Code and that mesue profits for more than three years could not be awarded even though possession was not delivered during that period (2) In executing a decree which awards mesne profits, and which is affirmed by a final Court of Appeal, the three years from the date of the decree until the expiration of which alone mesne profits are recoverable must be calculated from the date of the decree of the final Court of Appeal, and not from the date of the decree of the original Court (3)

Interest.—The Code of 1839 provided that interest might be decreed, (4) but the Code of 1882 first included interest in the definition of meson profits. There being no rule of law obliging the Court to allow interest upon meson profits it is a matter for the discretion of the Court, upon consideration of the facts, whether to allow interest or not (5). No difference should be made as rights interest between tensilal paid in kind and paid in money (6). A decree for interest on meson profits from the date they were ascertained was held to mean the date on which they were ascertained by the Court, and not by the Imm (7).

The words "together with interest on such profits" in the definition of meanprofits (see sect 2) do not refer to interest due after the ascertamment of the amount of mean-profits due under the decree, because the Courts have otherwise

⁽¹⁾ Uttaturam t Kishordas, I Bom L R 638, 641 (1893) s c, 24 B 149 and see Grish Chunder Lahur t Soshi Shikharesh war, 4 C W X 631 (1900)

⁽²⁾ Narayan r Sono, 1 Bom L R 846 (1899), s c, 24 B 345, Trailokya r Jogendia 35 (1017 (1908)

⁽³⁾ Bhup Indar e Bijai Bahadur 2 Bom L R 9 8 (1900) s c, 23 A 152, 5 C W N

⁽⁴⁾ Though in a suit for mesne profits only interest on mesne profits could not be recovered, such as vur being not for a debt but for unliquidated damages, and interest not but gallowable on such taken t Dullabh Dwirks, 9 B H C R 7 (1872). Gumdo Manadrav e Krahazarav, 4 B H C R 55 (1867), but in Lucky Nivain t Kalik Puddo I C S2 (1879), interest was given und see

Hurrodurga (how diram t Sharrat Soonders, 4 C 674 (1878), Moharuk Alt e Bonstu Chura, H W R 25 (1869), Bengal (oad Co t Darcembah, Marsh, 105 (1862), Hurropersaud Roy, 3 C 654 (1878). It was also held that a sum found due for meane protist was a judgment dubt, and carried interest by its own force, Airk land e Modee Pestonger, 3 M I A 220 (1843), and interest was decreted in respect of vongonashel. Sumbhoolall t Collector of Surat, 8 M.I. A (1859).

⁽⁵⁾ Ashnanand t Aunwar Partab, 10 (785 (1884), a.c., 11 1 1 88, 93

⁽⁶⁾ Sm Raye Kishoree ε Bonomally Churn Mytee, 10 W R 209 (1868)

⁽⁷⁾ Doorga Soonduret Debra t Shibes surco Debia, 10 W R 391 (1868)

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been given a discretion to award interest separately on the amount so ascertained. The words, therefore, contemplate that interest should form a separate item in the calculation of the amount due as mesne profits, and a decide holder is entitled to receive interest year by year on the amount found to be due, and not only on the imount actually ascertained and embodied in the decise (1). The Court has jurisdiction to give or refuse interest on mesne profits as it chooses. But if it does not intend to grant interest it should expressly refuse it, for, having regard to the additional words, "together with interest on such profits," a deene which merely grants mesne profits, and is silent as to interest, must be taken to mean that the mesne profits shall carry interest on them (2). Where a decree granted mesne profits and said nothing about interest, the amount of mesne profits being left for determination in execution of the decree. held, that the decree holder was entitled to interest upon the mesne profits due to him until such mesne profits were actually paid to him by the judgment debtors (3).

13. (1) Where a suit is for an account of any property Decree in administraand for its due administration under the decree of the Court, the Court shall, before passing the final decree, pass a preliminary decree ordering such accounts and inquiries to be taken and made, and giving such other directions as it thinks fit.

(2) In the administration by the Conit of the property of any deceased person, if such property proves to be insufficient for the payment in full of his debts and habilities, the same rules shall be observed as to the respective rights of secured and insecured creditors and as to debts and habilities proveable, and as to the valuation of annuties and future and contingent habilities respectively, as may be in force for the time being within the local limits of the Court in which the administration suit is pending with respect to the estates of persons adjudged in declared insolvent, and all persons, who in any such case would be entitled to be paid out of such property, may come in indet the preliminary decree, and make such claims against the same as they may respectively be entitled to by vitue of this Code

Administration suit - cet 10, 38 & 39 Vict c 77 In ordinary cases an administration decree is a matter of cour c on its being shown that the

⁽¹⁾ Radhad Raman Munsht : Surnamoyi Del: 7 C W N 437 (1 03), s c , 50 C ,00

⁽²⁾ Grish Chunder Lahiri i Soilin Shi kharishwar Roy, a C. 331 (1909), a c. 4 G. W. N. 031, and at 33 C. 1.2. (1905), a Bom 1 R. 701. But see Aladul Ghafur i Raja Rain. a V. a 2 (1900), relying on Drish Chow II rant e. Surat Soil Indilucto Drish Chow II rant e. Surat Soil Ist Devo. 1, 8 C. 332 (1951), f. H. in Req in Ito

Commar Madhult Chan Ict, 8 C 334 (1883), which I leaver, it is it to be observed was fast point I out in Radia, Raman Mundi ebara may Debi, 30 C 500 507 (1931) Is for it ocustem not the pression in Col. 11 c of I have was different. Beckerve Is say a trope math Pal 3 W R 3 3 (18 a).

⁽³⁾ for sh Chindr 1.1 m c Sala Shi khareshaar Roy, 33 C 3.3 (1907)

plantiff his an interest in the estate and that the defendant is an accounting party, and such a decree can only be averted by payment or the admission of assets and submission to a personal decree. But the Court has power to stay or dismiss frivolous or veatious actions, and will see whether there is bona fides, whether real and substitutal questions exist for determination, and whether an administration decree is the necessary and proper rehief (1). In such a case it is necessary to pass a preliminary decree, directing all such inquiries to be made and accounts taken which cannot be conveniently done in Court but which have to be carried out before the Court is in a position to pass its final decree. The first paragraph provides for this. An order under the first paragraph is a decree, and its appealable as such. See sect. 2, and, and notes thereto.

Insolvent estates.—The second paragraph of this rule is taken from sect 10 of the Judicature Act of 1875 [43 & 29 Vict c 77]. Before the Judicature Act, in administration in Chancity, a secured (redutor, who had not realized his security, could prove against the assets for the whole debt and receive a dividend his could then realize his security, and if he received in the whole more than 20s in the £, he paid over the excess. In bankruptcy he had to realize his security and prove for the balance. The Act made the rule in bankruptcy applicable to administration actions. It did not (nor does this section) apply ill this principles of bankruptcy to insolvent estates, but established uniformity of administration in respect of the four heads which are specifically mentioned in this section (2). A decree for administration is a decree in fivour of all creditors, and as all of them are included in the same decree, it is in quitable that one should be in a better position than another under that decree and therefore the Court divides the assets amongst them (3)

14. (1) Where the Court decrees a claim to pre-emption [5.2]

Decree in pre-emptionsoit. in respect of a particular sale of property and the purchase-money has not been paid into Court, the decree shall—

(a) specify a day on or before which the purchase money

shall be so paid, and

(b) direct that on payment into Coint of such purchasemoney, together with the costs (if any) decreed against the plaintiff, on or before the day referred to in clause (a), the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of such payment, but that, if the purchase-money and the costs (if any) are not so paid, the suit shall be dismissed with costs.

⁽¹⁾ Sm Atturnoucy Dasseo t Bepm Behari Dhur, Suit 875 of 1904 Cal H C, 23 Jan 1906

²³ Jan 1906 (2) See Annual Practice, 1905, vol 11 p 187, and cases there collected.

⁽³⁾ Soobul Chunder Law e Russick Lall Matter, 15 C 202 209 (1888), distinguishing the case where a creditor has obtained judgment before administration decree.

(2) Where the Court has adjudicated upon rival claims to

pre-emption, the decree shall direct,-

(a) if and in so far as the claims decreed are equal in degree, that the claim of each pre emptor complying with the provisions of sub rule (1) shall take effect in respect of a proportionate share of the property including any proportionate share in respect of which the claim of any me-emptor farling to comply with the said provisions would, but for such default, have taken effect, and,

(b) if and in so far as the claims decreed are different in degree, that the claim of the inferior pre emptor shall not take effect unless and until the superior pre emptor

has failed to comply with the said provisions

Pre emption -Sect 214 Code of 1877 and 1889 amended as indicated in it ilies. The former section, which was frequently criticized is midequite, has been considerably altered. In sub clause (1), para (b), the day is fixed As to the power of the Appellate Court to specify another day, (1) see note As regards delivery of pessession in the same paragraph, the duty of executing and registering any necessary instrument (2) has been held to be upon the defend int In sub clause (2) provision has been made for the form of decrees in the end of claims decreed in favour of rivil pre emptors (3)

The Mahomedan law is the only system prevalent in India which provides substitutive rules relating to the right of pre emption in a systematic form, though local Acts and the Code recognize the existence of the right, and by down rules belonging to the remedy. In all cases in which the right of pre emption is claimed, the Courts in administering equity will by analogy follow the rules of Milhomed in law, even in cases where the right is not elimited under that law, but under local usage or custom The rules of customary pre emption no doubt depend upon the custom itself, but where such custom is silent upon my particular point, the rule of Wahomed in law must by in dogs be taken to be the rule of

decision (1)

Rules in regard to decrees in pre-emption suits were formulated for the first time in the Code of 1877 and it is concer able that in introducing the c new rules the form which they took fell short of comprehending all the various cases that might are a miconsequence (5) Sect. 211 of the last Code thus laid down no rules is to the form of the decree in cases where rivil pre emptors, passessing equal rights of pre-emption, came forward to enforce the right in

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⁽I) See Pardiadi Lill r Raci Deal 2 1 741 (ISSO), Kelm Smalt r Tusir Smalt 17 1 176 (1871)

⁽²⁾ See Ramasame Latter e Climoin Asia 21 M 411 0 1 (1901) (1) See Kushi Natha Wakta Irwal + 1 Lo (1884), Hillance Shee Lie el a V 1 a (1881), Aprile Nath a Mathina I result 11 1 1 1 (1555)

⁽⁴⁾ Zamer Husabert Draft Ham o A 110, 113 (1884) Rajja i Lahan o A 180 182 (185-) the substantial law is then, with n the seope of the work is not further the two ! I few the swill be found in the n testis Mellikm dista le til (Illinia bipal Suan te V 3 I 34 (1881) I rannatured as no leg 1

respect of the value sale, or where one of rival pre emptors possessed superior right of pre emption to the other. The Court had to deal with such cases upon general principles of equity suited to the exigences of each case (1). The section again provided only for cases where costs have been decreed against a plaintiff, but not for cases where costs, instead of being awarded against the pre emptor, were awarded in his favour by the decree. But it was held that there being no specific provision in the Code to meet this case, the principles of justice, equity, and good conscience were applicable and that under the general rules of set off, which are so consonant with these, a plaintiff was entitled, when depositing the purchase money under the decree, to deduct the sum awarded to him as costs (2)

The former section it was held, contemplated cases where the party seeking to enforce a right of pre emption is out of possession, and was therefore in applicable to instances in which parties setting up such a right were already in possession (3)

Payment of purchase money - If on the day on which the time for pay . ment expires the Court is closed the pre emplice price may be paid on the next day that the Court is open (4) If the pre emptive price is not paid within the prescribed time then as the right decreed is dependent on payment within such period, the decree for pre emption cannot be enforced (5) Where the plaintiff naid the money into Court, petitioning that it should be retained until mutation ol names had taken place and the defendant refused to accept the money on the ground that the payment was elogged with a condition, it was held that the pryment was not saddled with a condition precluding pryment before mutation and the objection was disallowed (6) In making the payment the plaintiff may deduct his costs (7) The question whether the plaintiff has paid the purchase money in time is not a matter relating to the execution of a decree under sect 211, corresponding with sect 47 ante (8) A decree in a suit directed that the nurchase money should be paid within a certain period from the date the decree became final. The period of huntation prescribed for in appeal from this dicree expired on a day when the Court was closed held that the appeal could be fded on the first day it opened and that the decree did not become final till then (9) A plaintiff who has obtained a decree can appeal within the limits tion perial whether or not he has made the payment on or before the day haed (10)

- (1) Kashi Nath C Mukhts Frasad 6 A. 370-373 (1884) See Hulari C See Prasad 6 A 455 (1884) Ajaib Nath C Mathura Prasal 11 A 164 B 7 (1888), Arjun Singb C Nathura Emigh 10 A 182 (1889)
 - (2) Ishri i G pil Siran 0 1 Jol (1804)
 (3) Kralin Men ne Krosven 20 M 300
 - (3) Kratus Men na Krsasen 20 V 40 310 (1847)
- (1) Mr Wr lid K × rr Lall₁ < 2 × W 1 112 (15°)
- (1 lat Kolen e Bl. la Nath 14 A. a. (1842). O Km ales C. L. L. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M. p. Cao Nath Mr. et M.

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 15 1 227 at 3 22 (150), holas Nagare
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But the more appeal by a plaintiff or defendant will not of itself extend the time for payment (1) The Appellate Court may if it thinks fit extend the time for payment (2) But if the appellate decree says nothing about extending time it has not the effect of gring the plaintiff whether appellant or respondent, the corresponding period of time from the date of the appellate decree for payment to that which he had from the dute of the decree of the Court of first instance For this rule says that if the pre emptice price is not paid the suit shall stand dismissed and the decree, on the expiration of the time limited without payment by the plaintiff becomes a decree in favour of the defendant (3) (See first paragraph) If the pre emptine suit has arisen and been decreed before the vendee has paid the whole or part of the purchase money to the vendor, the Court in disbursing the purchase money deposited will make an order directing that the whole or part of the purchase money (as the case may be) should be paid to the vendor or vendee, both of whom must necessarily be judgment debtors and as such he liable alike to payment of the costs awarded to the pre emptor dicree) olde (4) It has been held that the profits of the property accounts between the date of the sile and the date when the pre emptor, in accordance with the decree paid the pre emptive price belonged not to the pre emptor nor to the original vendor, but to the original vendees (5) and that a suit could not be successfully maintained by a pie emptor to recover profits accrumbetween the date of his decree and the time when he obtained mutation of names (6)

15 Where a suit is for the dissolution of a partnership becree in suit for the taking of partnership accounts, the court, before passing a final decire, may pass shares of the parties, thing the day on which the partnership shall stand dissolved or be deemed to have been dissolied, and directing such accounts to be taken, and other ites to be done, as it funds fit.

Suit for dissolution of partnorship—The usual herms of decrean such a suit were given in Nos 132 and 133 Schedule IV of the lest Code. It was held that in a suit for an ecount of a dissolved partnership, a decrea should be presed under seet. 215 of that Code in econdance with form No. 132, Schedule IV and it should direct an account to be taken of the dealings and from actions to two the partner, and of the credits properly and effects due and I doubling to the late partner hip, and it should direct the appointment of a receiver of the

⁽¹⁾ In our Noth Lands (1 kl s I word In 1 = 3, at 1 = 6 (15)) (=) Il = 1 wolst h 1 1 s Reet Del 2 3

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⁽¹⁸⁸⁹⁾ - (4) [11] ([p.1] (Sur. (6.1.3.1.1.6)

⁽¹⁸⁸¹⁾ () De kom len e Srichar, 12 V 233 (1889) J. R.

^{(157) 1} B

outstanding debts and effects (1) The italieized words have been added, as the proliminary decree should dways contain a declaration of the rights of the patties

16 In a suit for an account of pecuniary transactions is. between a principal and an agent, and in any Decree in sult for other suit not herembefore provided for, account between princisal and agent. where it is necessary, in order to ascertain the amount of money due to or from any party, that an account should be taken, the Court shall, before passing its final decree, pass a preliminary decree directing such accounts to be taken as it thinks fit

Suit for account between principal and agent -In a suit by a principil against an agent for an account, on the fact of agency being established, it is the duty of the Court to direct an account to be taken of the defendint s dealings is igent. When once the plaintiff has shown that the defendant is an accounting party, it is then for the defendant to prove the amount of his receipts and disbursements (2) When an appeal is pending in the High Court against a preliminary order made by a Subordinate Court under this section, the High Court having seism of the appeal can apart from the question whether the ease falls within sect 545 of that Code, make an order staying the carrying out of such order pending the hearing of the appeal (3) These suits are not affected by section 10 (4)

- The Court may either by the decree directing an account Special directions as to be taken or by any subsequent order give to accounts special directions with regard to the mode in which the account is to be taken or couched and in particular may direct that in taking the account the books of account in which the accounts in question have been kept shall be taken as prima facio evidence of the truth of the matters therein contained with liberty to the parties interested to take such object on thereto as they man be advised
- Where the Court passes a decree for the partition of property or for the separate possession of a Decree in suit for partition of property or separate possession of a share therein share therein, then,-(1) if and in so far as the decree relates to

an estate assessed to the payment of revenue to

⁽¹⁾ Thirukumaresan v Sabbaraya 20 M 313 (1897) in which will be found observa tions on the procedure to be adopted and the burden of proof on the taking of the account

⁽²⁾ Rajhunath v Ganpatpi 27 A 374 (1904) For re opening of settled accounts,

see Kalanand Singh v Sri Prosad, 19 C L J 152 (1914)

⁽³⁾ Balkishen Sahu : Khugno, 8 C W N 572 (1904) F B s c 31 C 722

⁽⁴⁾ Chandra : Pramatho, 15 C W N 930 (1911)

the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or by any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54,

(2) if and in so far as such decree relates to any other immore able property or to moreable property, the Court may, if the partition or separation cannot be consensently made without further inquiry, pass a meliminary decree declaring the rights of the several parties interested in the property and giving such further directions as may be required

Suits for partition -The former Code contained no provision definitely prescribing the form of a decree for the partition of an estate or the separation of a share, though a somewhat special procedure was rendered applicable in such cases Sect 265 of the Code relegated the actual partition or separation of revenue paying estates entirely to the execution department, and entrusted it to the Collector On the other hand, sect 396 of the same Code contemplated in the case of other unmoveable property a preliminary order ascertaining the rights of the parties, which was itself a decree, but involved a final decree upon the report of the Commissioners These sections have been in part modified, and the present rule, which is new, inserted. Any local enactment by which juris diction to effect "imperfect partition" of revenue paying land is reserved oxclusively to the Revenue Courts, and which contemplates a procedure inconsistent with this rule, will be saved by the terms of sect 1, ante contemplates one preliminary deerce and no more. Thus, where after the confirmation of a preliminary decree for partition on appeal the Court of first met mee directed that actual partition should be made in accordance with certain directions then given by it, it was held that no appeal would be against such order, but its propriety could be questioned in an app. il from the final decree (1)

Decree when set-off is allowed and what amount is due to the defendant has been allowed a set off igainst the claim of the plaintiff, the decree shall state what amount is due to the plaintiff and what amount is due to the defendant, and shall be for the

(1) Any decree passed in a suit in which a set off is claimed

Appear from decree shall be subject to the same provisions in relating to set off

respect of appeal to which it would have

been subject if no set off had been claimed

(1) The provisions of this rule

y whether the set off wise

is idmissible under rule to of Oct

The words

from "if" to "plaintiff ' in the first paragraph of sect 216 of the last Code were substituted and the whole of the last paragraph of that section was added, by Act VII of 1888, sect 7(1) An amendment has been made to give effect to the view that appeals from decrees relating to set off should be to the Courts to which appeals in respect of the original claim would lie. In a suit by a principal against his agent for accounts where the agent does not specifically pray for a decree for the sum alleged to be due to him, the Court can grant a decree to the agent upon the finding that money was in fact due to him (2)

Certified copies of the judgment and decree shall be [5] furnished to the parties on application to Certified copies of ludgment and decree to be the Court, and at then expense furnished

Certified copies of judgment and decree -Act VIII of 1859, sect 198 The parties are entitled to receive copies of the judgment and not merely

translations of them (3) The practice of furnishing copies free of cost, on supplying the proper stamp has been set aside (4) (1) See Tiluck Clan 1 & Soudammee

Dassee 25 W R 275 (1976) (4) See Vil Monce Singh v Chimbash,

⁽²⁾ Parmanan i : Jagat 32 A 52 : (1910) 20 W P 40 (1873) (3) Varnivan : Ali Daji 1 B H C R 165

the Government, the decree shall declare the rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector, or by any gazetted suboidinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54,

(2) if and in so far as such decree relates to any other immoreable property or to moreable property, the Court may, if the partition or separation cannot be commented made without further inquiry pass a preliminary decree dicharing the rights of the several parties interested in the property and groung such further directions as may be required.

Suits for partition -The lorner Code contained no provise a definitely prescribing the form of a deen e for the partition of an estate or the sparation of a share, thank a somewhat special procedure was rendered applicable in such cases. Sect 207 of the Code relegated the actual partition or operation of resenue paring e true entirely to the execution department and entrusted it to the Collector. On the other hand sect 396 of the same Code contemplated in the case of other immoveable property a preliminary order a certaining the rights of the parties, which was it elf a decree, but involved a final decree upon the report of the Community ners. The exections have been in part makined and the present rule, which is new, inserted - Inv local enactment by which juris diction to effect "imperfect partition ' of revenue paying land is re-creed exclusively to the Revenue Courts, and which contemplates a procedure incon sistent with this rule, will be saved by the terms of sect 4 arte. The Code contemplates one preliminary decree in I no more. Thus where after the can firmation of a preliminary decree for partition on appeal the Court of first instance directed that actual partition should be made in accordance with certain directions then given by it, it was held that no appeal would be against such order but its propriets could be questioned in an appeal from the final decree (1)

19 (1) Where the defendant has been allowed a set off in its period when set of is a gunst the clum of the plantiff the decree what amount is due to the plantiff and what amount is due to the defendant, and shall be for the recovery of any sum which appears to be due to either parts

(2) Any decree passed in a suit in which a set off is claimed

Areal from decree shall be subject to the same provisions in

claim to set off te-pect of upped to which it would have

been subject if no set off had been claimed

(4) The provisions of this rule shall upply whether the set of it is admissible under rule to of Order VIII or otherwise

Decree in case of set off - let VIII of 1509 (c) 1)7 The winds

ment and decree to be

fumished

from "if" to "plaintiff" in the first paragraph of sect 216 of the last Code were substituted, and the whole of the last paragraph of that section was added, by Act VII of 1888, sect 7(1) An amendment has been made to give effect to the view that appeals from decrees relating to set off should be to the Courts to which appeals in respect of the original claim would lie. In a suit by a principal against his agent for accounts, where the agent does not specifically pray for a

decree for the sum alleged to be due to him, the Court can grant a decree to the agent upon the finding that money was in fact due to him (2) Certified copies of the judgment and decree shall be [5, 2]

the Court, and at then expense

furnished to the parties on application to

198 The parties are entitled to receive copies of the judgment, and not merely translations of them (3) The practice of furnishing copies free of cost, on supplying the proper stamp, has been set aside (4) (1) See Liuck Chand v Southmuse

Certified copies of judgment and decree -Act VIII of 1859, sect

Dassec, 25 W R 275 (197b) (4) See Md Monce Singh v Chimbash, 20 W P 405 (1873) (2) Parmanand t Jagat, 32 A 525 (1910)

⁽³⁾ Varjivan e Ali Daji 1 B II C R IC5

ORDER XXL

Execution of Decrees and Orders

Pajneit wider Decree

(1) All money payable under a decree shall be paid as follows, namely --Modes of paying money under decree (a) into the Court whose duty it is to

execute the decree, or (b) out of Court to the decree holder, or

(c) otherwise as the Court which made the decree directs

(2) Where any payment is made under clause (a) of sub rule (1) notice of such payment shall be given to the decree holder.

'Payable under a decree "-Co is onlined to be paid under seet 215 of the list Code (ee now ect 30) it was held were not paid under a decree and should be paid under that section (1) In in talment due under a decree may, under this rule be paid into Court (2) When an order has been made for the payment of money in a suit on a certain date and the Court is closed on that date, a payment made on the following day would be a good payment for the purpo e of the torder (3) Payment into Court is a valid compliance with a decree, even though the decree directs payment to the decree holder (4) On the death of a decree-holder, the debtor should either pay the debt into Court under cl (a) or 1-k for directions under cl (c) (5)

(1) Where any money payable under a decree of any Payment out of Court kind is paid out of Court, or the decree is otherwise admsted in whole or in part to the to decree-holder. satisfaction of the decree holder, the decree holder shall certify such payment or adjustment to the Court whose duty it is to execute the decree, and the Court shall record the same accordingly (2) The judgment-debtor also may inform the Court of such

(1) Shanks : Secretary of State 12 V 120 Chunder Roy 18 C 231 (1890), Dabee (1559)

(2) Madhay Appa : Rasp Vithu 1 Bom

I P 644 (1511). (3) Aravamudu t Samitappa 21 M 385

(1841), Shoosh c Phusan Rudro t Cobmd

Ra voot : Heraman Mahatoon S W R 223 (1867)

(4) Wana t Natu 35 B 35 (1910)

(b) Narendra t Charu 14 C W N 146 (1905)

psyment for adjustment, and apply to the Court to issue a notice to the decree holder to show cause, on a day to be fixed by the Court, why such payment or adjustment should not be recorded as certified, and if, after service of such notice, the decree-holder fails to show cause why the payment or adjustment should not be recorded as certified, the Court shall record the same accordingly

(3) A payment or adjustment which has not been certified or recorded as aforesaid, shall not be recognized by any Court executing the decree

Applicability—As to the principle upon which the rule proceeds and the cases to which the prohibition contained in it is applieable see notes post. Remedies of judgment debtor. The rule applies only to the ease of parties who stand in the relation of judgment debtor and judgment creditor at the date of the transaction (1). It applies only to a question of payment or adjustment of a derice and does not recognize an application by the decree holder (2). The former section was held not to govern payments made in excention of decrees passed under let \(\) of 18.9 in the Revenue Courts (3).

"Under a decree "—In Madras it was at one time held that the former section applied only to the execution of money decrees (4) and it was doubted whether the section applied to decrees for restitution of conjugal rights (6). In Calcutta and latterly in Madras also it was held that the section dealt with the adjustment of any decree and not merely with the adjustment of amoney decree (0). The amendment by the addition of the words of any lind adapts this latter view. The decree may be of any lind but money must be payable under it is to instalment decrees see O NA r 11. The rule presupposes that there is a decree in existence. So where \(\frac{1}{2}\) such a but to file a special appeal when \(\frac{1}{2}\) considered the compromised the case and \(\frac{1}{2}\) very the property it was held that the compromised the case and \(\frac{1}{2}\) very the property it was held that the coupromise having here effected after the decree in favour of B had been eversed it need not have been certified to the Court (7). And if payment is made under a decree which is set avade on appeal the decree holder must make

⁽¹⁾ Rama Ayyan v Sreenivasa Pattar 19 M 230 (1832) doubted in Ponnuswams t Letchmanan 3 M 659 (1911) 22 M I J 170 1 y Rahm J but see judgment of Sundara Ayar J p 178

⁽a) Lodd Govindoss v Ramdoss 24 M L J 88 (1912) and see Babar Ali t Shisir 16 C W N 9-J1 (1912)

⁽³⁾ Rajah I rotal Chunder t Kanaye Lal Dosa 3 W R Act \ 7 (1855) Ram Chun ler Roy t Raja Clira Balshee, 9 W R 3 2 (1868)

⁽⁴⁾ Sankaran Nambiar e Kanara Kurup 2., VI 183 (1898) - Vall karjuna Sastri e

[\]arasımha Rao 24 \ 412 (1901) but now see \aidhinadasam\ r Somasundram 28 \ 473 47" (1904)

⁽⁵⁾ Keshavlall Girdharlall t Bai Parvati 18 B 327 at p 331 (1893)

⁽⁶⁾ Baba Mohamed t Webb, 6 C 786 (1881) Rajah Padmanund Singh v Madhu Smgh 3 C W N clxxxvii. (1899), Naidhina dasam) t Somasundram 28 M. 473, 477 (1904) Subburaya t Kuppusawmy 34 M 442 (1911)

⁽⁷⁾ Hari Sadashiv : Bapu Balvant, 5 B H (R 4 C J 78 (1808)

C 1. 4 C 7 /3 (1 % o)

restitution even though the priment has not been certified (t). Where rent was payable for a mirror tenure and not under a decree, the provisions of the section were held mappheable (2). The rule does not apply to the case of a surety who having paid the amount due under the decree, if a rwards suce the principal (3)

"Out of Court"—The rule relates to voluntary adjustments of a decree made between parties to sent out of Court, and not to a case where a debtor pays to the other of the Court under the authority and pressure of the Court's process (1). When money as yield into Court the latter must pay it out immediately to the decree holder (5) or his ordinary legal hars, (6) though if the payment is made by the debtor to prevent his arrest, it is not a voluntary payment, and he is entitled to be he and before the money is paid out (7).

"Adjusted"—See as to the meaning of this term case cited (8) It only applies to matters occurring during the course of execution (9)

"The decree holder shall certify"—One joint decree holder is not bound by the sets of another who has compromised or received 1 syment out of Pourt, (10) and a joint decree holder has ordinarily no power to give a discharge out of Court to a judgment debtor for more than his own share of the decree (11) The debtor should therefore not pay unless jointly or to the extent of the identited shares (12)

The word "decree bolder" therefore must be read is decree holder or decree holders. The Court will not recognize a payment to one decree holder only in excess of that to which he is himself entitled. One of two or more jour decree holders is not competent without being inthorized by the other er other to certify sitisfaction by pryment out of Court of the entire decree, though he may certify satisfaction in respect of his own interest therein (13)

- (I) V csudi v (5) vin Li Vishini Vitbil 41 B 724 (1887)
- (2) Krihri Ciju 18 B Cii (1844) (3) Biliji Likshmin i Dilis 3 ti 12 B
- _15 (1557)
- (4) Billio Bal + Keshub Chun kr. 9
- W R ((2 (1868) (5) Inchment Perstade Se cram 21 W R
- 271 (1874)
 (6) See In to Perrunance, S.D. Sum. D.C.
- (a) Sea In 16 Permance, S.D. Shin D.C. Sept. 27 (183c) cited in O kinedy s.n. tes. t.i. sect. 258
- (7) Pr sann nath Ap lerger t Ben lo Ram Sem, 13 W R =9 (1870), s c 4 B 1 R App 25
- (s) I itch Mid numa I r Cepal Dis, 7 1 L4 (1883), Lrisajpa Muldur r Com itcend Boil, 23 W 17 (1812) Rui D yal Brunerju r Bam Hari I il 20 C 32 step 37 (1815) Sham I dt Hazarival 15C I I 131 (1911) Jarvan mi it es to lefudlaj
- (9) Prinithe Chinhe Rever Kleri M lan Ghose, al (651 (1902) [and there from the prin lift set in wish lifts!

- no lart an injury mto all rof payment rivel by mortagor lut see on this point in the best facility of the most larger lut see on this point with could luffer blen 5 C. W. 102 (1903). Whom I khan a Wilson I Wanawa et il M. 47 (1908).
 - (10) 1 dg timbe Bhanane Den 1 Agra
 - Mrc R (II) Mt Bil o Ballima Mt Hifzil 4 C I R (1879), Farm k Clumler Blutta
- charges: Din n by Nath Siny if 3 C SM (1883) (12) Malina Chandra Fey e Lyari M Lin Chandley 2 B F R App 43 (1893)
- (13) Moti Runt Hannu Frest 20 V 311 (1901) Firrack Chander Bhuttechapee (1904) Dancadro Nath Sanyal 3 C 831 (1884) Sultra Wolcent Strafty manal, 15 W 31 (1881) Farman San, be Laold and Kanwart A V 318 (1904) On the the Paramon part of create 1 Here are thy foregot Instead for we took for the thirty foregot types of the Computation of

The orduary way of certifying a payment or adjustment is by petition (1) made by the decree (2) but it can also be certified under O XXI r 11, clause (c), on an application to execute the decree. (2) but it can also be certified under O XXI r 11, clause (c), on an application to execute the decree. His for the party applying for execution to state any adjustment after decree (3) If, however, one of the parties is a minor his guardian must first obtain leave to compromise under O XXXII r 7 (2) Application may be made for a certificate of part satisfaction (5). To certify a payment or adjustment within the meaning of the section, it is in sufficient for the decree bolder to certify that mone, has been paid or that an adjustment has been arrived at without specifying the amount of the payment or mentioning the terms of the adjustment (6). Under this rule as there is no time fixed within which the decret holder is hound to certify a payment made out of Court such payment may be certified at any time (7). Intimation to a Collector in charge of the execution under the provisions of the 1hrd Schedule, amounts to a due certifying of the adjustment under this rule (8).

It has been held that an application in 1905 for certifying payments in satisfaction of a decree sufficed to give a fresh start for limitation, either is an acknowledgment within the me ruing of Sect. 19 of the Limitation Act (1A of 1908) or as a step in and of execution (9)

"Judgment debtor"—The term includes persons cluming through the judgment debtor or in his right e g an assigner from the judgment debtor of the equity of red imption after decree (10)

Remedies of debtor—Under the second parasisph of the rule the judgment debtor may upply to the Court executing the decree (11) if the decree holder does not e rifig that the adjustment be recorded (12) and he is illowed mustly days within which to take that step (13). Notice must issue to the decree holder to show cause—this does not mean merely to allege cause nor even to make out that there is room for argument but both to illege cause and to prove it to

⁽¹⁾ Stadoollah Shukh r halee Churn 12 W R 303 (1809), bit not vifete from a detre holder to his vikil Hiskoor Lall Virte r hanve Lall Tenaree 7 W R 301 (1807) directing, him to secretifa Bhoolin Vohun Buerper Sadheo Churn Sucar Lo W R 5 (1871) OC Secnotes to Chuse (3) (2) his to these words see Vulharimat Siid Khur t Layag Sahu 10 M 23 (1834) (3) Panjayya x Varesminh 2 W 1.16

⁽¹⁸⁸⁰⁾ (4) Yruna Jellinn i Limanadhan 29 M (190 (1905)

⁽a) Raj ulrenath l'ox bahal er e Chin

n cu il a (445 (1574) (6) Tuls gurappa Mu firad li e l ik rissa

^{\(\}mathrm{\text{to}}_n\) h 2 Born L R \(\text{01}\) (1 00)
(7) Tukaram c Babaji, 21 B 122 (184)
(184) a man block D words Sun half

Bhilen swirt Deliri Duonath Santial 2 h I I A C J 320 at p. 32248 9

⁽⁸⁾ Khushalch (nd + \andram 3) B 516 (1911)

⁽⁹⁾ Backaraj Nyahakhand v Bakaji ku karam, 38 B 47 (1913)

⁽¹⁰⁾ Panduranga Mudahar t Vythilm, a Red h 17 M I J 417 (1007) s c 30 M

⁽¹¹⁾ Rajendronath Roy r Chumiooma ! 5

C 445 (1879) (12) See ib Munmuhandas Jaikisson las

t Malai 13 B 171 176 (1855), Larrechut t Higho Goord o = A II (R 18 (1870) Chargo t Kalurain 4 B H C L A (J LOS 121 (1867)

⁽¹³⁾ Matheory Culam Morken _4 M L J JH (1411) in Biroo Gorain r Jannural, is C W N _23 (1311) it was diabeted at 1t r d kay will take away the right to 41 db

the satisfaction of the Court (I) If the judgment debtor applies to certife and the application is refused, then an order under this rule leng appealable (a) under sect. 17 (formerly 211) he should appeal and not Iring a separate suit In application, whether by a plantiff or defendant, for a certificate, though decided under this rul, is none the less a question relating to the execution in l satisfaction of the decree, and in appeal being available no sequente sint hes If, however, neither the creditor ner debtor apply to certify and the decree has in fact been satisfied in whole or in part, and yet the crediter sucs out execution the debtor has a remedy by suit. As already observed, this rule prohibits recognition of in uncertified idjustment only by iny Court executing the decree But the right of suit is controlled by the provisions of sect 17, is the operation of the latter section is not restricted by this (3). The subject has nowhere been more lucidly treated than by Pagot 1(1) In considering whether a suit is prohibited by sect 17, regard must be had to two points, viz, the cause of action and the relief claimed Numerous cases establish (5) that a Court other than a Court executing the decree can recognize an uncertified payment or adjustment of a decree in a suit hased upon such payment or adjustment. This goes to the cause of action. The principle upon which such cases it allowed has been that there is a cause of action arising from negligence, fraud (b) agreement or trust (7) So suits have lain to recover the money paid or property delivered (8) or for damages (9) Where, however, the relief sought comes within the prohibition contained in s ct 17, then a suit is barred. That section is framed to prohibit in a separate sint between the parties to the decree, any relief being granted which shall interfere with the conduct of the execution proceedings by the Court executing the decree (10) As a general rule, questions relating to the satisfaction of the decree must be settled by an order made in the course of execution and not by a regular suit, but no Court can settle a question of satis faction by an order made in execution unless such satisfaction shall have been duly certified (11)

(1) Rung Lall v Hem Naram Gir, 11 C 166 (1885)

(2) Rapp v Bhaip Harpvan 11 B 57 (1880) Lingayya v Narasunha 14 M 90 (1890), Garnvayya : Virdayappa 18 M 26 (1894), Jamna Prasa it Mathura Prasad 16 A 129 (1893)

(3) Deno Bundhu Nundy v Hari Miti

- Dassee, 31 C 480 (1904) (4) Azizin i Matuk Lal Sahu 21 C 437
- (1893)(5) Azızan ı Matuk Lal Sahu 21 C 4ob (1893)
 - (6) Viraraghava Reddi v Subbakka 5 M
- 3.7**,** FB (1881) (7) Gunamanı Dası t Pranl ishor Dasi, 5
- B L R 223 at p 232 l B (1870) Hoor masji Dorably Burjorji Jamsetn 10 B 155, it pp 163, 163 (1886) (8) Shadi v Gang : Sahar, 3 A 38 (1881) , Penatambi Uday in Vellaya Goundan 21

M 403 (1837) Iswar Chandra Ditt : Hars Chandra Dutt, 25 C 718 (1898) 8 c " C W V 217 In re Medai Kaliam Anni 30 M 545 (1907) Cendo : Mhat humar

(9) Guni Khan t Koonja Behary S in 3 C L R 414 (1878) Matlamma t Venkamma, 8 W 277 (1883) Poromanand Khasnabish t Khepoo Paramanick, 10 C 354 (1884) Krishnasami Ayyangar v Ranga Ayyangar 20 W 369 (1896)

(10) Azizan a Matul Lal Sahu _1 C 437

t p 458 (1893)

30 A 464 (1908)

(11) Virarighava t Subakka o 11 397 at p 398 F B (1881) see Sellamayyan v

of exec but a r intention as are --- Thus a suit which interferes with the execution, such its a suit steking a declaration that the defind intisinetentified to execute a decree and an injunction restraining execution (1) or for a declaration that the decree has been satisfied, (2) or a suit which seeks to set aside an execution sale, whether the purchased he the judgment creditor (3) or a stranger (4) will not he, being prohibited by the terms of sect. 17, as also, it has been held a suit to secure sums paid in execution in excess of what was due under the decree (5)

If the creditor fraudulently executes a satisfied decree and does not entitle satisfaction in his application to execute he may be proceeded against criminally, the provision as regards uncertified adjustments not affecting the substantive Criminal Law (6). In a recent case it was held that an application which did not recite the terms of an alleged adjustment could not be deemed to be an application of the kind contemplated by the second clause of this rule (7).

Clause (3) —This clause corresponds with unendments (ude post), with the last paragraph of sect 258 of the former Code (see sect 206 of Code of 1859), which was inserted by sect 27 of Act VII of 1888. The effect of this insertion was that uncertified adjustments could be recognized by other Courts than the Court executing the decree, the prohibition only extending to Courts executing decrees (8) and to no others (9). So the rule does not debur a Criminal

should, like the decree itself, he a matter of record and that unless it is made a matter of record no Court having to determine whether the decree has been executed shall recognize it as ovidence of a valid adjustment. But see Ramayyar: Ramayyar 21 V 336 (1897), where the Court went into the question of adjustment though not certified there having been a fraud committed.

(1833), dist in Iswar Chandra Dutt e Haris Chandra Dutt, 25 C 718 (1898), foll Deno Bundhu Vundy i Hari Vati Dasse, 31 C 480 (1904), s c, 8 C W N 395

(2) Barragulu + Bapanna, 15 M 302 (1832)

(3) Jaikaran Bharte : Raghunath Singh of A = 4 206 (1848), Prosonno humar Sanjai : Kahi Das Sanjai : Kahi Das Sanjai : Kali Das Sanjai : Kali 19 C 683 (1892) s c ; 131 A 106 Azuan : Matul Lai Saho, 21 C 437 4-34 (1832), co dra Ishan Chunder Bandopadhja : Indro Naram Gossam 9 C 788 (1883) which has been held in The previous casa to be no longer law

(4) Jaikaran Bharte e Raghunath Singh, supra, Vellappa v Raunchandra 21 B 403 (1850), Mothura Wohun Ghoso v Mhoj kumar Vitter, 15 C. 557 (1859), contra Lat Dacii Sharup Chand Vala, 14 C. 376 (1857), which is no longer law See last note.

(5) Kashee Kishere Roy (Kishen Chunder

Sandyal 15 W R 160 (1871)

(6) R & Bapuj Dayaram 10 B 288 (1886) Madhub Chunder Nozamdar 8 v Novodeep Chunder Pundut 10 C 120 (1888), and it was also held that oven though the application might be barred, and action could not be taken under this section, that did not vitute the order of a Munsif sending a case for inquiry under the section corresponding with sect 643 of the last Code R v Muthuraman Chetti 4 M 320 (1881)

(7) Jogendra Nath Sarkar: Provath Nath Chatterjee 19 C L. J. 126 (1914)

(8) See Ram Doyal Bannerjee P Ram Hari Pal, 20 C 32 (1892). Fatch Vuhanmed & Gopal Das 7 A 422 (1885). Blarut thunder Roy v Nawab Vuzer Ah 10 W R 354 (1898). Chedumbara c Rataa Inmai 3 M 113 (1881). In Chango c halaram 4 B H C R 129 (1867) [ref Bakshu v Lak Immai 4 B 394 at p 601] the kerce holder had removed the attachment and discharged the lebtor from prison and this was considered auther in

(9) Swamurao Naravan e Kashmaha Krahma, Io B 410 (1959) Ghamaham Lakshmandas e Kasharam Nauroka, Io B 050 (1891) Bal Krahma Landamunth e Baja Yesaji IJ B 294 (1994), the samo ruwhad bentakinjan r to the anno ruwhad bentakinjan r to the anno finent Kabyan Sagh e hamita Irasad, I3 A, 239

Court (1) from recognizing an uncertified payment, or a Civil Court which is not executing the deerce (ede ante) An adjustment not certified cannot, however, be taken cognizance of under sect 17 by a Court of execution, and the decree must be executed notwithstanding the idjustment (2). Prior to the addition of the list clause it was held that if the decree hold rhad been induced to compromise by fraud this was a matter which can be dealt with under the same section (3) It was subsequently held that the proviso did not stand in the way of the judgment debtor proving fried (1) But this dicision has been doubted (5) and it has recently been held by the Calcutta High Court that the executing Court connot enquire even when the conduct of the decree holder has been alleged to be friedulent (6). In objection that the provisions of the former section had no application to any payment made in pursuance of in invalid agreement not similared by the Court was overruled the section making no reference to Therefore a sum paid under in agreement void under the former s ction 2573 cumot be recognized unless certified (7). It has been held that though uncertified payments could not be recognized as adjustments of the decree yet a creditor might give evidence of uncertified payments in order to defe it the plea of limitation (8) The former section ran "It shall not be recounted as a payment or adjustment of the decree . These words have been omitted in order to make it clear that the Court cannot recognize a payment or adjusting at which has not been certified for any purpose whatsoever follows that an uncertained payment or adjustment cannot now operate to in den, the period of huntation for applying for execution under the Limitation

0 21, rr 3 1

Act,(1) neither can it give rise to an estoppel, for the doctrine of estoppel cannot be invoked to nullify an express statutory provision (2)

Courts executing Decrees

And the control of th

"Forms one estate"-See notes to sect ab, el seq, ante

4. Where a decree has been passed m a suit of which the Transfer to court of value as set forth in the plaint did not exceed two thousand rupees and which, as regards its subject matter, is not excepted by the law for the time being in force from the cognizance of either a Presidency of a Provincial Court of Small Causes, and the Court which passed it wishes it to be executed in Calcutta, Madras, Bombay of Rangoon, such Court may send to the Court of Small Causes in Calcutta, Madras, Bombay of Rangoon, as the case may be, the copies and certificate mentioned in rule 6, and such Court of Small Causes shall therenpon execute the decree as if it had been passed by itself

Small Cause Court — This is the fifth or penultimate paragraph of sect.

22.1. of the former Code, the last paragraph being the following rule, and the
(1) Time portion of the section being incorporated in sects 38, 39, and 41, ante
(1803) dryall Cause Court in exceuting the decree of another Court transferred
Chandra, Pite same powers as it possesses in regard to its own decrees (3)
489 (1904) has held that a Judge of a Small Cause Court when duly invested ith

(2) haurs of a Subordinate Judge, had in the exercise of such powers general (1832), ion (4). But a doubt was expressed whether under sect 223 (d) of (3) rimer Code (corresponding with sect 39 clause (d) anic) a Subordinate 20 / g could transfer a decree from his Court to that of a Smill Cause Court San'n the property attached was within the limits of his local jurisdiction (5) g. l. A Mofussil Small Cause Court was required to adopt the machinery of the

78(1) Monmohan t Dwarka, 12 (L J Pl2 (1910) Kutubullah t Durga Charun 4G C W N 396 (1912) Bajrang t Lachmi, 5C L J 88 (1909), Tulochan v Bakeswar, 15C L J 123 (1910)

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(2) Jogendra Nath Sarkar: Provath Nath Chatterice, 19 C L J 126 (1914)

(3) Gunaputty Roy 1garwallah a Thakurdye Thakuram, 34 C 823, 827 (1907) (4) Gopal c Nanku, I A 024 (1878) See Bhagban Dayalu v Balu 8 B 230 (1883) [rf to Ramchandra v Ganesh, 23 B 382 (1898)], Dharamdas Santidas v Vaman Govind 9 B 237 (1884), Kahanarama v Ranga, 8 W 8 (1884)

(5) Arishna Velji v Bhau Mansaram, 18 B 61, 64 (1893) former sect 223 m all cases where execution was sought a jumst persons or property outside its local jurisdiction (1)

5. Where the Court to which a decree is to be sent for
execution is situate within the same district
as the Court which passed such decree, such
twhere the Court to which the decree is to be sent for execution
is situate in a different district, the Court which passed it shall

send it to the District Court of the district in which the decice

"Directly."—Where both Courts are in the same District one Court may send to the other direct (2). A District Court on recurring a degree transfured for execution can, under r 8, direct my Subordinate Court to execute it. When, and in whatsoover manuer, the decree has been transferred for execution to another Court, the holder of the decree must, under r 10, make due application for execution to the latter Court.

6. The Court sending a dicree for execution shall send-

Procedure where Court (6) a copy

Procedure where Court desires that its own decree shall be executed by another Court.

ι

is to be executed.

(a) a copy of the decree,
 (b) a certificate setting forth that satisfaction of the decree has not been obtained by execution within the

junsdiction of the Court by which it was passed, or, where the decree has been executed in part, the extent to which satisfaction has been obtained and what part of the decree remains unexecuted, and

(c) a copy of any order for the execution of the decree, or, if no such order has been made, a certificate to that effect

"Shall send"—Upon the maxim' omma prasumuntar rate esse acta an ittachment will in the absence of evidence be deemed in this respect to have been correctly inide (3). The omission however, to transmit to the Court executing the decree the certificate required by this rule is a more irregularity which does not viriate the sale (4). If my order is passed on receipt of the report of service

⁽¹⁾ Pubati Charan v Panchanand, 6 A 243 (1884), F B, folf Abdul Gafur t Albyn 30 C 713 (1903), Sajadkhan v Davies 28 B 198 (1903) [attachment of

⁽²⁾ Seo kelu t Vikrishna, 15 M 345 (1891)

⁽³⁾ Saroda Prosaud Mullick v Lutch meeput Sin, Doogur 10 B L R 214 230 (1872) As regards Provincial Small Cause Courts, see s 34 Act IV of 1887 which modifies the rule

⁽⁴⁾ Abbubaker Salub v Moh din Salub 20 M 10 (1830)

7. The Court to which a decree is so sent shall cause such is copies and certificates to he filed, without any further proof of the decree or order for execusions without proof.

for any special reasons to be recorded under the hand of the Judge, requires such proof.

"Filed."—The filing of the copies and certificate is quite distinct from executing the decree, for which an application should be regularly made.

Inquiry into jurisdiction.—The former sect 2.25 contained after the words "copies thereof" the following, "or of the jurisdiction of the Court which passed it," thus recognizing the right of the executing Court to inquire into the jurisdiction of the Court which passed the detect (1). These words, however, have now been omitted, as it was considered that another Court ought not to go into any question as to the jurisdiction of the Court which passed it (5).

Sect. 38 enacts that a decree may be executed either by the Court which passed it or by the Court to which it is sent for execution under the provisious contained in the Code. Sect 39 provides that the Court which passed a decree (6) may, on certain conditions, send it, on the application of the decree-holder, for execution to another Court, and may of its own motion send it for execution to any Suhordinate Court. There is no express provision as to whether the Court to which a decree may be so sent must be a Court having jurisdiction over the amount of the suit in which the decree was passed or whether the mero sending of the decree will confer jurisdiction on a Court for all the proceedings then to the taken in its execution. On the ground, however, that sect 6 limits jurisdiction and that the word "suits" in that section include proceedings taken to execute the decree, the Calcutta and Bomhay High Courts hold that a Court which has no jurisdiction to try a suit can have no jurisdiction to execute a decree made in that suit (7). So a Court has no jurisdiction to execute a decree made in that suit (7). So a Court has no jurisdiction to execute a decree made in that suit (7).

(5) Hars Govind Kalkundri v Narsmgrao

Srihary Mundul v Murwi Choudhry,
 C 257, 362 (1886)

⁽²⁾ Hathibhai Nahansa v Patel Bechar Pragu, 13 B 371 (1888)

⁽³⁾ Sripati v Belchambers, 15 C W N 661 (1910)

⁽⁴⁾ Sco Bhagwantappa v Vishwanath, 28 B 378 (1904), Haji Musa v Purmanand, 15 B 216 219 (1650), Mohan Ishwar v Haku Rupa, 4 B 638 (1880)

Konherrao Desphande, 38 B 194 (1913)

⁽⁶⁾ As to execution of decrees passed on appeal, see as 36, 37

⁽⁷⁾ Gokul Krato Chunder v Aukhil Chunder Chatterjoe, 16 C 457 (1889), Durga Charan Wojumdar v Umatara Gupta, 16 C 455 (1889), Shir Sadheswar Pandut v Shri Harshar Pandit, 12 B - 165 (1887), dast, Vajuma v Ranchordji, 16 B 731 (1892) Jercention agamat pension

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- O XXI rr 11-11 It must be m writing except in the case provided for by O XXI r 11 (1) A person not a party to a suit is not entitled to object to the issue of an order for execution of the decree (1)
- 11. (1) Where a decree is for the payment of money the Oral application Court may, on the oral application of the decree holder at the time of the passing of the Judgment debtor, prior to the preparation of a variant if he is within the presents of the Court

(2) Save as otherwise provided by sub rule (1), every application for the execution of a decree shall be in writing, signed and verified by the applicant to be sequented with the frets of the case, and shall contain in

a tabular form the following particulars, namely -

(a) the number of the suit,

(b) the names of the parties, (c) the date of the decree.

(d) whether any appeal has been preferred from the decree,

(e) whether any, and (if any) what, payment or other adjust ment of the matter in controversy has been made hetween the patties subsequently to the decree,

(f) whether any, and (if any) what, previous applications have been made for the execution of the decree, the

dates of such applications and their results,

(g) the amount with interest (if any) due upon the decree, or other relief granted thereby, together with particulars of any cross decree, whether passed before or after the date of the decree sought to be executed.

(h) the amount of the costs (if any) awarded,

(i) the name of the person against whom execution of the decree is sought, and

(j) the mode in which the assistance of the Court is required, whether—

(1) by the delivery of any property specifically decreed,

(ii) by the attachment and sale, or by the sale without attachment, of any property,

(111) by the arrest and detention in prison of any person,

(iv) by the appointment of a receiver,

(v) otherwise, as the nuture of the rehef granted may require

(3) The Court to which an application is made under sub rule

⁽¹⁾ Nathubhat Mulchand v Nuna Babu 91 B 544 (1894)

Immediate execution -Ordinarily the application for execution is in It is to be noted that under the former sect 256 application for in mediate execution could not issue simultaneously against both the person and property or against my property except moveable property (1) within the local limits of the purisdiction of the particular Court. In the case of a warrant of irrest, this would only issue if the debtor was within the same limits. Moreover the section only related to decrees not exceeding Rs 1,000. The Legi lature has now omitted this limitation imposed under the former Code on oral applica tions for immediate execution As to exemption from arrest, see sect 13)

12 Where an application is in ide for the attachment of any moveable property belonging to a judgment Application for attachdebtor but not in his possession, the decree ment of movcable pre-

perty not in judgment holder shall annex to the application an debtor s possession inventory of the property to be attached, containing a reasonably accurate description of the same

Not in judgment debtor's possession -This rule refers only to an implication for the enforcement of a decree by attachment of moveable property belonging to the judgment debtor (2) but not in his possession Rules 12 46, 51 prescribe the mode of attachment in such cases Rules 13-45 deal with cases where the property is in the judgment debtor's possession The inventory must be delivered into Court along with the application for execution (3) Under O 39, r 7, the Court has purediction to make an order for preparation of an inventory (1)

Where an application is made for the attachment of 13 any immoveable property belonging to a Application for attachjudgment debtor, it shall contain at the footment of immoveable pro-(a) a description of such property sufficient perly to contain certain particulars

to identify the same and, in case such property can be identified by boundaries or numbers

in a record of settlement or surrey, a specification of such boundaries or numbers, and

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⁽I) As to what is see notes to sect 2 and Nazir Khan v Karamat Khan, 3 A 168 (1880) [fruit upon trees], Naru Pira i Naro Shidheswar, 3 B 28 (1878) [baluta] Nathu Meah v Nand Rum, 8 B L R 508 Deno Nath Batabyal v Nuffer (hunder Nundy, 28 C 778 (1899) s c in appeal 4 C W N 470 (1900) Act X of 197, a 3 clause 34 [tiled huts]

⁽²⁾ As to the liability of the execut on creditor, Sheriff or Nazir in respect of seizure of property belonging to third party see

Goma Mahad Patil v Gokaldas Ahim], 3 B 74 (1878) Kislori Mohun Rai v Hursook Das, 12 C 696 (1886), Framji Besanji v Hormasji Pestanji 2 B 258 271 (1877) Kalce Coomer Chattergeo v Siddhessur

Mandal 11 B L R 2 6 (1873) (3) Sreenath Gool a 2 Yusoof Klan, 7 C 556 at p 559 (1881), and see Dhonkal Singh : Phallar Singh 15 A 84 at p 86 (1893)

⁽⁴⁾ Ampad Ali v Ali Hussain 15 C W N 353 (1910)

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(b) a specification of the judgment-debtor's share or interest in such property to the best of the belief of the applicant, and so far as he has been able to ascertain the same

Description —Clause (a) has now been amended to expressly require boundaries and numbers to be given where such boundaries exist in a record of settlement or survey (1). The Code has been passed to be observed and not to be treated as a dead letter as regards this or any other provision (2). Still the Court will not press against a party a mere formal defect when the property which is sought to be attacked can be identified (3) and in any case a defect of description can be remoted (4).

Specification—In case of a joint family the application should state whether it is the judgment debtor's share or the joint family property which is sought to be attached. It should also specify the family property (6) The former section which this rule replaces required that the description and specification should be verified in the manner of a plaint. This has, however, been omitted as it was considered that a verification separate from that preserized by r. 11, second subsection, was not necessary. An omission to verify the inventory of property sought to be attached was held to be an irregularity only not virtuing the application (6)

14. Where an application is made for the attachment of any [s

Power to require certified extract from collector's register in certain land which is registered in the office of the Collector, the Court may require the applicant to produce a certified extract from the register of such office, specifying the persons registered

as proprietors of, or as possessing, any transferable interest in, the land or its revenue, or as hable to pay revenue for the land, and the shares of the registered proprietors

Extract from Gollector's Register—The sections which this and the last replace, as also sect 213 of the Code of 1859, made it compulsory that the application should be accompanied by an extract. The rule has now been amended so as to give the Courts an option in requiring extracts, since these did not in all cases appear to be required but had the effect of adding to the expenses of legal proceedings. The rule is not restricted to land registered in

(2) Dhonkal Singh : Phakkar Singh 15

A 84 86 (1893)

(3) Hurry Charan Bose : Subaydar Sheikh 12 C IGI (1885)

(4) Macgregor v Tarını Churn Sircar, 14

C 124 (1886)
(5) Muhamma l Husain : Dip Chand 14

A 190 (1892)
(6) Nastr un massa : Ghaf ir ud din 28 A

241 (1905)

⁽¹⁾ As to identification by boundaries, see Lack Rain v Mohesh Dass 12 W R 488 (1869), Maharaj Dhiraj Mahtub Ghund v Burodanath Mundul, 18 W R 411 (1872), and as to Estates in the Collector's Rent Roll, Ajoodhiya Dass's Sheo Pershun Singh, 11 W R 175 (1899), Zerkales hooce's Lalla Dourga Vershad, 16 W R 149 (1871)

the Collector's Office in the name of the judgment-debtor, for it frequently happens that the actual proprietors are not so registered (1)

Application for execution by folat decree holder.

Application for execution by folat decree-holder.

execution of the whole decree for the benefit of then all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the decreased.

(2) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application

Joint decree holders—The decree holders must be joint (2) Ordinarly all the decree holders in a joint decree must join in an application for execution (3). This section in the last Code (1) allowed one or more to apply for execution of the include decree unless execution is by the terms of the decree dependent upon a joint application (5). The ruling of the Prity Council (6) negatives decisions to the effect that a joint decree holder cannot apply for execution of a decree to the extent of his frictional interest (7). This can be done, provided that the interest is one determined by the decree itself. This is, of course, a different thing from applying separately for execution limited to what the applicant considers his interest in it (8). The words "or his or their representatives" have been omitted as this will be covered by the general clause. An order refusing to allow the decree to be executed by one joint decree holder.

⁽¹⁾ O kinealy, C P C, notes to section (2) Cf Ramusami v Anda Pillai, 13 M

^{347, 14} M 252 (1890)

⁽³⁾ Ponnampilath v Ponnampilath 3 M 79, 81 (1880) of Roy Goodin Roy v Dhun neshur Koger, 7 C L R 117 (1880)

⁽⁴⁾ Sec cases passin and Topa Singht Raj narayan Singh, 1 B L R A C 62 (1868) Azzunnissa Khatun v Shashi Bhusan Bose 2 B L R, App 47 (1869), Harogobind Das korburto v Issur Dasi 15 C 187 (1887) Kamlapat v Baldeo, 22 A 222 (1960), and as to minor joint decree holder and limitation, Surja Kumar Duttv Aran Chunder Roy, 28 C 406 (1901), Periasani v Krishia Ayyan, 25 M 431 (1901)

⁽⁵⁾ Farzand v Ab lallah, 6 A 69 (1883)
(6) Hurrish Chunder Chowdhry t Kali Sunder Debi 9 C 482 (1882), 19 I A 4, an I see Brojesnari Clow lhiance v Tripoora

Soonderee, 3 C L R 513 (1878)

⁽⁷⁾ Banats Das v Maharan Kuan, 5 Å 27 (1882) Collector of Shuhjahanpur v Surjan Singh 4 Å 72 (1881) Dallichand Bhudar t Bar Shivkor 15 B 242 at p 244 (1890) Thakoor Dass Sing v Luchneeput Doograf, W R 10 (1897) Haro Sanker Sandyal t Tarak. Chandra Bhuttacharjee 3 B L R A C J 114 at p 117 (1895), Purna Chandra Mookerjee v Sarada Charan Roy, 3 B L R App 21 (1869) Ponnampilath t Ponnam pilath 3 M 79 (1880), Prannath Mitter Mothoreanth Chuckerbutty 6 W R Miss 64 (1866)

⁽⁸⁾ So in Muthusami Ayyan v Nates-Ayyar, 13 M 464 (1804) the decree did not award any specific sum as so due to the particular defendants and therefore, the decree had to be executed as a joint decree or not at all.

alone is not appealable (1) In this case the contest was between two joint decree holders, and it was sought to distinguish it on this ground from the Madras decision cited in which it was held an appeal would be (2)

"It shall make such order"—One of several decree holders has no right to claim execution. Sufficient cause must be shown. The Court has a discretion, and before executing it should give notice to the other decree holders and hear what they have to ray, (3) notice, however, is not obligatory (4) If made, the order ought in express terms to reserve the rights of the other decree holders to share in the proceeds of execution, and, meanwhile, the interests of the non-applicants should be protected (5) either by taking security or otherwise as the Court thinks fit. The judgment debtor may be compelled to pay into Court the whole amount due under the decree upon which the share of each decree holder will be determined. The judgment debtor cannot object to the share which one or more decree holders may claim (6). Under the Code of 1859, where the Court did not reserve the rights of the other decree holders to share in the proceeds of execution, an appeal was entertained as to the distribution of the assets realized (7). See ante-

18. Where a decree or, if a decree has been passed jointly to.

Application for circ in fatour of two or more persons, the interest of earter.

In fatour of two or more persons, the interest of decree.

In fatour of two or more persons, the interest of early decree holder in the decree is transferred by assignment in writing or by operation of law, the transferred may apply for execution of the decree to the Court which passed it, and the decree may be executed in the same manner and subject to the same conditions as if the applica-

tion were inide by such deeree holder

Provided that, where the deeree, or such interest as aforesaid, has been transferred by assignment, notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard then objections (if any) to its execution

Provided also that, where a decree for the payment of money against two or more persons has been transferred to one of them, it shall not be executed against the others

(2) Lakshmi Ammah v Poonassa Menon, 17 M 394 (1894)

⁽¹⁾ Ratanial Rangildas v Bai Golab, 1 Bom L R 87 (1899) s c 23 B 623 Sec also Odhoya Pershad i Mohudeo Dutt, 17 W R 415 (1872)

⁽³⁾ Sheikh Alimed Chowdhry t Shadzada Khatoon 7 C L R 537 538 (1880), Umrith Nath Chowdhry v Chunder Kishore S agh 21 W R 31 (1874)

⁽⁴⁾ Durga Das v Dewraj 33 C 306 (1905) (7) Tarasundari Burmoni v Beharilol Roy 1 B 1 R A C 28 (1868), Budrudeen v

Gulam Mordun 36 M 357 (1911)

⁽⁶⁾ Maharajah Satish Chunder Roy i Saroda Pershad Mookerjee, 5 W R Misc 58 (1866)

⁽⁷⁾ Tarasundari Burmoni. Beharial Roy, 1B L R 28 (1968) in Gyamonee : Radha Romon 5 C 592 (1879), no appeal was held to he under sect 244 of the Code of 1877, as the question was one between co decree holders only, and in Haragobind Das Kolburto v Issuri Dasi 15 C 187 (1887) a sunt was held to he

the Collector's Office in the name of the judgment-debtor, for it frequently happens that the netual proprietors are not so registered (1)

Application for cxc. of more persons than one, any one or more of such persons may, unless the decree imposes any condition to the contrary, apply for the execution of the whole decree for the benefit of them all, or, where any of them has died, for the benefit of the survivors and the legal representatives of the decreased.

(?) Where the Court sees sufficient cause for allowing the decree to be executed on an application made under this rule it shall make such order as it deems necessary for protecting the interests of the persons who have not joined in the application.

Joint decree holders —The decree holders must be joint (2) Ordinarly all the decree holders in a joint decree must join in an application for execution (3). This section in the last Code (4) allowed one or more to apply for execution of the under decree unless execution is by the terms of the decree dependent upon a joint application (5). The ruling of the Prixy Council (6) negatives decisions to the effect that a joint decree holder cannot apply for execution of a decree to the extent of his fractional interest (7). This can be done, provided that the interest is one determined by the decree itself. This is, of course, a different thing from applying separately for execution limited to what the applicant considers his interest in it (8). The words "or his or their representatives" have been omitted as this will be covered by the general clause. An order refusing to allow the decree to be executed by one joint decree holder.

O kincaly, C P C, notes to section
 Of Ramasami v Anda Pillar, 13 M

^{347, 14} M 252 (1890)

⁽³⁾ Ponnampilath v Ponnampilath 3 M 79, 81 (1880) of Roy Goodin Roy v Dhun neshur Kooer, 7 C L R II7 (1880)

⁽⁴⁾ See cases passiva and Teja Singhi Raj narayan Singh, 1 B L R A C 62 (1884). Azzunnussa Khatua v Shashi Bhusan Bose, 2 B L R, App 47 (1869), Hvrogobind Das Koriburto v Issuri Dasi 15 C 187 (1887), Kamlapat v Baldco, 22 A 222 (1900), and as to munor joint decreo holder and lunda tion, Surja kumar Duttv Arun Chunder Roy, 28 C 465 (1901), Pernasami v Krishna Ayyan, 25 M 431 (1901)

⁽⁵⁾ Farzand v Abdullah, 6 A 69 (1983)
(6) Hurrish Chunder Chowdhry r Kahl
Sunderi Debi 9 C 482 (1882), 10 I A 4,
and so Brojeswari Chowdhrance v Terpoora

Soonderee, 3 C L R 513 (1878)
(7) Banarau Das w Maharau Kuar, 5 A 27
(1882), Collector of Shahjahanpur v Sarjau
Singh, 4 A 72 (1881), Dalichand Bhade,
Bar Shivkor, 15 B 242, at p 244 (1890)
Thakoor Dass Sing v Luchmeeput Doogra, 7
W R 10 (1867), Haro Sanker Sandjat
Tarak Chandra Bhuttacharjee, 3 B L R
A C J 114, at p 117 (1869), Furna Chanda
Mookerjee v Sarada Charau Roy, 3 B L R
App 21 (1869), Ponnamplath Ponnam
plath 3 M 79 (1880), Prannath Mitter v
Mothooranath Chuckerbutty, 6 W R Miss
64 (1869)

⁽⁸⁾ So m Muthusami Ayyan v Nates Ayyar, 18 M 404 (1894), the decree did not award any specific sum as so due to the particular defendants, and, therefore, the decree had to be executed as a joint decree or not at all

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Provided that where the decree, or such interest as aforesind, has been transferred by assignment notice of such application shall be given to the transferor and the judgment debtor, and the decree shall not be executed until the Court has heard their objections (if any) to its execution.

Proceeded also that where a decree for the payment of money igainst two or more persons has been transferred to one of them,

it'shall not be executed against the others

(1) Ratanial Ran_o i has r Rai (ulai | 1 Ra n 1 R 87 (16 J) | a c _ 3 R (_1 bec also Odl) a 1 Dial (M 1 a 1 Date 17 W R 415 (15"-)

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(3) SICAN AI al (Lowdiny r Shalzala Khatoon 7 C I R 37 538 (1889) Ur rich Nath Clowdiny r (1 n I r halor Sigh 21 W R 31 (1874)

(4) Durga Das t D vraj 33 C 706 (1.905) (7) Farasun ları Burn viv Belav bil Roy 1 B 1 R A C 28 (1805) Budrul civ (ulsm V lun 36 M 3-" 11911)

16) Maharajah Satul Cl nd r Roy t

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17) Tras I lati Br 14: Bitarbillio, 1B 1 R - 8(18 8) 11 (yan ore r Badha Rom n + 6 - 32 (1870) 10 appeal was led to lound reset 24 to 1 to 6 odo of 187 as the puston was one between co decrected lets (nly a) 1 in Haragob ad Das hol into 1 lesuri Dis 16 C 187 (1887) a silt was 1 d to lie

"The interest of any decree-holder"-The additions are intended to remove any doubt (1) in regard to the power of the transferee of the interest of one out of several joint decree holders to apply for execution. One of several decree holders may assign his interest under the decree, and as regards joint decree holders, see last rule. The transferce of a portion of a decree is a trans force of the deerce within the morning of this section (2)

"Is transferred "-This excludes the owners of any interest in existence before decree The section does not apply where the person seeking to execute is not a transferce from the original deeree holder, or to cases where the right to an equitable interest in a decree is contested, and was not intended to enable the Court to try such a question as the legitim icy of an heir (3) And apparently if the decree holder's interest in the property itself and not the decree be assigned the decree should be executed by the decree holder (i) The transferce of a decree stands in the same position for getting execution as the immelerer (5) If a decree is sold the purchaser as assignee of the decree is entitled to any me ne profits thereunder (6) A decree for the payment of a sum of money and for costs of the suit is one and indivisible and the decree so far as it may be only for costs cannot be separated from the rest of the decree and transferred (7) As for transfer of rent decrees in Bengal (8) and of village Munciffs in Madrae (9) see below

"In writing "-An oral transfer is not recognized for the purposes of the rulo (10) Where S obtained a decree against D the owner in possession and subsequently in a suit brought by J against S a decree was passed by consent that I should execute S's decree it was held that I was a transferee within the section (11)

"Operation of law "-The words "by operation of law must be under stood to mean the operation of law as administered in Indian Courts (12) Where

⁽I) See Sectaput Roy v Syud 11 Hossen 24 W R 11 (1870) diss from in Li hore Chand Bhalat v Gisborne & Co 17 C 341 (1889) Muthu Narayana Redds v Bala krishna Reldi 19 M 306 (1896) and as to effect of transfer of part Banars: Das : Maharam Kuar 5 A 27 (1882) Pogose v Fukurooddeen 25 W R 343 (1876) Kudhai v Sheo Dayal 10 A 570 (1888) Pasupathy v hothanda 28 VI 61 (1904)

⁽²⁾ Endoori t Venkatachamulu 33 M

^{80 (1909)} (3) Abedoonnissa Khatoon i Ameeroon

nissa Khatoon 2 C 327 (1876) s c 4 I A 66 73

⁽⁴⁾ Ram Sahai i Gays 7 A 107 (1884)

⁽⁵⁾ Khushrobhai Nasarvanji i Hormazsha Phirozsha 11 B 727 (1881) As to the necessity for registration see Cous Vahomed 2 Kha vas Ali Khan 23 C 450 (1896) Koob Vittyan and Smith 9 C Lall Chowdhry

^{839 (1883)} Abdul Walid t Fatzullah 13 A 89 (1890)

Mulhraji Kunwar 30 A 28 (1907) (6) Gonesh Lal Tewari v Sham Varain 6 C L R 533 536 (1880)

⁽⁷⁾ Ram Chandra v Ibdul Halim 35

A 204 (1913) (8) Kodash Chunder Roy v Jodu Nath

Roy 14 C 380 (1887) Karuna Moya Banneriee : Surendra Nath Mookerjee 26 C 176 (1898)

⁽⁹⁾ Kalandan : Pakrichi 9 \u2213 378 (1886) (10) Parvata e Digembar 15 B 307 (1890) Javermal Hirachand: Umaji Haya

bats 9 B 179 (1884)

⁽¹¹⁾ Doorga Pershad : Lallah Juggunnath

S D V W (1809) 34 (12) Purmanandas Jiwundas t Vallabhdas Walls 11 B 506 at 1, al2 (1581) [ass gn ment of decree in equity]

a minor succeeded to an estate, which up to the date it fell into his lands had been in possession of the executirs, it was held that there was a transfer by operation of law, (1) as also where an order setting asside an adjudication presed the benefit under a decree from the Official Assignce to the applicant (2). The holder of a certificate of administration under Reg. VIII of 1827 is a transferred by law of a decree obtained by the deceased (3).

"May apply"—Unless an application is made to it, all that the Court his to do is to look to the record Unless therefore, a decree holder applies to the Court to certify a train for of his interest the Court can take no notice of such ille, od trainsfer (1) An application for the transmission of a decree has been treated as an application for execution under the former section, under which notice has issued to the issigned and judgment debtor (5) More notice and nothing elso his been held not to operato as a revivor of the decree (6) A decree is not a debt within the meaning of sect 131 of the Transfer of Property Act, and the outcer required by this rule is, on sesignment, sufficient (7)

"To the Court which passed it'—In application by the transferee of a deeree for execution after substitution of his name can be entertained only by the Court which passed the decree (5)

May be executed —It was formerly held that the transferce was not entitled to have execution as of right like the original decice holder for the matter was one within the Court's discretion (3) but that the discretion must be excressed rea outsily. The mero fact of the existence of a cross claim against the assignor of a decree by his judgment debtor was no reason for refusing issue of execution on the application of the o siguec (10). Nor was the probability that the decree might be executed against some particular judgment-debtor sufficient ground for refusing a transfer (11). If there was no

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⁽¹⁾ Umasoondury Dassy : Brojonath Bhuttacharjee 16 C 347 349 (1889) see Sethurayar : Shanmugam I idaa 21 M 353 356 (1897)

⁽²⁾ Miller v Abmash Chunder Dutt 4 C W N "85 (1900)

⁽³⁾ Khanderav Rayajirav v Can sh Shas tri 11 B 368 (1887)

tri 11 B 368 (1887)
(4) Khettur Mohun Chittopadhya v Ishur
Chunder Surma 11 W R 271 (1869)

⁽a) Nando Lal t Chutterput Sing 29 C 23a (1902)

⁽⁶⁾ Monohar Das v Futteh Chand 30 C 949 (1903) s. c 7 C W N 793

⁽⁷⁾ Dagdu v Vanj: 24 B 502 (1900) (8) Amar Chundra Bannerjen z Guru

⁽s) and Chamas Bankright Cutta Prosunto Mukerjee 27 C 488 (1900) Jam cshar Prasad v Thakur Prasad 25 1 433 444 (1903) Shoo Narayan Sing v Harbans Lal 5 B L R 497 (18 0)

⁽⁹⁾ Parvata v Digambar 15 B 307

⁽¹⁸⁻¹⁰⁾ Javermal Hirachand t Umajt Hjalatis 9 B 179 (184) Ballahlen Das t Bedmatt Koer 20 C 388 (1892) Amar Chandra Bannerjoo t Guru Frestmino Hukerjeo 27 C 488 491 (1900) Shana Puddo Datte Nobin Chunder Bose 15 W R 233 (1871) 4 kulabharana v Ranganayau 23 M 3-7 [right of transferos sub judice] But see Asad v Haidar 38 C 13 (1910)

⁽¹⁰⁾ Arashaa Mohuu Dossoo v Kedarnath Chuckerbutty 15 C 446 (1888) but soo Jodoonath Roy v Ram Buksh Chulungoo 8 W R 202 (1867) the decrees must be such as are capable of being dealt with as cross decrees Kuseemeonissa Biboe v Hill 15 W R 127 (1871)

⁽¹¹⁾ Brahtoe Churn Bheosun v Kishen Gopal Misser 13 W R 207 (1870) aco Rughoo Vundun Ram v Somessur Panday, 22 W R 23. (1874)

dispute it might idmit him, or if the dispute was one which it could decide it might try it, and upon the result of that trial admit the assignce to carry on the decree (I) In this country in issignment circulativitys be impresched by third parties who can show that it is not a real transaction (2) A Court may refuse to recognize a benamidar as transferee, but it may allow execution to proceed at the instance of a person who is in fact such, if it thinks fit, and such proceeding if in proper time, keeps the decree alive. The legality of the proceedings depends, not on the reality of the transfer, but on the sanction accorded (3) If a deered is transferred to one as benamidar for the actual rur chaser the latter is entitled to execute the decree, and his right course is to apply under this section (i) If the application is suctioned, then the transferce is placed in the same position as regards execution as the original decree holder (9) Under the present Code it has been held that this rule does not specifically lay down any restriction upon the assignment of a decree, and that the assignees right of execution does not depend upon the discretion of the Court (6) The tule makes no provision for the transferee's name being placed on the record and though the actual substitution of the name of the assignee may not be necessary for the validity of the execution proceedings, yet ordinarily then signes n ame should he brought on the record (7) Where the decree was transferred and the transfer admitted by the decree holder in Court, the debter could not, it was held, contest the right of the transfered to execute it, except on plea of payment to the original decree holder (8) Decisions under this rule are only summary for purposes of procedure, and are not decisive of the rights of persons claiming to be transferees, and where there is no appeal, a suit lies (9) A transferee whose application to execute has been rejected can if no appeal he bring a separate suit for a declaration that he is the person entitled to execute the decree,(10) or rather for a declaration as to the validity of the assignment a declaration that the assignee is entitled to execute heing, under this rule a

⁽¹⁾ Agra Bank v Cripps 8 W 455 (1885), as to exclusive execution against one owner of the on nty of redemption see More Rag hunath v Balan Trimbak, 13 B 45 (1888) . and as to objection to execution by co sharer, see Kally Doss Bhadury v Golam Ally Chowdhry 3 C L R 237 (1878)

⁽²⁾ Mulii Govindji v Nathulai Hirachand

¹⁵ B 1 (1890)

⁽³⁾ Balkishen Das i Bedmati Koer 20 C 388 (1892), in which the earlier cases are cited, and see Halodhar Shaha v Harago bind Das Koiburto, 12 C 105 (1885)

⁽⁴⁾ Manikkam v Tatayja 21 M 383

⁽⁵⁾ Shamanund Surmah v Shumboo Chunder Doss 7 W R 205 (1867), Rughoo Nundun Ram v Somessur Panday 22 W R .35 (1874) as to execution of mortgage deerce by holder who has also purchased art of the mortgaged property, see Nafer

Chunder Mundul v Baikanto Nath Roy 4

C L R 156 (1879) (6) Asad v Hardar, 38 C 13 21 (1910)

⁽⁷⁾ Balkishore v Mahomtd Tazam Allec 4 A H C R 90 (1872) [when he becomes a party to the suit], Khetter Mohun Chutto padhya v Ishur Chunder Surma 11 W R 271 (1869)

⁽⁸⁾ Sunnooburnessa Lhanum v Meher Chund 1864 W P 313

⁽⁹⁾ Abedoonnissa Khatoon v Ameeroon missa Khatoon 2 C 327 (1876) as to in junction to restrain execution by ass gace see Dhurondhur Sn t Agra Bank 4 C 380 (1878)

⁽¹⁰⁾ Sheora) Singh v Amin ud din Khan 20 A 539 (1898) Ram Baksh v Panna Lal 7 A 457 (1884) [though he cannot directly attempt to execute the decree by suit], Raman v Muppil Nayar, 14 M 478 (1891)

matter for the Court of execution,(1) or it may be (as where there is an invalid assignment), a party may suo for refund of money paid by him (2)

Notice -The penalty imposed by the proviso is that there should be no power to execute if the proviso is not complied with (3) Where there are more transferors than one, all should be cited (4) If a decree is transferred by assignment after the death of the judgment-debtor, notice may be served on his legal representative. The death of the judgment debtor does not render the transferred decree meanable of execution (5) As to the procedure in such a case, see case cited (6) If a transfer is made after notice to transferor and debtor and the decree partly executed, the representative of the judgment debtor cannot subsequently object (7) It is illegal (and not merely irregular) to execute the decree before hearing the objections (8)

Money decrees .- This provise applies only to deerces for money personally due by two or more persons, (9) and in cases coming within the proviso the assigned is left to a regular suit (10)

Appeal -Disputes as to sharo transferred arising between a judgmentdobtor and decree holder must be determined under sect 47 by order of the Court ovecuting the decree (11) There is no express appeal given from on order on an opplication made under this section, but if the Court in disposing of the transferee's application is acting under and determines a question of the nature referred to in sect 17, then an appeal lies Upon this there is a conflict of decision In some cases it has been held that no appeal lies against an order dismissing on application for execution by a transferee, either on the ground that os the Court had not recognized him and accepted him on the record os a representative, either such transfered did not become a representative within tho meaning of sect 47, or that the question as to whether such transferce should

(4) Ib, at p 50

Chinta (1) Bommanapati Vecrappa v hunta Srinivasa, 26 M 264 (1902)

⁽²⁾ Ramasami v Basayappa, 16 M. 325 (1893), and the transferor may be liable to pay compensation if the assignee is prevented from recovering under the decree by an attachment of it in execution proceedings against the transferor Puthiandi Mammed v Avalil Moidin, 20 M 157 (1896) In Ram Cobind Singh t Gheenoo Singh, 20 W R 406 (1873), a suit for a refund failed on the facts.

⁽³⁾ Gulzarı Lal t Daya Ram. 9 A 46, 49 (1886) [where, however, the order appealed from was not an order for execution but mercly for transfer)

⁽⁵⁾ Khushrobhat Nasarvanji r Hormazsha Phirozaha, 11 B 7..7 (1857) (b) Mahalinga Moopanar t Kuppanacha

rar, 30 M 541 (1507) (7) Mukhand Ranchoddas v Chhanan

Naraa, 10 B 74 (1885)

⁽⁸⁾ Kassam Goolam v Dayabhar, 36 B 58 (1911)

⁽⁹⁾ Lalla Bhagun Pershad t Holloway, 11 (393 (1850) Laldhari t Manager of Bhabatpura Estate 14 C L J 639, 612 (1911)

⁽¹⁶⁾ Yakoob Mc Chowdhry v Ram Doolal, 13 (L R 272 (1553) see Soroop Chunder Hazrah e Troylokhonath Roy, 9 W R 230 (1866), Luldham Singh t Manager, Court of Wards, Bhabutpura Estate 16 C W > 132 (1911)

⁽¹¹⁾ Kudhai v Sheo Dayal, 10 1 570 (1885), aco Lalla Bhagan Lershad v Holleway, 11 C 333, at p. 395 (1885) As to questions between to decree holders only, see Gyamoneo e Radha Romon 5 C 532 (1873). and plantiff and stranger to suit, Mohabit Singh e Ram Bhagowan Chowbey, 11 C 150. 152 (1554),

45.]

have execution was one to be decided under this section and not sect 17, and Most of these cases were decided prior to the amendment of sect 211 (now hy Act VII of 1888, according to which the Court determined who was representative of a party According to the contrary and more recent via the order is made under sect 17, ante,(2) though this rule may afford the ra decedendi,(3) and is therefore appealable, (1) and this appears to be the law no And though an appeal may he, the Madras High Court has held that the ng of suit has not been taken muny, as the words "and not by separate suit" sect 211 (now 17) did not, it was said, apply (5) Sed qu now after the amen ment of clause 3 in that section

17. (1) On receiving an application for the execution o a decree as provided by rule 11, sub rule (2) Procedure on receiving application for execution the Court shall ascertain whether such of the of decreo. requirements of rules 11 to 14 as may be applicable to the case have been complied with; and, if they have not been complied with, the Court may reject the application, or may allow the defect to be remedied then and there or within a time to be fixed by it.

(2) Where an application is amended under the procisions of sub-rule (1), it shall be deemed to have been an application in accordance with law and presented on the date when it was first

presented.

(3) Every amendment made under this rule shall be signed

or unitialled by the Judge,

(4) When the application is admitted, the Court shall enter in the proper register a note of the application and the date on which it was made, and shall, subject to the provisions heremafter contained, order execution of the decree according to the nature of the application.

Provided that, in the case of a decree for the payment of money, the value of the property attached shall, as nearly as

may be, correspond with the amount due under the decree

Amendment -An application, if perfect in form is admitted, and an

(5) Bommanapati Vecrappa v Chinta

kunta Srinivasa, 26 M 264 (1902)

⁽¹⁾ See remarks in Badri Narain v Jai Kishen Das, 16 A 483, at pp 486, 490 (1894), on the cases there cited, and Sobha Bibee v Mirza Sakhamut, 3 C 371 (1878), Sambasiba v Srinivasa, 12 M 511 (1889), Sheorai Singh v Amin ud din Khan, 20 A 539, 542 (1898). or substituting the assignce, Megh Narayan Sing v Radha Prasad Sing, 1 B L R A C 200 (1870)

⁽²⁾ Badri Narain v Jai Kishen Das, 16 A 483 at p 490 (1894)

⁽³⁾ Lalia Bhagun Pershad v Holloway, II C 386, at p 395 (1885)

⁽⁴⁾ Badrı Naraın v Jai Kishen Das supra. Canga Das Scal v Yakub Alı Dobashi, 27 C 670 (1900), Arishnama Chariar v Appasami Mudaliar, 25 M 545 (1901), Bommanapati Vecrappa v Chintakunta Srinivasa, 26 M 264 (1902), Hridoy Kant v Behari Lal, 11 C W N 239 (1906)

order is immediately granted to execute the decree Sect 245 of the last Code, which the rule replaces, provided that the Court should reject such applications or allow their amendment This might be done then and there, or the application might be returned for amendment within a time fixed. If the application was not amended it was to be rejected, but if it was not rejected there was nothing to prevent the Court from extending the time for amendment (1) If amended, the application was admitted, and the Court proceeded to order execution according to the nature of the application The rule, in the first place, substitutes for the term "amended" the phrase the "defect to be remedied," hecause the first term does not cover the remedying of a defect, such as the omission to produce a copy as required by r 11, third sub section As regards the subjectmatter of the second sub section of this rule it was originally (in order to meet various difficulties which were raised regarding defective applications) proposed to enact that until an application returned under this rule was presented with such amendments as the Court might have required, it should not be deemed to he in accordance with law. This was proposed in view of a decision of the Calcutta High Court (2) The Select Committee, bowever, rejected this proposal and have relaxed the stringency of this rule and have allowed the application to date back to the time of its original presentation on the lines followed in connection with plaints It was proposed to enact that when once an application had been admitted it was to be deemed to be in recordance with law for the purpose of limitation, even though it was eventually dismissed after hearing the parties On the other hand, to prevent dismissals for defect of form not affecting the merits, it was proposed to allow the Court, even after admission, to allow any amendment not converting an application into one of another and inconsistent The suggested additions, however, have not been made Though under the previous Code, applications for execution were often allowed to be nuended without objection as to the Court's competency to allow it,(3) it was a matter of doubt whether the Court had any power to amend after admission and registration (4) In a recent case where within a short time of the expiration of the period of limitation a decree holder applied under this rule for leave to file a list of minoveable properties and his application was granted but the list was not filed till after the period had expired it was held that the proceedings in execution were harred by huntation (5)

"Value of the property attached "—Availe the Court has mex parte ipplications little material on which to determine how much of the delitor's monerty should be attached. If more is attached than ought to be attached

- Kaminy Mohun Someddar t Gopal, 8 C 479 (1882)
- (2) Gopal Sab v Janki Koer, 23 C 217 (1835), distinguished in Mathura v Musst Anurago 14 C W N 481 (1910), and see Musaraf v Amir 15 C W N 71 (1910)
- (3) Hukm Chand (P C 643
- (4) Seo Isgar Ali i Troilelya Nath Ghosh, 17 C 631 636 641 (1849) Mac Bregor r Tarini Churn Nivar 14 (124 (1887), Sattappa Chetti i Jogi Scorappa

17 M 67 to (18-3) which deals also with the principle on which amendment should be made. Jiwat Dube e hali Charan Ram 20 A 475 (1856) where it was also ruled that an application having once been admitted the date of a subsequent amendment would not by rasson of such amendment, become the date of the application.

ment, become the date of the application
(5) Salmullah r Samaddi Sarkar, 18
C L J 35 (1913)

the judgment debtor can and ought to come in and ask that the attachment should be withdrawn from some particular portion of the project. Even if the order for attachment is wrong and excessive under this rule, the attachment as actually put is not without jurisdiction or null and void (1)

18. (1) Where applications are made to a Court for the Execution in case of execution of closs decrees in separate suits for the payment of two sums of money passed time by such Court, then—

(a) if the two snins are equal, satisfaction shall be entered

upon both decrees, and

(b) the two sums are unequal, execution may be taken out only by the holder of the decree for the larger sum and for so much only as remains after deducting the smaller sum, and satisfaction for the smaller sum shall be entered on the decree for the larger sum as well as satisfaction on the decree for the smaller sum

(2) This rule shall be deemed to apply where either party is an assignee of one of the decrees and as well in respect of indigment-debts due by the original assignor as in respect of

judgment-debts due by the assignee himself

(4) This rule shall not be deemed to apply inless-

(a) the decree-holder in one of the suits in which the decrees have been made is the judgment-debtor in the other and each party fills the same character in both suits, and

(b) the sums due under the decree are definite.

(1) The holder of a decree passed against several persons jointly and severally may treat it as a cross decree in relation to a decree passed against him singly in favour of one or more of such persons

Illustrations

(a) A holds a decree against B for Rs 1 000 B holds a decree against \(\) for the pryment of Rs 1,000 m case \(\) fails to deliver certain goods at a future lay \(\) B cannot treat his decree as a cross decree under this rule

(b) A and B, co plaintiffs, obtain a decree for Rs 1 000 against C, and C obtains a decree for Rs 1,000 against E C cunnot treat his decree as a cross

lecree under this rule

- (c) A obtains a decree against B for Rs 1 000 C who is a trustee for B obtains a decree on behalf of B against A for Rs 1 000 B cannot treat C selectee as a cross decree under this rule
 - (d) A, B, C, D and L are jointly and severally liable for R : 1 000 under a

decree obtained by F . A obtains a decree for Rs 100 ajainst F singly and applies for execution to the Court in which the joint decree is being executed F may treat his sout decree as a cross decree under this roll.

Applicability.- The rule contemplates that where a decree is sought to he set off against another, the decree against which the set off is asked for must be before the Court for execution (1) A judgment deliter is entitled to set off a decree whether the judgment creditor may or may not intend to object on appeal to the judgment debtor's decree, for a decree is a decree till it is reversed whether it be appealed or not (2) Should either decree he reversed in appeal the deeree of the Appellate Court can then be executed (3) The rule does not preclude a claim of set off of a sum due on a decree which is not under execution the rule being inapplicable to such a case (1) The transferee of a decree holds subject to equities enforceable against original holder (sect 49) The purchaser of a decree against which a cross decree may be set off, takes his deeree subject to the set off (5) Where there were cross decrees and one of the decree holders was, hy an order of Court, made with the consent of hoth parties. hound in executing his decree to set off the amount of the decree against him held that it would be inequitable to allow the other decree holder to obtain execution in full without setting off the amount decreed against him (6) In the under mentioned case a course was adopted which if not strictly in accordance with the letter, was in accordance with the spirit of this and the next rule, and at all events should be allowed on principles of natural equity (7)

"To a Court"—That is the Court to which the application is made for execution and which is dealing with the case as to whether execution shall be issued or not (8) The former section contained the words, "produced to the Court" This would seem still to be necessary as if all the decrees are not produced to the Court it will not have jurisdation over them all

"In separate suits"—The insertion of these words is intended to show that for the purposes of execution a counterclaim is not a separate action (9). This rule deals with cross decrees and not with cross claims under one decree. That is provided for by the next rule (10)

- Chapmal Das v Lal Dharam Singh 24
 A 48I (1902), followed in Ponnusamy t
 Dorawamy, 32 M 336 (1909)
- (2) Huro Pershad Roy v Shama Pershad Roy, 6 W R Misc 52 (1866), Sheo Pro sunno Singh v Shib Lal Jha 1864 W R Misc 1
- (3) Shee Prosume Singh v Shib Lal Jha supra but where there has b en consent see Gupinath Roy v Dinabandhu Nandi 3 B L R app 62 (1869)
- (1) Bharath Prosad v Rameshwar Koer, 8 C W N 118 (1903)
- (5) Aundo Coomar Bukshee v Koonjo Kishoro Roy, 6 W R Misc 73 (1868) and see Kristo Ramani Dasseo v Kedar Nath

- Chakravart: 16 C 619 (1883) [Equity held to operate against assignce with notice of existence of pending suit] and of Mt Pecloo v Court of Wards 7 W R 219 (1867)
- (6) Haro Sankar Sandyal v Tarak Chan dra Bhuttacharjee 3 B L R 114 (1869)
 - n Phuttacharjee 3 B L R 114 (1869)
 (7) Matadin v Chandi Din 10 1 188 (1888)
- (8) Rewa Wahton v Ram Kishen Singh 13 I A 106 110 (1886)
- (9) Per Esher M R, Stumore v Campbell & Co (1892) 1 Q B 317
- (10) Kalka Prasad v Ramdin, 5 A 272 (1883), as to cross decrees on same day against same parties in different suits, see
- against same parties in different suits, see Sumn Pandaram v Santhoji Row, 26 VI 428 (1902)

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Fried Scinia U 21, tr 20 -2,

> so much only as remains after deducting the smaller sum, and satisfaction for the smiller sum shill be entered upon the decree

Cross claims -This rule proceeds on the same principle as the last, applying not where there are several decrees but one decree only. All that the decree holder is entitled to enforce execution of is the difference between the amount found recoverable by him and the amount which the indiment debtor is entitled to recover against him (1) The rule is not limited in its application to eases in which the remedy of each party against the other is of precisely the same nature (2) This rule does not apply to a case of pre emption but only to counter claims in smits for money, but the principle on which it is based is applicable, and under an order to deposit the purchase money costs may be deducted (3)

The provisions contained in rules 18 and 19 shall apply to decrees for sale in enforcement of a mortgage or charge cross claims in mort gage suits

Mortgage suits -This rule is new It is inserted in order to make it clear that the provisions as to cross decrees and cross claims apply to the case of mortgage decrees (1) The rule also meidentally makes it clear that the expression "decree for the payment of money 'and other similar expressions in the Codo do not include a decree for sale in enforcement of a mortgage or charge

The Court may, m its discretion, refuse execution at [s the same time against the person and property Simultaneous execu of the judgment debtor tion

Execution against person and property -It is discretionary with the Court citber to grant or to refuse execution at the same time against the person and property of the judgment debtor. An appeal however, has been held (5) to be on the question whether this discretion was properly exercised

(1) Where an application for execution is made-

(a) more than one year after the date of Notice to show cause the decree, or against execution in certain cases

(b) against the legal representative of a party to the decree,

- (1) Sm Giribala Debia v Sm Ram Mina 5 C W A 497 (1900), Jugo Mohun Bukshee v Soorendronath Roy Chowdhry 13 W R 106 (1870) Amjad Ali Khan v Syad Fazal Hossem 19 W R 187 (1873)
- (2) Blagwan Singh t Ratan, 16 1 395 (1894) Sankara Menon v Gonala Pattar 23 M 121 (1891) diss from halka Prasad r Rund n 5 A 272 (1883)

(3) Ishrit Gopal Saran 6 A 351 (1884) (4) See Vagar Lal & Ram Chand 33 A 240 (1910) in which it was held that a Court may set off a simple decree for recovery of money against a decree for recovery of money by enforcement of a charge

(5) Chena Pemaji v Ghelabhai Narandas. 7 B 301 (1853)

the Court executing the decree shall issue a notice to the person against whom execution is applied for requiring him to show cause, on a date to be fixed, why the decree should not be executed against him;

Provided that no such notice shall be necessary in consequence of more than one year having clapsed between the date of the decree and the application for execution if the application is made within one year from the date of the last order against the party against whom execution is applied for, made on any previous application for execution, or in consequence of the application being made against the legal representative of the judgment-debtor, if upon a previous application for execution against the same person the Conrt has ordered execution to issue against him.

(2) Nothing in the foregoing sub-rule shall be deemed to preclude the Court from issuing any process in execution of a decree without issuing the notice thereby prescribed, if, for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice.

Notice—This rule is materially altered—Clauses (a) and (b) are the same as in the last Code—The Explanation to the corresponding section (248) of the last Code has been omitted and the second sub-section inserted, as it was represented that oven in the cases referred to in clauses (a) and (b) issue of the notice may involve an unreasonable delay or defeat the ends of justice—The Courts have thus been given a discretion in the matter—Where a judgment debtor appears and contests the decree holder's right to execute his decree he cannot object that no notice was served on him (1)—The notice should be addressed to the widow of a deceased Hindu who held joint undivided property along with his brothers, for it must be as quasi separate property that the attaching creditor had a claim to it (2)—As to proof of service of notice see below (3). As to whether the issuing of notice acts as a revivor within the meaning of art 180 of the Limitation Act, (4), and as to the time provided for by art 179 (5) see cases cited—The judgment creditor should ask for the execution of the decree and not for the issue of a notice, it being the duty of the Court to issue the notice (6)

⁽¹⁾ Grish Chandra Bannerjee v Bhaneo Motee, 11 W R 229 (1869) As to where the objection can be taken, see Srihary Mundal v Murari Chowdhry, 13 C 257 (1886), but see Sripat v Belchrumber, 15 C W N 661 (1910), and cases there eited (2) Nanabhai v Janardhan, 16 B 637

<sup>(1892)
(3)</sup> Bunola Soonduree v Kalee Kishen,
22 W R 5 (1874), Meer Lootf Ali t Aboe

Bibec 15 W R 203 (1871)
(i) Lalla M nohur Dass : Futtch Chand,

⁷ C W N 793, 30 C 979 (1903), Ramesh war v Ratishwar, 17 C L J 125 (1912), Khosal t Uklalidi, 14 C W N 117 (1909), Sreepativ Shamildone, 15 C L J 123 (1910)

⁽⁵⁾ Damodar v Sonaji, 27 B 622 (1903). Kaduressur Sen v Mohin Chandra, 6 C W N 5.66 (1902), Govind v Dada, 28 B 416 (1904). Ratan Chand v Deb Nath, 10 C W N 303 (1906), Cheruvath Thalangal v Nerata Thalangan 30 M 30 (1906).

⁽⁶⁾ Gooroo Dass v Modhoo, 6 W R Visc 98 (1866)

If neither party appears on the day on which the notice under this sule is made returnable the application for execution can be dismissed (1). Under the last Code it was held that the issuing of notice was a condition precedent to the valid execution of a decree in eases falling within clauses (a) (2) and (b) (3). More recently, however, the Privy Council held that where the deliter and his estate were made properly subject to the decree, the fact that notice was given to the wrong person and sale took place without notice to the legal representative, though constituting a material irregularity, did not render the judicial sale a multity (4). Where a defendant respondent dues before judgment in appeal is pronounced, it may be entered nume protune, and the decree may be executed under this and cognate sections a gainst the hoirs of the decrees of without placing them on the record (5). An appheation to set aside a decree on the ground that the notice had not been served under this rule must be made under sect. 17, and not under r. 90 of this order, and can only succeed on proof that the omission to serve the notice caused substantial injury to the owner of the property sold (6).

"Court executing the decree."—It was held under the last Code that though the notice under sect 248, corresponding with this rule, must be assued by the Court to which the decree was transferred for execution, the application to execute against a legal representative should be made to the Court which passed the decree (7). But an emission to apply to the latter Court was held to be a mere irregularity (8). It has been held under the present Code that a notice under this rule is not required to be issued upon an application for transfer of a decree, and that such notice must be issued by the Court which has a true of the application for execution, whether it be the original Court which in de the decree or the Court to which the decree has been trussferred for execution [9].

23. (1) Where the person to whom notice is issued under is.

the last preceding rule does not appear or of notice.

does not show cause to the satisfaction of the

Tukaram e Bhayam 20 B 541 (1835), descrited from in Kumed e Prasanus, 40 C 45 (1912)

⁽²⁾ Sahdeo Panl y t Ghrs ram Gyawal, 21 C 19 (1833) [in-glect to used a motic under clause (a) vitates the sah and it makes no difference that the auctim purchaser is a third party and not the dierce.

^{(3) &}amp; pal Chard r. c. Gurrari in Basses, p. C. 370 (1842). Immi ut masser. Lakata Blussim 3 A. 424 (1881). Ramessum Bassec. i. Dorgadus Chitterpe. 6 C. 103 (1886). Paraya Suffamaji pa. 218 424 (1884) whire louver, Larran, C.J., exisishered the proceedings voidable and not void. In Slave Procad. Chira Lal, 12 A. 440 (1884) the cross usa distinguishable, focasine death took, hier after attachment and before sale and

the attachment did not abate

⁽⁴⁾ Malkarjun (Nathari 25 B 347 a., 2 Bom L R 927 (1909) Lechia Vallet un und 14 C W N 569 (1910), Lakshun v Sun 13 C L 1 162 (1910) Bajun Behary (New Mithoun, 18 C L 1 1628 (1914)

⁽of Remachines i Amenta hirya 21 B. 314 (1817)

⁽⁶⁾ Kumed Boya - Frisania 10 (- 4) (1312) - Lakalini a Srie 13 (-1 J. 1) 2 (1310)

<sup>(140)
(7)</sup> Hira Chan | Harjiyan Davir Kastur
(bai I Kasilan, 15 H. 2.1 (153) Swar i
milia v Vanlyanatla. p. 31.40a (191)

⁽⁸⁾ Shari hal I al r. Modhu Suosu Siriyi, 28 C So (1830) (9) Strepati e. Shari al Juc, 15 C. In J. 122 (1910)

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he finds lumself (1)

Court why the decree should not be executed, the Court shall order the decree to be executed.

(2) Where such person offers any objection to the execution of the decree, the Court shall consider such objection and make such order as it thinks (it

"Offers any objection."—When a petition of objection (which, it has been held, need not be verified (2)) is presented under this rule the Judge is bound, whether a day for hearing has been fixed or not, to fix a day for consideration of it, and (even if the petitioner is not present either personally or by a pleader) to consider those objections, and to pass such orders as maj be just and proper for it might be that the grounds of objection raised would be of such a nature as that the Judge might prima facts, and without going further into the case, see reason for not proceeding with the execution (3)

Process for execution

24. (1) When the preliminary measures (if any) required by the foregoing rules have been taken, the Court shall, unless it sees cause to the contrary, issue its process for the execution of the decree.

(2) Every such process shall bear date the day on which its issued, and shall be signed by the Judge or such afficer as the Court may appoint in this behalf, and shall be sealed with the seal of the Court and delivered to the proper officer to be executed.

(3) In every such process a day shall be specified on or before

which it shall be executed

Issue of Process.—This rule amalgamates with some alterations seeds 350 and 251 of the last Code, the first of which sections was amended by sect 3 of Act VI of 1886 by the introduction of the words "subject to the protisions of sect 245 a and 245 s," which have been now omitted Sects 245 a and 245 s are now seed 56 and r 37 of this order respectively. Probably the words "subject," etc, were omitted as unnecessary, as this or any other provision of the Code must be subject to other provisions contained in it. For the word "uterrant," the word "process" has been substituted, as being more exhaustive and familiar. It was pointed out under the last Code (4) that though in cases

In 16 Samuel Cochrane, 14 B L R
 330 (1875)

⁽²⁾ Sunt Gopal Chander t Jugat Indar Bunnaice 8 W R 200 (1867)

⁽³⁾ Rajbullub Saha : Ramsudoy Ghose, 5 B L R , App. 65, 66 (1870)

⁽⁴⁾ Dhonkal Singh v Phakkar Singh, 15 A 81(1993) A v 94

0 21, r 2a

of the decree holder's default the Court might, under seet 250, suspend the issue of its warrant, that course, if adopted, would not bave disposed of the application for execution which would still remain undisposed of in the register of pending cases. A distress warrant issued under the Public Demands Recovery Act, which has hen extended heyond the original date of return, but does not hear on the face of it the altered date, is not a legal warrant under this rule (1) See now as to default, r 57, post

It was held under the preceding section that a day had to be specified on or before which it was to be executed, and after that date no law ful order was in force (2) If the process is not signed by the Judge or other officer it is bad (3). The execution of the process may he delegated to unother by the officer to whom it is addressed the words "to be executed," seeming to imply that it was not intended that the "proper officer" should himself execute all warrants sent to him (4). An officir cannot arrist without having the warrant in his possession (5) As to proof of execution, (6) see below

25. (1) The officer entrusted with the execution of the Endorsement on pro process shall endorse thereon the day on, and, if the latest day specified in the process for the return thereof has been exceeded, the reason of the delay, or, if it was not executed, the reason why it was not executed, and shall return the process with such endorsement to the Court

(2) Where the eudorsement is to the effect that such officer is unable to execute the process, the Court shall examine him touching his alleged mability, and may, if it thinks fit, summou and examine witnesses as to such mability and shall record the result

Endorsement on process—Act VIII of 1839 sect 272 The Nazir can delagate the execution to a subordinate officer by endorsing his name on the warrant. If the endorsement is irregular it does not invalidate the arrest (7) In a recent case in the Calciuta High Court it has been held that "the officer entrusted with the execution within the meaning of this rule is not the Nazir

Sheikh \asur r Emperor 37 C 122 (1909)

⁽²⁾ Ananda Lall Bera t R 10 C 18 (1883), and see Ibinash Chandra Aditya t Ananda Chandra Pal 31 C 424 (1904) and see Sheikh Vasur e Emperor, 37 C 122 (1902)

⁽³⁾ Ram Dayal r Mahtub Chand, 7 1 506 (1855) It cannot, however, be said that because a signature was confined to mitials it was not the duty of the officer to execute the warrant R v Janki Prasad, S 1, 293 (1886).

⁽⁴⁾ Abdul Karım v Bullen 6 1 385 (1884), Dharam Chand Lal v R, 22 C 596 (1895) Sheo Progash Tewari v Bhoop Varam Prosad 22 C 759 (1895)

⁽a) R : \text{1mur \ath 5 1 318 (1583)}

⁽⁶⁾ Mohunt Megh Lall r Shib Pershad Mads 7 C 34 (1881) and cases there exted.

⁽⁷⁾ Abdul harim r Bull n, 6 A 385 (1884) Dharam Chand Lal r R 22 C 536 (1836), Sheo Pregash Tewari r Bhoop Naram Prosad, 22 C 759 (1835)

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but the peon (1) In this case the peon had been directed by the Nazir to attach ecrtain property within a certain time and had executed the warrant after the time bad expired; and it was held that he had power to do this because his authority was derived from the Court.

Stay of execution.

26. (1) The Court to which a decree has been sent for when Court may stay execution shall, upon sufficient cause being shown, stay the execution of such decree for a reasonable time, to enable the judgment-debtor to apply to the Court by which the decree was passed, or to any Court having appellate jurisdiction in respect of the decree or the execution thereof, for an order to stay the execution, or for any other order relating to the decree or execution which might have been made by such Court of first instance or appellate Court if execution had been issued thereby, or if application for execution had been made thereto.

(2) Where the property or person of the judgment-debtor has been seized under an execution, the Court which issued the execution may order the restitution of such property or the discharge of such

discharge of such person pending the result of the application

(3) Before making an order to stay execution or for the

Power to require security from, or impose conditions upon, judgment-debtor. restitution of property or the discharge of the judgment-debtor, the Court may require such security from, or impose such conditions upon, the judgment-debtor as it thinks fit

Stay of execution —Ordinarily a debtor once discharged after airest cannot be re arrested in execution of the same decree (2). Under the former (as under the present) Code, execution was stayed on the application or objection of the judgment debtor, to enable the latter to apply to the Court which passed the decree, or to a Court having appellate jurisdiction in respect of the decree or its execution. This is necessary both to prevent precipitate execution when the decree itself or some order passed in execution is still under appeal, and also because the Court to which the decree bas been transferred for execution had no jurisdiction to decide certain matters. It has been held that an applicant can exclude the period of stay (even if the order only relates to a part of the decree, as, for instance, recovery of costs) in computing the period of limitation (3)

Security and conditions—Where a condition precedent is infringed, execution must continue as a matter of course, whereas conditions subsequent may be enforced like decrees. It has been held that an order for security in

⁽¹⁾ Subed Ah v R, 40 C 849 (1913), 657 (1886), In re Bolye Chund Dutt, 20 C distinguishing Dharam Chand Lal v R, 22 874 (1893) 674 (1893) (3) Bat Uy un v Bu Ruxman, 33 B

⁽²⁾ Secretary of State v Judah 12 6 652, 153 (1913)

stay of execution is not appealable, for it is not an order determining the rights of the parties, and is neither an order within meaning of sect. 47 nor a decree within meaning of sect. 2 (1)

27. No order of restitution or discharge under rule 26 shall prevent the property or person of a judgment-debter discharged.

debter span for execution of the decree sent for execution.

"Shall prevent."—The words "order of restitution" have been added to bring the rule in conformity with the wording of the second clause of r 26 Ordinantly as their once discharged after arrest cannot be re-arrested in execution of the same decree (2). It has, however, also been hild, distinguishing the first, and disacnting from the second of the cases cited, that though the Code specifically provides for retaking of the person under certain defined circumstances, it does not follow from this that as condained simulation unistances forbidden (3). In any case this rule creates a specific exception.

28. Any order of the Court by which the decree was passed, or of suck Court of appeal as aforesaid, in relation to the execution of such decree, shall lake Court to be hinding upon the Court to which the decree was sent for execution.

"Binding"—The transfer of a decree to another Court for execution mounts to a qualified delegation of the powers possessed by the Court that passed the decree, in discharging its functions relating to the execution of that decree. Such delegation is, however, not complete, nor does it entirely divest the Court which transfers the decree of its powers and functions "in relation to the execution of such decree," for under 1.26 and the present rule the highest authority in some matters still rests with that Court notwithstanding the transfer, (1) and the ordinary Court of appeal would still exercise its jurisdiction in respect of any order passed by the Court to which a decree wassent for execution has essent 42, ante

29. Where a suit is pending in any Court against the holder of a decree of such Court, on the part of the person against whom the decree was passed, holder and judgment the Court may, on such terms as to security or otherwise, as it thinks fit, stay execution of the decree until the pending suit has been decided

(1) Saraswati Barmania v Golap Dis Barman, 41 C 160 (1913), Dioki Nandan Singh v Bansi Singh, 14 C L J 35 (1911)

⁽²⁾ Secretary of State v Judah, 12 C 653 (1886), In re Boyle Chand Dutt, 20 C 574 (1893), dist in Rajendro Naram Roy v

Chunder Mohan Misser, 23 C 128 (1895) [the rule is conditional not only on arrest but also on imprisonment under arrest]

 ⁽³⁾ Shamji v Poona, 28 B 652, 659 (1902)
 (4) Ohazıdın v Lakir Baksh, 7 A. 73, 76, 77 (1884).

Stay pending suit -The provisions of this rule are limited to staying execution, and have no reference to a case in which execution has already been carried out and the decree holder placed in possession of the property decreed to him (1) It was held under the last Code that the section was not limited to a Court executing its own deeree (2) An appeal hes from an order staying execu tion (3) The rule refers to the parties to the suits pending or about to be executed Execution cannot be stayed on the ground that a stranger to the decree impeaches it ou the ground of fried He should file a suit and obtain an injunction for the purpose (1) An award filed in Court under sect 11 of the Indian Arbitration Let is nothing more than an iward although it is enforceable as a decree and execution of an award cannot be stayed under this rule (5)

Mode of execution

41 Every decice for the payment of money, including a Decree for payment of decree for the payment of money as the alterna tive to some other rehef, may be executed by money. the detention in the civil prison of the judgment debtor or by the attachment and sale of his property, or by both

Imprisonment -1 his rule, as it appeared in sect 254 of the Code of 1882 was a repetition of that in Act X of 1877, the latter being the same as sect 201 of Act VIII of 1859, though differently expressed and amplifying the expres sion "decree be for money" in the earlier Code In the Code of 1882 it com menced "Liery decree or order directing a party to pay money as compensation, or costs or as the alternative 'and included the terms "enforced" and "imprison ment" for the present "executed' and "detention in the civil prison

"For the payment "-A decree for rent without charging any property, against a putnular may be executed as a decree for money, (6) while a decree for maintenance payable monthly stands on the same footing as a decice by instalments and may be executed from time to time as the instalments fall due (7)

"Alternative"-A decree for the delivery of moveable property shall state the amount of money to be paid as an alternative if delivery be not

made (8) "Some other relief"-An order directing refund of money, awarded as

(I) Ghazidin v Fakir Balsh, 7 A at 1 p 73, 78 (1884)

(2) Ib, at p 77, Kassa Mal v Gopi 10 A

389 (1888) Steel v Itchamoy: Chowdhram (3) Ib 13 C 111 (1886), Lungum Brishnabhupati t Kandula Swaramayya 20 M 366 (1896) Aristomohiny Dossee v Bama Churn Nag, 7 C W N 733, 735 (1881) [stay of sale pending

administration suit]

compensation under the Land Acquisition Act and wrongly paid out can be (1) Purshettam Vithal v Purshettam

Ishwar, 8 B 532 (1884) (6) Tribbuwandas v Jivanchand 35 B 198 (1910)

(6) Tarimprosad : Narayan, 17 C 301

(1889)(7) Pearcenath Brohmo v Juggessurce, 15 W B 128 (1871)

(8) O YX r 10

executed under this rule (1). The Court executing a decree has no power to direct asyment of interest on collawh re the decree of the Prisy Council is silent as lo interest (2)

"May be executed."-A Court should execute the decree in the manner applied for by the decree helder,(3) but it has discretion to refuse execution at the same lune against the person and property of the judgment debtor,(1) and may in a sait for money call upon the latter to show cau a why he should not be improveded (5) A woman, however, cannot be arrested on a money d erec (6) As to costs of applications under this rule, we seed 35

"Detention in the civil prison."-The High Court's power to comput for contempt is unaffected by this Code (7). An insolvent obtaining a protection order is not liable to imprisonment for arrears of maintenance included in his schedule (5) A suit to recover damages on account of injuries caused by wrongful arrest can only be maintained if the original suit has been finally decided in favour of the plaintiff, if the arrest was made without reasonable or probably cause, and the injuries cannot be compensated by costs (9)

(1) Where the decree is for any specific moveable, or (1) for specific for any share in a specific moveable, it may be executed by the seizure, if practicable of moreable | top city the moveable or share, and by the delivery thereof to the party to whom it has been adjudged, or to such person as he appoints to receive delivery on his behalf, or by the detention in the civil prison of the judgment debtor, or by the attachment of his property or by both.

(2) Il here any attachment under sub-rule (1) has remained in force for six months, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, such property may be sold, and out of the proceeds the Comt may award to the decree-holder, in cases where any amount has been fixed by the decree to be paid as an alternative to delivery of moveable property, such amount, and, in other cases, such compensation as it thinks fit, and shall pay the balance (if any) to the judgment-debtor on his application

(3) Where the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of six months from the date of the

⁽¹⁾ Noben Kalı Debi v Banalata Debi, 32 C 921 (1905), 2 C L J 595 (2) Baron Forester v Sceretars of State 1

I A 137 (1877) (3) O XXI r 17

⁽⁴⁾ O XXL r 21 (5) O XXI r 37

⁽⁶⁾ S 56

⁽⁷⁾ Vartin v Lawrence, 4 C 655 (1879). Hassonbhoy v Cowasji, 7 B 1 (1881) Nave vahoo v Narotamdas, 7 B 5 (1852) In re Bar Amrit, S B 387 (1884)

⁽⁸⁾ Tokee Bdier v Abdul Khin 5 (536

⁽⁹⁾ Raj Chunder 1 Shana Soon lari, 4 C 583 (1879)

attachment, no application to have the property sold has been made, or, if made, has been refused, the attachment shall cease

Decree for specific moverble -In the Code of 1859, sect 200 included sects 259 and 260 of Act XIV of 1882 The words' or for any share in a specife moreable or for the recovery of a urfe ' and the second clause were added by Act X of 1877 This clause was altered by Act XIV, and the words ' and the decree holder has applied to have the attached property sold" and "in cases where any amount has been fixed under sect 208 such amount and in offer cases, ' were also added and the last claus appended. In the present rule the stabered words "executed" "detention in the enil prison," and "by the decree to be juid as an alternative to delivery of moreable property," have been substituted for "enforced " imprisonment" and "under sect 208," appearing in sect 209 of the Code of 1882 and the words " for the recovery of a wife, 'have been omitted as there can be no such decree, a wife not being a chattel to be delivered over to the husband. Where any third person prevents the wife from returning to her linshand the latter may obtain an impraction against him which may be enforced in ease of disobedience either by the imprisonment of the defendant, or by the attachment of his property or by both. This rule is not applie ible where the property sought to be attached is not in the possession of the judgment debter (1) A deoree being given for specific immoveable and moveable properties and the Ameen ducated to recept un the extent of the move ables, an order was made in execution for the Ameen to give possession of such moveables as he could find and to inquire into the nature amount and value of such as he could not find On appeal it was held that this order was not one for alternative damages, but to enable the Court of necessary to make a sufficient and not excessive order for imprisonment or attichment of property in ease of non delivery (2) A writ of attichment against the person of the judgment deltor will not be granted without notice to him (3)

Deeree for specific performance, for restitution of conjugal rights, or for an injunction

(1) Where the puts against whom a decree for the specific performance of a contract, or for restitution of conjugal rights, or for an injunction, has been passed has had in opportunity of obeying the decree and has wilfully fuled

to obey it, the decice may be enforced by his detention in the civil prison, or by the attuchment of his property or by both (2) Where the party against whom a deere for specific per formance or for an injunction has been passed is a corporation, the decree may be enforced by the attachment of the property of the corporation or, with the leave of the Court by the detention in the civil prison of the directors or other principal officers thereof, or by both attachment and detention

⁽¹⁾ Pu lmanund Smgh t Chun h Dit Hit

¹³ W R 52 (1573) (3) Projekho Nath Dutt t Ralharan, 1 C W \ 170 (1896)

⁽⁻⁾ Bh Inn Mohmoe t Cobin I Chun kr

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(3) Where any attachment under sub rule (1) or sub rule (2) has remanued in force for one year, if the judgment-dehtor has not obeyed the decree and the decree holder has apphed to have the attached property sold, such property may he sold, and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and shall pay the balance (if any) to the judgment debtor on his application

(4) Where the judgment debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or where, at the end of one year from the date of the attachment, no application to have the property sold has been made, or if

made has been refused, the attachment shall cease

(5) Where a decree for the specific performance of a contract or for an injunction has not been obeyed, the Court may, in lieu of or in addition to all or any of the processes aforesaid, direct that the act required to be done may be done so far as practicable by the decree holder or some other person appointed by the Court, at the cost of the judgment debtor, and upon the act being done the expenses incurred may be ascertained in such manner as the Court may direct and may be recovered as if they were included in the decree

Illustration

A, a person of little substance, creets a building which renders uninhabitable a family mansion belonging to B. A, in spite of his detention in prison and the attachment of his property declines to obey a decree obtained against him by B and directing him to remove the building. The Court is of opinion that no sum realizable by the sale of A's property would adequately compensate B for the depreciation in the volue of his maintoin. B may apply to the Court to remove the building and may recover the cost of such removal from A in the execution proceedings.

Decree for specific performance—Sect 200 of let VIII of 18,0 was divided up by Act X of 1877 mit two sections 259 and 260. To the latter section the Code of 1877 vided or for restriction of conjugal rights, altered "it shall be enforced to "I saked an opportunity of obeying the decree or injunction and has wilfully foiled to obey it the deer e may be enforced, deleted from the earlier section the words "and keeping the same under attachment until further order of the Court, and added the second clause. By the Code of 1882 were added the words "and the tention from to the first clause the words "and the decree holder has applied to have the attacled property sold" to the second clause, and the whole of the last clause. The portions in takes as also the Illustration, were added by the pris int Code which also substituted an injunction has been passed" for "the performance of or abstention from any offer particular act, has been made, and "detendion in the citil prison for "imprisonment," and in claus 3 "d all for "moy," and in claus 4 or if made has been refused"

for "and granted" This section is inapplicable to Parsees as far as restitution of conjugal rights are concerned (1)

"Restitution of conjugal rights"-These words were added to meet the objection raised in the case of Gatha Ram : Moohita Kochin, (2) though sect 200 of Act VIII of 1859, as it stood, was held to cover such a case (3) A person directed by a decree to refrain from preventing her daughter returning to her husband, and who permitted her daughter to reside in her house, is not thereby guilty of such interference as would justify execution under that section (4) The Court has now a discretion under O XXI r 33, in executing decrees for the restitution of conjugil rights. No provision is made for executing a decree for the recovery of a wife in this or the preceding rule, as no such decree can be made Where any third person prevents the wife from returning to her husband, the latter may obtain an injunction against him which may be enforced in the manner provided by this rule

"For an injunction "-A decree directing the removal of certain obstruc tions in a pathway can only be enforced as directed by this rule and not by directing the Court Ameen to remove the obstructions, (5) similarly in regard to a decree duecting the removal of a building , (6) or one for removal of obstruc tion to light and air, (7) but see sub clause (1) and the Illustration to this rule Each breach of a perpetual injunction may be enforced under this rule (8) A decree settling a scheme for the future management of a temple should be executed in accordance with this rule , (9) so where the decree directed certain property to be jointly insuaged by the plaintiff and defendant and both their names to appear in all papers connected with the same on the defendant disobeying the Court can direct attachment of his property (10) A decree ordering delivery of certain moveables and declaring title to certain rights is not incapable of being executed under this rule as being merely a declaratory decree, (11) but a decree ordering that payment in kind accruing after the decree he from time to time given is too indefinite for execution (12) An order for the refund of money, awarded under the Land Acquisition Act and wrough paid out, should be (xecuted under sect 145 rather than under this rule (13)

"An opportunity of obeying "-All a Court has to see is whether the party bound by the decree has had an opportunity of obeying the decree or

⁽¹⁾ Ardesar Jahangir & Avabai, 9 B H C 290 (1872) This was decided under sect

²⁰⁰ of Act VIII of 1859

^{(2) 23} W R 179 (1875), 14 B L R 2J8 (3) Yamunabar v Nuayan, 1 B 164

^{(1876),} see also Chotun Bibee v Ameer Chund, 6 W R 105 (1866) (4) Ajnası Kuar v Suraj Prasad 1 A 501

⁽⁵⁾ Bhoobun Mohun v Nobin Chunder, 18

W R 282 (1872) (t) Protop Chunder v Peary Chowdhrain,

⁸ C 174 (1881) 9 C L R 451

⁽⁷⁾ Sakurlal : Bu l irratibar, 26 B 283

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⁽⁸⁾ Venkatachallam v Veorappa, 20 M 314 (1905)

⁽⁹⁾ Shakaram 1 Ghelabhar, 19 B 34

^{(1893),} Damodarbhat v Bhogilal, 24 B 45

⁽¹⁰⁾ Gours Prosad v Bholanath, 8 C L R

^{487 (1881)} (11) Kishore Bun v Duarkanath 21 B 784

⁽¹⁸⁹⁴ P C) (12) Tata Chariar & Singara 4 M 219

⁽¹³⁾ Nobin Kali + Banalata, 33 C 921

^{(1905), 2} C L J 535

O 21, r 33

injunction and has wifully failed to obey it (1). The proper course when an application is made to execute a decree for the reinoval of a huiding, is to serve notice upon the judgment delitor calling upon him to comply within a time to be fixed by such notice, with the order in the decree, and on his failure to do so to make an order in terms of this rule, (2) but that is not a general rule; the rule does not require notice to issue, and it is discretionary with the Court (1).

"May be enforced."—When an application was dismissed on the ground that the defendant had not been afforded an opportunity of obeying, a second application after such opportunity was not barred as res judicata (3)

Limitation.—Failure to enforce prior breaches of a perpetual injunction will not bar the enforcement within three years of a subsequent breach. Art, 178, Sebed. II, of the Limitation Act applies to such a ease, (1) Art. 179 is inapplicable (5)

33. (1) Notwithstanding anything in rule 32, the Court, cuther at the time of passing a decree for the restitution of conjugal rights of all any time restitution of conjugal afterwards, may order that the decree shall not rights

be executed by detention in prison

(2) Where the Court has made an order under sub rule (1), and the decree-holder is the wife, it may order that, in the event of the decree not being obeyed within such period as may be fixed in this behalf, the judgment-debtor shall make to the decree-holder such periodical payments as may be just, and, if it thinks fit, require that the judgment debtor shall, to its satisfaction, secure to the decree-holder such periodical payments

(3) The Court may from time to time vary or modify any order made under sub-rule (1) for the periodical payment of money, either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the same as to the whole or any part of the money so ordered to be paid, and again revice the same, either wholly or in part as it may limb just

(4) Any money ordered to be paid under this rule may be recovered as though it were payable under a decree for the payment

of money

Decrees for restitution of conjugal rights —Under the last Code a Court could not refuse to execute a decree for the restitution of conjugal rights by the

⁽¹⁾ Durga Das v Dewtaj, 33 C 306 1905), 3 C L J 112, 10 C W N 297, Bhagwan Das v Sukhder, 28 A 300 (1905), 2 A L J 836

⁽²⁾ Protap Chunder v Peary Chowdhram, 8 C 174 (1881)

⁽³⁾ Kishore Bun t Dwarkanath 21 C 784 (1894 P C), 21 I A 89

⁽⁴⁾ Venkatachallam v Veerappa 29 VI 314 (1905)

⁽⁵⁾ Bhagwan Das v Sukhder, 28 A 300 (1905), 2 A L J 836

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attachment of the person or property of a recalcitrant judgment debtor in England this mode of execution has been put an end to by the enactment of the Matrimonial Clauses Act, 1881, 17 & 48 Vict c 68 (cf sects 2-4) It has been considered that some relaxation of the provision in force in India is desirable, but that it was doubtful whether it should go as far as this For the present Courts have been given a discretion in the matter, and they have been enabled to follow a procedure slightly adapted from the English practice in cases in which attachment and imprisonment appear mappropriate

(1) Where a deeree is for the execution of a docu ment or for the endorsement of a negotiable Decree for execution instrument and the judgment debtor neglects of document or endorsement of negotiable inor refuses to obey the decree, the decree holder

may prepare a draft of the document or endorsement in accordance with the terms of the decree and deliver the same to the Coint

(') The Court shall thereupon cause the draft to be served on the judgment debtor together with a notice requiring his object tions (if any) to be made within such time as the Court fixes in this behalf

(3) Where the judgment debtor objects to the draft, his object tions shall be stated in writing within such time, and the Court shall make such order approving or altering the draft, as it

thinks fit

strument

(4) The decree holder shall delines to the Court a copy of the draft with such alterations (if any) as the Court may have directed upon the proper stamp paper if a stamp is required by the law for the time being in force, and the Judge or such officer as may be appointed in this behalf shall execute the document so delnered

(5) The execution of a document or the endorsement of a negotiable instrument under this rule may be in the following form namely -

(or as the case "C D, Judge of the Court of may be), for A B, in a suit by E F against A B and shall have the same effect as the execution of the document or the endorsement of the negotiable instrument by the party ordered to execute or endorse the same

(6) The Court, or such officer as it may appoint in this behalf, shall eause the document to be registered if its registration is required by the law for the time being in force or the decree holder desires to have it registered, and may make such order as it thinks fit as to the payment of the expenses of the registration

I irst Schrd O 21, r 35

extended to cover optional as well as compulsory (1) registration, and an order for the payment of expenses of either kind may presumably be summarily enforced in the execution department. The Registrar of the High Court can if directed by thist Court execute a conveyance on behalf of a party refusing so to do so as to pass his estate, but he cannot enter into a covenant on his behalf (2). Objections to draft conveyances or draft endorsements can be made the subject of appeal under O XLIII r 1 (c)

35 (1) Where a decree is for the delivery of any immove-[s 2 able property, possession thereof shall be property.

able property, possession thereof shall be delivered to the party to whom it has been adjudged, or to such person as he may appoint to receive delivery on his bebalf, and, if necessary, by removing any person bound by the decree who refuses to vacate the property

(2) Where a decree is for the joint possession of immoreable property such possession shall be delivered by affixing a copy of the varrant in some conspicuous place on the property and proclaiming by beat of drum or other customary mode, at some contentent place,

the substance of the decree

(3) Where possession of any building or enclosure is to be delivered and the person in possession, being bound by the decree, does not afford free access, the Court, through its officers, may, after giving reasonable varning and facility to any woman not appearing in public according to the customs of the country to withdraw, remove or open any lock or both or break open any door or do any other act necessary for pulling the decree holder in possession

"Decree!—The decree should describe the land accurately so as to avoid any objection (3) in execution as regards the lands covered by it. Possession should not be given unless it is so ordered by the decree (4). If the plaintiff is entitled to possession it should be given him. He cannot be compelled to accept compensation against his will (5). When a decree is obtained for possession that decree should be executed and a second suit will not be for the jurgose (6). Where an adverse title is unsuccessfully set up the plaintiff is intitled to ad cree for khas possession under this ruk. (7) and having set up his in a living title.

⁽¹⁾ See Kanal is Lale Kali Din 2 V 33-(1873) as regards, lowever the ground of Spanke J & judgment & e leokash Chun der Dass : lury Chand Dass J C 82 (1882) I: B.

⁽²⁾ Ram Chund r Datt e Dwarkadnath Bysack, 10 C 350 (1883)

⁽³⁾ So Dwarka Nath Hallar e Kumola Kant 12 W R J (186) Zeemut Mr r Ram D val Paldar 18 W K → (185) Kal o Debec i Modhoo Sodun, 16 W 1 171 (1871), Ra lha Gob nd Shaka e Bro

jendro Coomar Roj. 18 W. 1. u.," (16"3) Annoda Lershad v. Treviu konati. 13 W. R

<sup>123 (15-0)

(4)</sup> Ametroonissa Khatoon e Abedis saa Khatoon 16 W. P. 207 (1571)

hhatoon 16 W R 30" (1871)

(5) Govind Venhaji v Sadashiv Bharina

¹⁷ B "_1 (15 _)

(6) Ramsura Mal-ton c J nonauth Bl. _

out 10 W R. 3 % (18 %)

^{(&}quot;) Raj Mungal Lawa in Anardisoy of 11 W. 1. 63 (1) 31.

in the suit, the defendant cannot be allowed for the first time when the decree is being executed to plead his occupancy as a tenant (1). As to growing crop see bolow (2) It was held that if the decree was silent as to a building situated on the laud, it was not within the province of the exceuting Court to direct that the building be pulled down (3)

Possession -Possession may be actual or formal or, as it is often called symbolical poss soion. The delivery of possession which is directed to be given by this rule is the placing of the decree holder in actual possession, which act may involve the dispossession of some other. Whilst this rule relates to the d livery of what is known as thas or immediate or direct possession the following rule provides for the case where the immoveable property is in the occupancy of a tenant or of some other p rson entitled to occupy the same Formal delivery of possession consists in the reading by the officers on the land of the order for putting the decree holder in possession and taking a receipt from Whether what occurs on the occasion of giving delivery has the effect of dispossession is a question which must be decided on the evidence (4) It has been held that the delivery of formal possession in execution of a decree for noss ssion gives a cause of action against a defendant who remains in occupation of the possession which may be enforced in a regular suit (5) Rules 97 and 98 provide for my resistance or obstruction to the delivery of possession complained of by the decree holder, and r 100 to any complaint on the part of a third party is to his being dispossessed in execution of the decree. Where in execution of a decree a person not a party to the suit is dispossession does not give him a caus of action within the purisdiction of the Mamlatdar Rule 100 (formerly sect 333) applies (6)

Joint possession - 1 pluntiff who is entitled to possession jointly with other persons can be granted a decree for joint possession whether he had been one mally in joint possession or not (7)

"Bound by the decree' -I has uncludes not only the judgment debtor but persons taking from him and affected by the lis perdens A person who purchases during the pendency of the suit is bound by the decree that may be made is must the per on from whom he derive title So one who takes title or poss suon from a defendant in ejectim nt pending the snit is bound by the indgment, and can be exacted by the pro which shall rome therein although he is not a party the reto (5) Is per les continues during the pendency of

⁽¹⁾ Banca Maht n e. t pec Blagat 12

W R 285 (1801) (2) Udit Narun Smigh e Slah I al 20 1

^{198 (1898)} (3) Radha Gobul Slala e Brinine

Chowdhry 18 W R 527 (1873) (4, Ramchandra Subrao i Ravji N R

^{3.1 (1895),} and for n cann, of despess wan m Bengal Tenacy let Sh III lrt. 7 a Rudra Avrain Maitt t \ t | 10 Jun 41

c 22(1913) (5) Slama Charan (!

⁽later Uxkeyx 11 C. 93 (1884) see Hati VI lun Shaha et Isaburali _7 C 715 (INF) freffet ffm al possession on luntal n ace pook n t a to O XXI r 97 and Malako a lanu "o B. 37c 14 Bom 1. 1 115 (101.)

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an appeal (1) There has been some conflict whether the rule of his per lens applies to a sale in execution. But the weight of authority appears to be in favour of the view that a purchaser at a sale in execution pending a suit is bound by the result in that suit (2) Where sons living with their father had no inde pendent juridical possession the possession which was obtained through the Court against their father was held to operate as well against his dependents as against himself (3) Decree holders seeking to obtain las possession of property which is already in possession of a surburakar under order of Court should aprly for his removal to the Court which appointed him in the matter of the suit in which he was appointed (4)

Undivided share -Difficulty was often felt (5) in executing a decree obtained by the proprietors of an undivided share in immoveable property for Mas possession The second sub clause of this rule now regulates this matter Thus where a decree holder in execution of her decree purchased an undivided share in a house which the judgment dehtor owned jointly with a third person and the judgment-dehtor resisted her attempt to get possession it was held that on the construction of this rule with r 95 of this Order the decree holder was entitled to have him removed from the premises (6)

'Break open -See cases cited below (7)

Occree for delivery of immoveable property when in occupancy of tenant.

Where a decree is for the dehvery of any immoveable is property in the occupancy of a tenant or other person entitled to occupy the same and not bound by the decree to rehnquish such occupancy, the Court shall order delivery to

The doctrino of Is pendens first received statutory recognition in sect 2º3 of the Code of 1809 The rule however is now con tained in sect 52 of the Transfer of Property Act.

(1) Gobind Chunder Roy v Guru Churn hurmokar to C 94 (1882) Radbika v Radhamani 7 M 96 (1883)

(2) Hukm Chand Res Jud 713 714 Raj Kishen Mookerjee v Radha Madhub Holdar 21 W R 349 (1874) Lala halı 1 rosad v Buli Singh 4 C 789 (1878) Jlaroo t Raj Chunder Dass 12 C 999 (1885) Gobind Chunder Roy v Guru Churn Kurmokar 15 C 94 (1887) Dinonath Ghose v Shama Bih 28 C 23 (1900) Parvati t Kisansing 6 B 567 (1882) In Nilalant Bannerje v Suresh Chandra Mullick 1º C 414 (1885) the P C. expressed a doubt as to the correctness of the judgment of the H gh Court on the question of I s pendens

(3) Pandharmath : Vahabub Khan _1 B 38 (1895) dist Lakshman t Moru 16 B 22 (1890) white the son who was a

Hindu was in actual and apparently in juridical possession of the land of which he took the crop

(4) Hurrish Lishto v Moteo Chand 10 W R 445 (1868)

() See O Kineal; a notes to sect 263 c ting Brohmo Moyee Debia v Raj Chunder 5 W R Misc 15 (1866) Rance Shama Scondorce v Jardine Skinner & Co 7 W R 376 (1867) Koon vur Bijoy Keshub v Shama Soonduree B L R Sup Vol 172 2 W R Visc 31 (1865) Rajani Kanth v Ramnath Yeogy 10 ("44 (1883) Ram Chandra v Damodhar Trimbal '0 B 467 (1895) Krishnaji v Vithu 18 B 000 (1893) Bhau v Dade Krishnap "1 B 77 (1896) Watson L Co v Ram Chand Dutt 18 C 10 (1890) Luchmeswar Singh : Mano var Hossein 19 C 953 (1891) and generally as to the postou of co sharers see Woodroffo a In junctions 2nded p 400 et seq

(6) Sarva Begam v Tal Begam 36 A 181 (1914)

(7) Ganesh Chund r Shal v Ram Dhunco

be made by affixing a copy of the warrant in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, the substance of the decree in regard to the property.

Occupancy of tenant -In order to a legal possession being given under this rule it is essential that all its requirements should be earried out (1) But if the party in possession when the decree is being executed admits to the Court that the decree holder has formally obtained possession, he cannot afterwards ple id a title by adverse possession, denying that the decree holder ever received possession (2) " The substance of the decree in regard to the property" which must be proclaimed to the occupant may or may not be a declaration that the decree holder is the immediate I indlord of the occupant, and as such entitled to receive cent directly from him, as there may be an intermediate holder Probably both the intermediate tenant as well as the cultivating tenant or actual occupant would come within the terms of the rule (3) In executing a decree under this rule the Court should confine its action strictly to the terms of the law, and should not add to the decree an order directing the ryots to pay rent to the decree holder (4)

Arrest and detention in the civil prison

(1) Notwithstanding anything in these rules, where an 15B 1 application is for the execution of a decree Discretionary power to for the payment of money by the arrest and permit judgment-debtor to

show cause against deten tion in prison

detention in the civil prison of a judgment-debtor who is hable to be arrested in pur suance of the application, the Court may, instead of issuing

wairant for his ariest, issue a notice calling upon him to appear before the Court on a day to be specified in the notice and show cause why he should not be committed to the civil prison

(2) Where appearance is not made in obedience to the notice, the Court shall, if the decree holder so requires, issue a warrant

for the arrest of the judgment debtor

Discretionary power - This rule was introduced into the Code by Act VI of 1888 By the present Code the words 'the payment of have been added and the words "detention in the civil prison" and ' the civil prison" have been substituted for 'imprisonment' and 'jail in execution of the decree' respectively This rule applies to cases under O XXI r 11 (5) where in respect of decrees for the payment of money, the Court may order immediate execution against the judgment debtor on the oral application of the decree holder

Dassee, 22 W R 283 (1874), Radha Gobind v Brojendro Chowdhry, 18 W R 527 (1873) (1) Court of Wards v Oopendronath Doo,

¹⁵ W R 99 (1871) (2) Bindobashinco Dossee v Renney, 15

W R 307 (1871)

⁽³⁾ O Kinealy, C P C, notes to sect 264 (4) Gibbon v Sheo Purshun Misser, 17 W R _36 (1872)

⁽⁵⁾ O XXI r 21

"The Court may "—It has discretion to refuse execution at the same time against the person and property of the judgment debtor (1). It is the practice of the Calcutta High Court to issue notice to the party whose arrest is sought in execution in all cases. Even after a vesting order has been made the Court may under this rule direct execution by arrest and imprisonment where protection has been refused by the Insolvent Court (2).

"Issue a notice"—Notice may issue against a judgment-dehter who in other execution proceedings has made an application to be declared an insolvent (3)

38. Every warrant for the arrest of a judgment-debton is.

Warrant for arrest to shall direct the officer entitusted with its direct tidement-debtor to be brought up.

which he has been ordered to pay, together with the interest their and the costs (if any) to which he is hable, be soonen paid.

Warrant for arrest of judgment debtor—Act VIII of 1859, sect 22.1 For form of warrant, seo Schedule IV No 154, of former Code Tho executing officer is only empowered to arrest the defendant and detain him for such a reasonable tima as is sufficient to allow of his being brought hefore the Court, and having an opportunity of applying for his discharge, the detention of a defendant after such reasonable time and without further authority of law is illegal (4). So where a sheriff sofficer of his own motion took a prisoner, in custody under a warrant directed to the Superintendent of the Presidency Jail, to the Alipore Jail and delivered her there, it was held that the imprisonment was unlawful and that she was entitled to her discharge (5)

39. (1) No judgment debtor shall be arrested in execution is.

Subsistence-allowance of a decree unless and until the decree-holder pays into Court such sum as the Judge thinks subsistence of the judgment debtor from the time of his arrest until he can be brought before the Court

(2) Where a judgment debtor is committed to the circl prison in execution of a decree the Court shall fix for his subsistence such monthly allowance as he may be entitled to according to the scales fixed under section 57 or, where no such scales have been fixed, as it considers sufficient with reference to the class to which he belong.

(3) The monthly allowance fixed by the Court shall be

⁽¹⁾ ONL r 21 (2) Bhasker (Shudiar, J Bom L. R vs) Bourke 35 (1800) 100) (4) Shanakhrowa Bajan v Anne Lore,

⁽³⁾ transact t Mahades, 2 B 31 (1897). 11 C 027 (1885).

Attachment of projecty

- 7.] 41 Where a decree is for the payment of money the Examination of judg ment debtor as to his order that—
 - (a) the judgment debtor, or

(b) in the east of a corporation, any officer thereof, or(c) any other person,

be orally examined as to whether any or what debts are owing to the judgment debtor and whether the judgment debtor has any and what other property or means of satisfying the decree, and the Court may make an order for the attendance and examination of such judgment debtor, or officer or other person, and for the production of any books or documents

Examination of judgment debtor —this rule is an amphification of the provisions of sect 219 of Act VIII of 1859 modified by sect 267 of Act & of 1877, but nove of the decisions hereinafter referred to are based on any particular working appearing in the earlier forms of this rule under which the examination then was "in respect to any properly liable to be secred in satisfaction of the decree"

"Any other person' -This includes the mortgageo of the property attached (1)

Examination -In executing a decree for possession all the Court has to do is to put the decree holder in possession of the property described in the decree if the description is so uncertain that it is impossible to ascertain what is decreed execution cannot be given. The examination cannot be to ascertain what is decreed, (2) but it may be to ascertain what is the subject upon which the decree operates. When a judgment debtor maintains that the property which the judgment creditor specifies is not the subject of the decree an inquiry should be held and the judgment debtor is at least in honesty bound to point out the actual subject of the decree (3) For the purpose of ascertaining the subject of the decree, the executing Court is not precluded from considering other decrees between the same parties for the purpose of explaining and support ing the subject of the decree (4) In execution of a decree against two of several co sharers the Court should give possession of the shares of the two judgment debtors, but is not authorized to hold any inquiry into the extent or amount of those shares in relation to the remaining co sharers This can be done by separate suit (5)

"Means of satisfying "-Under the Code of 1882 the words 'hable to

⁽¹⁾ In re Premji Trikumdas, 17 B 514 R 330 (1874) (1893) (4) Rajend

⁽⁴⁾ Rajendro Kishoro v Hyabul Singh 17 W R 379 (1872)

⁽²⁾ Dwarkanath Haldar v Kumola Kant, 12 W R 93 (1809)

⁽⁵⁾ Annod Pershad v Troyluckhonath

⁽³⁾ Bhugobat Singh v Ram Adhm 22 W 1 and, 13 W B 123 (1870)

be serzed" were held to mean any property which is attachable under the decree (1)

"For the production."—On an application for execution of a decree by attachment of debts the Court can require the judgment debtor to produce his books in Court (2)

42. Where a

Attachment in case of decree for rent or mesne profits or other matter, amount of which to be subsequently determined

Where a decree directs an inquiry as to rent or mesne is profits or any other matter, the property of the intermediate which to ally deter attached, as in the case of an ordinary decree for the payment of money

Attachment where decree directs inquiry—I his section was introduced into the Code by seet 255 of Act X of 1877, which then ran "If a decree be for mesne profits," etc. It embodies the decision in Sharoda Moyee Burmonec v Wooma Moyee Burmonee, 8 W R 9 (1867). The decree, how ever, will not be binding on the representatives of the deceased judgment-debter, after whose death the amount of the decree was determined, unless they be parties to the suit (3)

43 Where the property to be attached is moveable property, is also property, other than agricultural produce, in the posses as supposession of judgments debtor. Shall be made by actual seizure, and the attaching officer shall keep the property in the responsible for the due custody thereof

Provided that, when the property seized is subject to speedy and natural decay, or when the expense of keeping it in custody is likely to exceed its value, the attacking officer may sell it at once

Attachment of moveable property—The first clause of this rule corresponds with sect 233 of Act VIII of 1859—The words "other than the property mentioned in the first protiso to sect 266" were added by sect 269 of Act X of 1877, and these words have been altered to "other than agricultural produce by the present Code, by which also the words is hiely to "and "attaching" were substituted for "will" and proper respectively while the last clause (as to the power of the Local Government to make rules for maintenance of attached live stock) appearing in sect 269 of the Codes of 1877 and 1885 has been omitted. The next two rules deal with the attachment of agricultural produce and rr 47 and 49 with the attachment of shares in moveables and of partnership property respectively

⁽¹⁾ In re Premji Trikumdas 17 B ol4 W P H C 334 (1871) (1893) (3) Radha Prasad t Lal Sabeb, 13 A 53,

⁽²⁾ Adjoodby a 1 ershad v Middleton, 3 \ p. 65 (1890 P C.)

38 1

Agricultural produce.-See notes to sect 61, ante

46. (1) In the case of-

Attachment of debt, share and other property not in possession of ludgment-debtor.

- (a) a debt not secured by a negetiable instrument,
- possession of (b) a share in the capital of a corporation,
- (c) other moveable property not in the possession of the judgment-debtor, except property deposited in, er in the eistedy of any Court

the enstody of, any Court.
the attachment shall be made by a written order prohibiting,—

(i) in the case of the debt, the creditor from recovering the debt and the debtor from making payment thereof until the further order of the Court,

(11) in the case of the share, the person in whose name the share may be standing from transferring the same or

neceiving any dividend thereon.

(111) in the case of the other moveable property except as aforesaid, the person in possession of the same from

giving it over to the judgment-debtor.

(') A copy of such order shall be affixed on some conspicuous part of the court house, and another copy shall be sent, in the case of the debt, to the debtor, in the case of the share, to the proper officer of the corporation, and, in the case of the ether moveable property (except as aforesaid), to the person in possession of the same

(3) A debtor prohibited under clause (i) of sub rule (1) may pay the amount of his debt into Court, and such payment shall discharge him as effectually as payment to the party entitled

to receive the same

Debts, shares and other property not in possession —This rule enacts of Act VIII of 1859 The clause commencing "A debtor prohibitel" was added by sect 286 of Act XIII of 1859 The clause commencing "A debtor prohibitel" was added by sect 286 of Act X of 1877 That Act also provided —"No attachment under this section shall remain in force for more than six months, at the end of which time, if the judgment debtor has not obeyed the decree, the property attached may be sold, and out of the proceeds the Court may award to the decree holder such compensation as it thinks fit, and pay the balance, if any tothe judgment debtor on his application." This provision was repealed by Act XIV of 1882, which Act also added three clauses affecting the salary of a public officer or the servant of a Railway Company, and which matter is now dealt with by O XXI r 18. The only other alteration made by the present Code is to substitute "a" for "any public Company or" and "affixed" The "kized". The term "debt" has been used in this rule in its legil sense of a debt either due or accroined me. (1) that is, a sim

of money which is either now payable or will become payable in the future by reason of a present obligation (1) A sum payable upon a contingency does not become a debt till the contingency bus happened (2) An allowance payable as an annuity is not a debt, and cunnot be attached under this rule until it has fallen due (3)

A Provincial Small Cause Court cannot directly attach a debt due to the

"Debt not secured by a negotfable instrument."-Includes a decree of a Revenue Court (5) If a debt under a deed of bypothecation is intended to be sold alone or mouth with immoveable property in order to recover it by personal remedy, it should be attached under this rule, but where the interest under such a deed was attached under O XXI r 51, the absence of an attachment under this rule did not affect the right of the nurchaser to realize the amount due under it (6) The rights and interests under his mortgage of a mortgageo out of possession should be attached under this rule and not under sect. 274 of the former Code and O XXI r 51 of the present Code (7) In a recent case in the Madras High Court, the effect of the words "debt not secured by a negotiable instrument" was considered, and it was held that they are undoubtedly wide enough to cover a debt secured by an hypothecation hand or a simple mortgage, and that r 51 of this order is not applicable to such cases, though the General Clauses Act and Transfer of Property Act speak of such a deht as an interest in immoveable property (8) The form of prohibitory order is given in the First Sched App E No 10 If such a debt be attached a claim may be preferred by a third party and investigated under O XXI r 58 (9) corresponding section in the Code of 1877 provided that an attachment under this rule could not remain in force more than six months, but the property could Under such section it was held that honds which would be barred in the mean time could not be made available for satisfaction of a decree in execution by the Small Cause Court (10)

"Share in the capital"—The form of probibitory order is given in the First Sched App E No 11

"Other moveable property."—The form of prohibitory order is given in the First Sched App E No 5 Money deposited as security for performance of duties of servant may be attached under this rule subject to the employer's

⁽¹⁾ Bancharan t Adyanath, 36 C 936

^{(1909), 13} C W N 966 (2) Padmanund t Ramaprasad, 14 C L J

<sup>127 (1911)
(3)</sup> Padmanund v Ramaprasad, supra

⁽⁴⁾ Hossein Ally v Ashotosh Gangoolly, 3 C L R 30 (1878), Begg Dunlop and Co v

Jagannath Marwari, 39 C 104 (1911) (5) Aulia Bibi v Abu Jafar, 21 1 405

⁽¹⁸⁹⁹⁾ (6) Sami Ayyar t Krishnasami, 10 B 169

⁽⁶⁾ Sami Ayjar t Krishnasami, 10 B 1 (1886)

⁽⁷⁾ Karım un nessa v Phul Chand, 15 A 134 (1893), Tatvadı v Bat Kashi, 26 B 305 (1901)

⁽⁸⁾ Natarya lyer t South Indian Bank of Tumovelly, 37 M 51 (1914), following Tarvadi Bholanath t Bai Kashi, 26 B 305 (1902), not following Sami Ayyar t Krishnaswami, 10 M 169 (1887)

⁽⁹⁾ Chidambara v Ramasamy, 27 M 67

⁽¹⁹⁰³⁾ (10) Nursingdas v Tulsiram, 2 B 558 (1878)

hen, but cannot be sold or realized until the deposit is at the disposal of the judgment debtor freed from the lien (1)

" Not in the possession "-When the moveable property of the judgment debtor is in the bands of a third party, the decree-holder must proceed under this rule He ennuot sue the third party, (2) but it would be otherwise if the decree declared the decree holder entitled to the immoveable property (3)

"The creditor from recovering"—An attachment under this rule does not prevent the debtor sung for the debt,(1) but he cannot realize it (5)

"Copy of such order shall be affixed "-Non comphance with this provision vitiates the attachment and makes it invalid as against a subsequent assignment (6)

"May pay the amount of his debt into Court "-He cannot be ordered to pay or to show cause why he should not pay (7) nor can he be ordered to pay into Court a debt he denies is due (8) In Bombay, however, it has been held that clause (1) of this rule implies that the Court may make an order for pay ment of the debt which the garmsbee is to obey including an order for payment to the judgment creditor (9) Whore instead of paying juto Court, the debtor paid the money to the only person who had it been paid into Court would have been entitled to withdraw it and the payment was certified by the Court it was held the payment amounted to a sufficient compliance with the former section (10) Money paid juto Court under the former section was held to he assets realized in execution under sect 295 corresponding with sect 73 (11) In the Calcutta High Court after the attachment of a debt an order can be made gaving liberty to the dehter to pay the amount attached into Court, and appointing a Receiver to sue for and realize the debt if it he not paid in within a time to be fixed by the order A voluntary payment by a debtor of his own choice and at his own risk made in a Court of inferior jurisdiction, with full knowledge of an attachment by a higher Court was held not to discharge him (12)

Effect of attachment —An attaching creditor is not in the same position as an assignee for value without respect of prior assignments in no

An order for attachment gives the (1) Karuthau 2 Subramanya 9 M 203

⁽¹⁸⁸⁵⁾ (2) Mirza Mahomed v Widow of Balma

kund, 3 I A 241 (1876) (3) Padmanund Singh v Chundi Dat Jha

¹ C W N 170 (1896) (4) Shib Singh v S ta Ram 13 A 76

⁽¹⁸⁹⁰⁾

⁽⁵⁾ Collector of Etawah v Beti Maharani 14 A 162 (1892), s c, 17 A 198 (P C

^{1894) 22} f A 31 (6) Satya Charan v Madhub Chunder, 9 C

W N 693 (1905) (7) Siriah v Muckanachary, 10 M 194

⁽⁸⁾ Kishen Pertaub v Bhowya Debya 18

W R 40 (1872) (9) Toolsa Goolal : Antone, II B 448

⁽¹⁸⁸⁷⁾

⁽¹⁰⁾ Fida Husain v Maula Bakhsh 21 A

^{145 (1897)} (11) Sorabji Edulji v Govind Ramji, 16 B

^{91,} p 98 (1891), Jettha Bhima t Lady Janbar 14 Bom L R 904 (1912) (12) Ramasamy Udayar i Chakrapany, 17

M L J 488 (1907)

⁽¹³⁾ Megi Hansraj v Ramji Joita 8 B H

C 169 (1871)

FIRST SCHLD EXECUTION OF DECREES AND ORDERS O 21, 1r 17, 48

If such rights are not exercised before the presentation of a petition in insolvency they will not create a title so as to prevail against that of the Official Assigned un ler the vesting order (1) Until a dehtor receives a notice under this rule he is bound to pay his judgment creditor, and it is no part of his duty to inquire whether his creditor is or is not cutifled to receive the money (2) The payment of a cheque given before notice of attachment cannot be stopped (3) In Lugland an order for attachment does not are the judgment creditor a charge until it is served (1) and there is no difference between the service of an order niss and of an order shoolute (a)

- Where the property to be attached consists of the share or interest of the judgment debtor in moveable in moveables property belonging to him and another as co owners, the attachment shall be made by a notice to the judgmentdebtor prohibiting him from transferring the share or interest or charanna it in any uay
- (1) Where the property to be attached is the salary or allouances of a public officer or of a seriant of Attachment of salary or allowances of jubic a railway company or local authority, the Court, officer or servant of uhether the jadgment debtor or the disbursing railwaj company local authority officer is or is not within the local limits of the Court's jurisdiction, may order that the amount shall subject to the processions of section 60, be withheld from such salary or allowances either in one payment or by monthly instalments as the Court may direct, and, upon notice of the order to such officer as the Government may by notification in the Gazette of India or in the local official Gazette, as the case may be, appoint in this behalf, the officer or other person whose duty it is to disburse such salary or allowances shall withhold and remit to the Court the amount due under the order, or the monthly instalments, as the case may be

(2) Where the attachable proportion of such salary or allow ances is already being withheld and remitted to a Court in pursu ance of a previous and unsatisfied order of attachment, the officer appointed by the Government in this behalf shall forthwith return the subsequent order to the Court issuing it with a full statement of all the particulars of the existing attachment

(3) Every order made under this rule, unless it is returned in accordance with the provisions of sub rule (4), shall, without further notice or other process, bind the Government or the railway

⁽¹⁾ Kristnasawmy t Official Assignee of (1878)

Madras 26 M. 673 (1903) (2) Thakoor Dass t I uchmeeput 7 W R 10 (1867)

⁽⁴⁾ In re Stanhope Silkstone Collieries Co. 11 C D 160 (1879) (5) Ex parte Joselyne, L R 8 C D 333

⁽³⁾ Bhagvandas t Abdul Husem 3 B 49

company or local authority, as the case may be, while the judgment debtor is within the local limits to which this Code for the time being extends and while he is beyond those limits if he is in receipt of any salary or allowances payable out of His Majesty's Indian recenues or the funds of a valuay company carrying on business in any part of British India or local authority in British India, and the Government or the railway company or local authority, as the case may be, shall be liable for any sum paid in contraiention of this rule

Attachment of salary, etc -In the Report upon the Bill it was pointed out that the provisious here enacted are not altogether a novelty in the history of execution Officers of the Army serving in this country, whether they do or do not helong to the Indian forces, are public officers within the meaning of the Code Under sect 151 (3) of the Army 1ct (14 & 15 Vict e 58) such officers were hable to stoppage of one half of their pay in execution of decrees and such orders remained in force wherever the judgment debtor was in India When this provision was repealed as a sequel to the abolition of the Courts of Request an addition was made to sect 136 by the Army (Annual) Act 1890 to legalize deductions authorized by any law passed by the Governor General of India in Council This provision in view of the definition of "public officer placed military and civil officers on the same footing for the purposes of attach ment under the Code of Civil Procedure Owing to the comparatively more frequent and rapid transfers of military officers to places at a considerable dis trace attention has been directed somewhat more pointedly to an inconvenience which to a greater or smaller extent is experienced in connection with the various hranches of the public services in India A public officer, whatever the amount of his indehtedness remains by virtue of statutory exemption in enjoyment of one moiety of his salary while his creditor, hy reason of the application of the provisions relating to local jurisdiction, must follow him from Court to Court all over the country with troublesome and expensive applicatious for transfer and attachment It has moreover been represented that a tradesman at distance ought not to be burdened with responsibility for tracing out the actual officer disbursing the salary and it is possible in practice for a public servant acting as his own paymaster to place the most serious obstructions in the way of execution In these circumstances a reversion has been made, in substance to the provisions of seet 151 sub seet (3) of the Army Act which have been extended to all public officers, railway servants and servants of local authorities and the responsibility is cast on the Government or the company or authority concerned for making its arrangements for receiving notice and for effecting the proper deduction As a corollary to these provisions it is behaved that the order may reasonably be declared effective not merely while the judgment debtor is in India but while he is in receipt of emoluments from the Indian revenues or from the funds of an Indian local authority or of a Rulway Compan) calrying on business in British India

Salary or allowances -Ihis rule is new though it I artly includes the

provisions in the list three clauses of sect 268 of Act XIV of 1882. There is no inconsistency between it and the explanation to sect 64 (1)

"Within the local limits of the Court's jurisdiction"—Under the other Codes, which contained no such provision as this, it was held that a Provincial Small Cause Court could not directly attach the salary of a public officer disbursed outside its jurisdiction, (3) nor that of a railway servant when not actually due disbursed outside such jurisdiction (3). This rule provides a special rule in the case of certain judgment delitors because r. 46 does not entitle the execution Court to attach a delit payable by a non resident outside the jurisdiction (4).

"May order that the amount shall be withheld"—The order should also prohibit the public officer or servant from receiving the amount of the salary attached (5)

- 49 (1) Save as otherwise provided by this rule, property

 Attachment of part belonging to a partnership shall not be attached nership property or sold in execution of a decree other than a decree passed against the firm or against the partners in the firm us such
- (2) The Court may, on the application of the holder of a decice against a partner, make an order charging the interest of such partner in the partnership property and profits with payment of the amount due under the decree, and may, by the same or a subsequent order, appoint a receiver of the share of such partner in the profits (whether already declared or accruing) and of any other money which may be coming to him in respect of the partnership, and direct accounts and inquiries and make an order for the sale of such interest or other orders as might have been directed on made if a charge had been made in favour of the decree holder by such partner, or as the circumstances of the case may require

(,) The other partner or partners shall be at liberty at any time to redeem the interest charged or, in the case of a sale being

directed, to purchase the same

(s) Every application for an order under sub-rule (*) shall be served on the judgment debtor and on his partners or such of them as are within British India.

(3) Every application made by any partner of the judgment-debtor under sub rule (3) shall be served on the decree holder and on the judgment debtor, and on such of the other partners as do not join in the application and as are within British India

⁽¹⁾ Valchand v Musson 14 Bom L R 633 (1912)

⁽²⁾ Parbati 1 Panchanand 6 1 -43 (1884)

⁽³⁾ Abdul Gafur v Albyn 30 C 713 (1)03) 7 C W N 821 Sayadkhan t

Davies 28 B 198 (1903)

⁽⁴⁾ Begg Dunlop and Co t Jagannath Marwan 16 C W N 402 (1911), 39 C 104

⁽⁵⁾ Willcock • Terrell 3 Ex. D 331 (1878).

(b) Service under sub-rule (1) or sub-rule (5) shall be deemed to be service on all the partners and all orders made on such applications shall be similarly served

Partnership property—This ction has been introduced in consequence of representations that, for the precision of representations that, for the precision of representations that, for the precision of representations that, for the precision of representations that that all any rate in the commercial centres the time has a read for introducing the provisions of sect 23 of the Partnership Act 1.0 (30.5 f left c 39), but how far they are likely to be us full when a related to the family business forming portion of the joint estate of Hindus is a latter which remains to be seen. The enactment in question has therefore been tentatively adapted as succlauses (1) to (3), to which sub-clauses (4) and (5) embodring the simplined procedure directed by O 46 or 11 and 10 of the Rules of the Supreme Court are merely another.

50. (1) Where a decree has been passed against a firm,

Execution f axive execution may be granted—
against frm
(a) against any property of the partner

ship,

(b) against any person who has appeared in his own name under rule to or rule 7 of Order AAX or who has admitted on the pleadings that he is or who has been adjudged to be, a partner,

(c) against any person who has been individually seried as a partner with the summons and has failed to appear

Provided that nothing in this sub-rule shall be deemed to limit or otherwise affect the provisions of section 247 of the Indian Contract

Aet. 1872

(2) Where the decree holder claims to be entitled to cause the decree to be executed against any person other than such a person as a referred to in sub rule (1), clauses (b) and (c), as being a partner in the firm, he may apply to the Court which passed the decree for leave, and where the liability is not disputed such Court may grant such leave, or, where such liability is disputed, may order that the liability of such person be tried and determined in any manner in which any issue in a suit may be tried and determined

(3) Where the hability of any person has been tried and determined under sub rule (2), the order made thereon shall have the same force and be subject to the same conditions as to uppeal or other

wise as if it were a decree

(i) Save as against any property of the partnership, a decree against a firm shall not release, render liable or otherwise affect any partner therein unless he has been served with a summons to appear and assure.

Cross references — \s to actions by or against partners in the name of the firm, see 0 \lambda XX rr 1-3, supra Action against the person trading under an assumed or trading name r 10 of same Order Actions between co partners, execution not to issue without leave, 0 \lambda XX r 9 As to issue directed under this rule to try question of liability of retiring partners see note (1)

"Where a decree has been passed against a firm "—Where a with his been issued against a firm and served on a partner according to 0 \(\lambda \text{XX} \) as upra judgment must be signed against the firm. It cannot be signed against one partner separately for default of appearance (2) But it has been held in England that where judgment has been recovered against the firm, the plaintiff is not confined to the remedy given by this rule but may still bring an action on the judgment against the individual members of the firm without any special leave of the Court (3) \quad \text{plaintiff having obtained judgment against a firm cannot by subsequent service of the writ render the person served liable as a partner hereunder. He must apply under this rule (4)

Infant partner -It has been held by the House of Lords (5) (a) that an infant can be a partner in a firm (b) that though a partner he cannot contract debts by trading and is not therefore liable for the debts of the firm . (c) that the adult partner is entitled to insist that all the assets of the partnership shall be applied in payment of the liabdities of the partnership and until this is done the infant partner has no claim on them . (d) that a judgment against a firm containing an infant partner and bankruptcy proceedings based upon such judgment must specifically exclude the infant partner (6) The form of judgment in such a case therefore is in England as follows Adjudged that the plaintiff recover against the defendant firm other than A B an infant partner, etc (7) On a judgment so worded, execution issues as of course on the property of the firm irrespective of the question of infancy of any member thereof , and semble, even if the sole member of the firm were an infant the right of the plaintiff to issue execution against the goods of the firm would not be affected. But no execution can issue against the private property of the infant partner It would seem to follow from the above that an infant partner could not be served as a partner though semble the firm might be served by service on him as the person in control of the husiness It would seem also to follow that an infant partner can neither appear nor defend as a partner (8)

"Execution may be granted "—See also O XXX rr 6 8 supra as to subsequent proceedings No execution can issue against any partnership property except on a judgment against the firm. Where a partnership was dissolved as to A and afterwards an action was instituted against the firm for a debt contracted before the dissolution but A was not served with the writ and had no notice of the action till after judgment it was held that his liability must

⁽¹⁾ Worcester Banking Co v Trotter 3 Times Rep "08 Cf also Davis v André 24 Q B D 598 and Davies t Morris 10 Q B D 43G,

⁽²⁾ Jackson & Lichfield S Q B D 474

⁽³⁾ Clark v Cullen 9 Q B D 3 also Davies t Morris 10 Q B D 43b

⁽⁴⁾ See O λλλ r 3 ευντα

⁽a) In Lovell v Beauchamp A C 607 (1894)

⁽⁶⁾ Cf also Harris t Beauchamp 2 Q B 534 (1893)

⁽⁷⁾ Ann. Pr notes to 0 481, r 8

⁽⁸⁾ Ann Pr 1b

be determined before the judgment could be enforced against him, and a debtor summons founded on the judgment was dismissed (1). A partner so situated crimot now be made hable unless he has been served with the writ (2). But where there had been a dissolution under an order by consent in the Chancry Division, and a receiver appointed of the partnership property, and subsequently a judgment in the King's Bench Division was recovered for a debt accuracy alice after dissolution, it was held that a charging order on the property of the firm in the hands of the receiver was valid, and could not be set aside by partners who had not heen served with the writ (3). Where the action is between a firm and one or more of its members or between firms having one or more members in common, no execution can issue without an order (4). Where a judgment is recovered by a firm sung in the firm maine, and afterwards one of the partners dies the surviving partner may issue execution by leave hereunder (5).

"Against any property of the partnership "-As already stated execution will not issue against any partnership property exception a judgment against the firm

"Against any person who has appeared," etc.—As to effect of entry of appearance under O XXX in 6-8, see that rule, supra and respective notes thereto. They shall appear individually and 'Unless he is a partner of the firm seed. If in an action against a firm in the firm name, a partner who las appeared as such dies before judgment his estate is not liable except so far as it consists of property of the partnership (6)

"Has failed to appear"—Where one person is triding as a firm execution cannot in England issue against him under clause (c) of this rule, unless he has been individually served (either personally or by substituted service) or leave has been obtained under the rule (7). As to a case where the writ is served first on the person in charge of the business of the firm and afterwaits on a pattner see helow (8)

"Claims to be entitled to cause the decree to be executed "—This does not include a partner who has left the firm to the knowledge of the plantiff hefore action brought. If he has been served with the writ as provided by O XXX r 3, supra he becomes hable under clause (b) or (c) of this rule. The provise to that rule is imperative and if he has not been served with the writ no order can be made against him hereunder (9). Where the Master ordered an issue, "Whether the said S M H was or had led himself out to be a partner," and the Judge varied the issue by limiting it to whether the person sought to be

⁽¹⁾ Ex parte Young 19 C D 124 and see Davies v Morris 10 Q B D 436

⁽²⁾ Wigrim v Cox & Co 1 Q B 792 (1894)

⁽³⁾ Bran I v Saudground 85 I T 517 (4) See O XXX r 9 Cf also note

¹ction between partners
(5) Davies v in liews W N (84) 94 see

also Daniells Ch Pr 832
(6) See Ellist Wadeson 1 Q B 714 (1899)

⁽⁷⁾ See O NAN F 10 note Cases (8) See Alden a Beckley & Co 25 Q B D 543 O NN rr I 3 cited supra note Several services and see O NN r I note Deemed to bo s ricl as a paintif See also Banhinab Claran Sahav Banl of Bengal 19 C I J 531 (1914) (service on an alleged partner who fault I to appear)

⁽⁹⁾ Wignam v Cox t (o, 1 Q B 70-(1894)

made Iralie was a partner at the time the cause of action arose, the C A reversed the Judge's order, and held that the issue directed by the Master was related.

"Shall not release, render liable or otherwise affect"—These and the preceding and following words of the rule limit in England the operation of a judgment against a firm to (A) partnership property within the juris diction, (2) (B) the private property of any partner who was within the juris diction when the writ was issued and his become hable to execution under (a), (b), or (c) of this rule, (C) the private property within the jurisdiction of any partner who was out of the jurisdiction when the writ was issued but who has become hable to the jurisdiction of the Court list by appearing to the writ, or 2ndly by failing to appear after being duly served outside the jurisdiction, or having been served with the writ within the jurisdiction and having failed to appear. The present rule ormits reference to jurisdiction in clause (a) and clause (4) has been simplified in the manner appearing.

The rule in England as regards joint contractors has been thus stated (3) "An action and a judgment against some of several joint contractors is a bar to subsequent proceedings against the remainder of them on the same contract (4) And this holds good when the joint contractors are partners in a firm (5) sucd not in the firm name but as individuals. A judgment against a firm sucd in the name of the firm is a judgment against all the partners in the firm (6). Indeven where partners are sued together by their names and not in the name of the firm judgment against one is no bar to continuance of the action against the others (7). But a judgment entered by consent against one joint contractor if pleaded is a har to further proceedings against others (8). And it has been held that where one of two joint contractors gave a cheque for the amount of the joint debt and was sued to judgment on the dishonoured cheque the action and judgment were no bar to a subsequent action against the other joint contractor on the original contract (9). Seet 43 of the Contract

has been the subject of considerable discussion. It was considered applicable

- (1) Davis v Hyman & Co 1 K B 854 C A (1903)
 - (2) Cf note Infant partner sup a
 - (3) inn Pr notes to O 48a r 8
 - (4) King v Hoare 13 V & W 494 (5) Kendall v Hamilton 4 App Cas. 504
- (6) Sce judgment of Lindley L J Western National Bank & Co t Perez 1 Q B p 314
- (1891)
 (7) See Ann Pr note to O 48 r 8
 Joint Contractors and Weall: Jam s 68
- Joint Contractors and Weall i Jam s 68 L. T 54 (8) McLeol v Lover 2 Cl 295 (1898) and cf Munster t Cox 10 Mn Cas 680

- ented O NAX rr 6 8 s pra and notes as to Act on against firm and Appear ance by one etc
 - (9) Wegg Prosser v Evans 2 Q B 101
- (1894) I Q B 103 (1895)
- (10) Lukmidas Khimpi t I urshotam Haridas 6 B 700 01 (1882) though a defendant might apply to the Court to l'ave his co contractor added as a party Pollock s Indian Contract Act p 188
- (11) See Hukm Chand Res. Jul 34 where the subject is fully discussed and Polock p 41 and p 186 at 1 Cunningham & Sleplerd's Contract Act notes to 8 43

2.1

iu the cases undermentioned.(1) The Allahahad High Court,(2) however, has held that the effect of sect. 43 of the Contract Act being to exclude the right of a joint contractor to be sued along with his co-contractors, the English rule is no longer applicable in India; at all events in the Mofussil. Since the passing of that Act a judgment obtained against some only of the joint contractors, and remaining unsatisfied, is no bar to a second suit on the contract against the other joint contractors.(3)

Unless summons has been served.—Partners carrying on business within the jurisdiction may he sued in the name of the firm (O. XXX. r. 1); service within the jurisdiction is to be deemed good service on the firm whether any members are out of the jurisdiction or not (b. 2, 3).

Attachment of negotiable instruments of deposited in a Court, nor in the custody of a public officer, the attachment shall be made by actual scieure, and the instrument shall be brought into Court and held subject to further orders of the Court.

Attachment of property to be attached is in the custody of any Court or public officer, the attachment shall be made by a notice to such Court or officer, requesting that such property, and any interest or dividend becoming payable thereon, may be held is issued:

Provided that, where such property is in the custody of a Court, any question of title or priority arising between the decree-holder and any other person, not being the judgment-debtor, claiming to be interested in such property by virtue of any sasignment, attachment or otherwise, shall be determined by such Court.

Property in Court's custody.—This rule corresponds with sect. 237 of Act VIII. of 1859, save that in such section the property in deposit was described as property which "shall consist of money, or any security." It is similar to sect. 272 of the Codes of 1877 and 1882, save for the slight verhal alterations indicated in italics. The rule does not apply to a case where the property sought to be attached has, under the decree being executed, been declared the property of

(2) Muhammad Askarı v. Radhe Ram Singh, 22 A. 307 (1900); and see Mathura Prasad v Ramchandra Rao, 25 A. 57 (1902)

(3) Sir F. Pollock, in his Indian Contract Act, p. 187, expresses an opinion in the same sense, but states that until it has been adopted by the other High Courts or confirmed by the Privy Conneil the point must be regarded as open.

⁽¹⁾ Hemendro Coomar Mullick v. Rajendro Lall Moonshee, 3 C. 353 (1878); Gurusamn Chetti v. Samurti Chetti, 5 M. 37 (1881); Luckmidas Khimji v. Purshotam Haridas, supra; Lakshmishankar v. Vishnuram, 24 B. 77 (1899).

decree-holder (1) The form of attachment is given in the First Sched App E

"Where the property."-This does not include the life interest of a beneficiary in a trust estate in the hands of the Official Trustee (2)

"In the custody of "-This means actual custody. (3) and not in anticipation of property coming into custody (4) If it be in the custody of a Receiver appointed by Court, sanction to attach must first be obtained from the Court. and will only be granted on such terms as would ensure equality between the creditors, (5) such an attachment without sanction will not be recognized (6) Letters containing money addressed to the indement debtor can be attached in the hands of the Post Office (7) The Official Trustee is a public officer (8)

"Shall be made by a notice."-A Court has no discretion to refuse an application for attachment under this rule (9) A notice sent to a Court is sufficient to make an effectual attachment of moverbles in its hands even though the Court refuse to receive it (10)

"May be held subject to the further orders "-A Collector in whose hands moneys are attached cannot pay away the same without orders of the attaching Court (11)

"In the custody of a Court "-The second clause does not cover the custody of a Collector, and no determination of any question can be made (12)

"Any question of title or priority"-Where one Court attaches and then makes an order directing another Court to pay certain monoys to A and before payment the amount is attached by B, the second Court has ceased to have a disposing power over the money, and cannot try any question of title or priority (13) A and B obtained a decree against X and Y Z obtained a decree against A and B for a lesser sum and attached the first decree, whereupon A and B paid the money into Court and alleged Z s decree was really that of X, it was held that, though such allegations had not been raised in Z s suit, it could be raised in execution and, on its being substantiated that A and B were entitled to enforce for the purpose of satisfying their decree any claim that X could have done, and Z's claim to the money in Court was disallowed (14)

⁽¹⁾ Pudmanund v Chunds Dat Jha 1 C W N 170 (1896)

⁽²⁾ Abdul Lateef v Doutre, 12 M 250

⁽¹⁸⁸⁹⁾ (3) Muttukaruppan v Mutturamalinga 7 M 47 (1883)

⁽⁴⁾ Tulajı Fatesing v Balabhar, 22 B 39 (1896), followed in Padmauund v Rama prasad 16 C W N 14 (1911) 14 C L J

⁽⁵⁾ J Khan t Allı Mahomed, 16 B 577 (1892)(6) Mahommed Zohnruddeen v Mahomed

Noorooddeen 21 C 85 (1893)

⁽⁷⁾ Narasımhulu & Adiappa, 13 M 242

⁽¹⁸⁹⁰⁾

⁽⁸⁾ Abdul Lateef v Doutre 12 V 250

⁽⁹⁾ Noor Jehan v Mashitty, S C L R 17

⁽¹⁰⁾ John Tiel & Co v Abdool Hye, 19 W R 37 (1872)

⁽¹¹⁾ Saefollah v Luchmeeput, 13 W R 58

⁽¹⁸⁷⁰⁾ (12) In matter of Brojonath Witter, 13

W R 301 (1870)

⁽¹³⁾ Gopce Nath v Achcha Bibee 7 C 553 (1831)

⁽¹⁴⁾ Mchayya v Bangarayya, 16 M 117

⁽¹⁸⁹²⁾

Clause (b) "Passed by another Court."-This does not include a decree for money passed by a Revenue Court (1) The other Court on receiving the order is hound to comply therewith, and is deharred from proceeding with the execution unless the har is removed in one of the ways specified in the section and a sale notwithstanding the order attaching the decree is invalid (2)

proceed to execute "-The Court has no power after receipt of notice to sanction an adjustment, (3) nor can it return the notice to the Court which sent it as the amount for which the attachment was issued was not stated, and then proceed to execute its own decree The Court on receiving the notice is hound to comply with it (4)

Sub rule (4) -This refers to decrees other than money decrees, (5) and under the previous Code, where the wording of this clause ran, "In the case of all other decrees, it was held to include decrees for redemption (6) and decrees for sale of immoveable property under sect 88 of the Transfer of Property Act (7) The present rule, however, excludes decrees for sale in enforcement of a mortgage or charge as well as decrees for the payment of moncy from the operation of this olause When "the Court which passed the decree 'attaches its own decree, it may execute such decree on the application of the attaching creditor (8) In the provious Code this clause concluded with the words, "Every Court receiving such notice shall give effect to the same until it is so cancelled", that is, to abstain from executing the decree The Court receiving the notice cannot substitute in the record of the decree heing attached the judgment creditor for the judgment-dehtor in the decree being executed (9)

(1) Where the property is immoveable, the attachment shall be made by an order prohibiting Attachment of the judgment debtor from transferring or moveable property. charging the property in any way, and all persons from taking any benefit from such transfer or charge

(?) The order shall be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order shall be affixed on a conspicuous

⁽¹⁾ Aulia Bibi v Abu Jafar, 21 A 405

⁽¹⁸⁹⁹⁾ (2) Manik Lal Scal v Banamali Morkeyce.

³² C 1104 (1905), s c, 10 C W N 193

⁽³⁾ Gopal Nanashet v Johanimal, 16 B 522 (1891)

⁽⁴⁾ Manik Lal Scal : Banamah, 32 C 1104 (1905), 10 C W N 193, 3 C L J 27 It was said by Maclean, CJ, in Adhar v Lal Mohun 24 C 778 (1897) (under the last Code), that attachment of a decree did not present a holder from executing it, but the Madras High Court I as held that the only person competent to execute is 1 be attaching creditor who will be liable in damages if he

allows the decree to be barred by limitation T Unm Lova v A P Ummv 35 M 622

⁽¹⁹¹¹⁾ (5) Sultan Kuar v Gulzarı Lal, 2 A 290

⁽¹⁸⁷⁹⁾

⁽⁶⁾ Naigar Timapa v Bhaskar, 10 B 444

⁽⁷⁾ Delhi & London Bank v Partap Singh 28 A 771 (1906), 3 A L J 585 (F B)

⁽⁸⁾ Perry Mohun : Romesh Chunder, 15 C 371 (1888), Rangasamı : Periasami, 17 M 58 (1893)

⁽⁹⁾ Barlina Din v Baji Lal, 26 A 91 (1903)

0 21, r. 54

part of the property and then upon a conspicuous part of the court-house, and also, where the property is land paying revenue to the Government, in the office of the Collector of the district in which the land is situate.

Mode of attachment of immoveable property.—The first clause of the present rule corresponds with sect 235 of Act VIII of 1859, the wording being practically the same. The present form was adopted by sect 271 of Act X of 1877, save that the words "taking any benefit from such transfer or charge" have been substituted for "receiting the same from him by purchase, gyft, or otherwise. The remaining clause corresponds with portions of sect 239 of Act VIII of 1859. In that section the words were "the written order shall be read out." This was altered by sect 274 of Act X of 1877 to "the order shall be proclaimed," which Act added the words "by best of drum or other customary mode" and "paying receive to Government." Certain virbal alterations have been made as shown in itshes

"Where the property is Immoveable '- Decrees for money charged on land are immoveable property (1). A decree for redemption cannot be attached innder this rule, but under O XM r 53 (2). A debt secured by mortgage of immoveable property should be attached under this rule and not under O XM r 16, (3) later cases have however, held that such a debt, especially if the mortgagee is not in possession is not immoveable property, and need not be attached under this rule. (1) it most omission to attach under this rule is an irregularity (5)

It has been recently held that in the cise of a jurely usufructuary mort, he where there is no debt payable by the mortgager the procedure should be by attachment (under this rule) of the interest in minows the jet perity (b). An ittichment is not necessary in execution of a mertgage decice, where the decice continus a direction for sale (7). When this point was raised before the Privy Council they would not go into it and held a sale without attachment in execution was good on the ground that the project call all best attached unification for a direction was good on the ground that the project call all best attached unification for a direction of a decree carries with it its secretive we that

attaching the mortgaged property under this rule (1) The equity of redemption of a mortgagor can be attached under this rule, the attachment being by order prohibiting the judgment dehtor from dealing with it in any way and all persons from receiving it, such order being proclaimed and notified as therein directed (2) The execution of mortgage decrees are now governed by O XXXIV, but prior to the present Code they were governed by the sules made under the Transfer of Property Act in Bengal and Assam (3) The life interest of a Hindu widow under her husband's will in the income of his immoveable estate is immoveable property and is attachable (4)

"By an order prohibiting."-This should be the procedure where the property sought to be attached is a factory in the possession of a prior mortgagee, and not by putting peons in possession (5) The prohibitory order does not have the effect of dispossessing the judgment dehter (6) For form of prohibitory order, see the First Sched App E No 8

"The property."-Where an attachment was made of the debtor's sbare without specifying the share, it was held only to cover the share and not the whole property (7)

"Proclaimed."—Omission of the beat of drum was held to be a material megularity, and the sale was cancelled (8) Objections as to irregularities in the proclamation cannot be taken on appeal to the PC for the first time (9)

Where-

Removal of attachment after satisfaction of decree.

(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any pro-

perty are paid into Court, or

(b) satisfaction of the decree is otherwise made through the Court or certified to the Court, or

(c) the decree is set aside or reversed.

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judymentdebtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner prescribed by the last preceding rule.

Removal of attachment-This rule corresponds with sect 215 of let \ III of 1859, and down to the words "otherwise made" was practically as it

- (1) Baldeo Dhanrup v Ramchandra, 19 B 121 (1803)
- (2) Parashram : Govind Ganesh, 21 B -26 (1535).
- (3) Calcul'a Ga ette, Pt I, p 414, dated 13th April, 1802, Is an Gazette, Pt III,
- 1º 272, date 1 16th April 1832
- (4) Nath Kerna i Dhunberg, 23 B 1 (1535)
- (5) Mudhun Mohun v Gokul Doss, 10 Moo
- I A 563, p 571. (6) Narayanrav v Balkrishna, 4 B 52J (1880)
- (7) Suroop Narain v Ram Tahul, 18 W R 106 (1872)
 - (8) Trimbak v Nana, 10 B 504 (1880)
- (9) Ramkrishna 2 Surfunnissa, 6 C 129 (P C 1880), 7 I A 157

FIRST SCHLD LARCUTION OF DECREES AND ORDERS. U 21, 17 J6, J7

now stands It then continued " an order shall be assued for the until drawal of the uttachmert; and if the defendant shall desire it and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclained or intimated in the same manner as hereinb fore prescribed for the proclamation or intimation of the attachment; and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree" This was repealed by sect 275 of Act X of 1877, which concluded with the words " an order shall be issued on the applica tion of any person interested in the property for the withdrawal of the attachment' For this has been substituted the last clause in italies by the present Code, which also added the words in italies in clause (b) But where property has been attached, an order dismissing an application for execution but not specifi cally withdrawing the attachment or declaring the decree inexpable of execution, did not, it was held, raise the attachment. If on appeal such order were set aside the decree holder was entitled to the full benefit of his attachment (1) The striking off of execution proceedings from the file of a Court did not, it was held, interfere with the continuance of an attachment (2) A sale in pursuance of an attachment being set aside does not displace the attachment , (3) por does the death of the judgment debtor,(4) even though he be a Mitakshara coparcener and his interest in the property attached passed to the surviving conarceners (5) An attachment nine years old in execution of a decree twelve years old in the absence of other information must, it was held be assumed to have been removed (6) Sec, however, now as to striking off on default of prosecution of execution proceedings the notes to r 57, post Sums paid into Court under this rule are not assets within the meaning of sect 73 (7)

Where the property attached is current coin or currency [notes, the Court may, at any time during the Order for payment of coin or currency notes to party entitled under continuance of the attachment, direct that such com or notes, or a part thereof sufficient decree to satisfy the decree, be paid over to the party entitled under the decree to receive the same

Where any property has been attached in execution of a decree but by reason of the decree holder's Determination of at tachment

default the Court is unable to proceed further with the application for execution, it shall either dismiss the appli cation or for any sufficient reason adjourn the proceedings to a Upon the dismissal of such application the attachment future date shall cease

⁽¹⁾ Bank of Upper India v Sheo Prasad 19 A 482 (1897), Golam Yaheya v Sham Soon durce, 12 W R 142 (1869)

⁽²⁾ Syud Nadir v Pearoo Thovildarince, 14

B L R 425 note (3) Gossam Munraj : Deen Dyal, 20 W R

^{20 (1873)} (4) Shee Pershad v Hura Lai, 12 1 440

⁽¹⁸⁸⁹⁾ (5) Bem Pershad : Parbat: 20 C 895

⁽⁶⁾ Goonessur v Luchmee 20 W R 418

⁽⁷⁾ Sorabji Coovarji v Kala Raghunath 36 B 156 (1911)

attaching the mortgaged property under this rule (1) The equity of redemption of a mortgagor can be attached under this rule, the attachment being hy order prohibiting the judgment debtor from dealing with it in any way and all persons from receiving it, such order being proclaimed and notified as therein directed (2) The execution of mortgage decrees are now governed by O XXXIV, but prior to the present Code they were governed by the rules made under the Transfer of Property Act in Bengal and Assam (3) The life interest of a Hindu widow under her husband's will in the income of his immoveable estate is immoveable property and is attachable (4)

"By an order prohibiting "-This should be the procedure where the property sought to be attached is a factory in the possession of a prior mortgagee, and not by putting peons in possession (5) The prohihitory order does not have the effect of dispossessing the judgment-debtor (6) For form of prohibitory order, see the First Sched App E Ne 8

"The property"-Where an attachment was made of the debtor's share without specifying the share, it was held only to cover the share and not the whole property (7)

"Proclaimed "-Omission of the heat of drum was held to be a material megularity, and the sale was cancelled (8) Objections as to irregularities in the proclamation cannot be taken on appeal to the P C for the first time (9)

55. Where-

Removal of attachment after satisfaction of decree

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(a) the amount decreed with costs and all charges and expenses resulting from the attachment of any pro-

perty are paid into Court, or (b) satisfaction of the decree is otherwise made through the

Court or certified to the Court, or (c) the decree is set aside or reversed.

the attachment shall be deemed to be withdrawn, and, in the case of immoveable property, the withdrawal shall, if the judgment debtor so desires, be proclaimed at his expense, and a copy of the proclamation shall be affixed in the manner preseribed by the last mecedina rule

Removal of attachment -1 his rule corresponds with sect 215 of Act VIII of 1859, and down to the words "otherwise made" was practically as it

- (1) Baldeo Dhanrup v Ramchandra 19
- B 121 (1893) (2) Parashram : Govind Ganesh, 21 B
- (3) Calcul a Ga ette, Pt I, p 414, dated
- 13th April, 1892, As its Gazette, Pt 111, p 272, dated loth April, 1892
- (4) Nath Kerrs i Dhunbrys, 23 B 1 (15J8)
- (5) Mudhun Wohun v Gokul Doss, 10 Moo
- I A 563, p 571 (6) Narayanrav v Balkrishna, i B 5.J
- (1880)(7) S troop Narain v Ram Tahul, 18 W R
- 106 (1872)
 - (8) Trimbal v Vana, 10 B 504 (1886)
- (9) Ramkrishna v Surfunnissa 6 C 1.9 (P C 1850), 7 I A 157

now stands It then continued 'an order shall be assued for the until drawal of the attachment, and of the defendant shall desire it and shall deposit in Court a sum sufficient to cover the expense, the order shall be proclained or inti- aled in the same manner as levernly fore preseribed for the proclamation or intimation of the attachment, and such steps shall be taken as may be necessary for staying further proceedings in execution of the decree" This was repealed by sect 275 of Act & of 1877, which concluded with the words " an order shall be issued on the applica tion of any person interested in the property for the uith drawal of the attachment For this has been substituted the last clause in italies by the present Code, which also added the words in italies in clause (b) But where property has been attached, an order dismissing an application for execution but not specifi cally withdrawing the attachment or declaring the decree meapable of execution, did not, it was held raise the attachment. If on appeal such order were set aside the decree holder was entitled to the full benefit of his attachment (1) The striking off of execution proceedings from the file of a Court did not, it was held, interfere with the continuance of an attachment (2) A sale in pursuance of an attachment being set aside does not displace the attachment , (3) nor does the death of the judgment dehtor (4) even though he be a Vitakshara coparcener and his interest in the property attached passed to the surviving coparequers (5) In attachment nine years old in execution of a decree twelve years old in the absence of other information must it was held be assumed to have been removed (6) Sec, however, now as to striking off on default of prosecution of oxecution proceedings the notes to r 57, post Sums paid into Court under this rule are not assets within the meaning of sect 73 (7)

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Where any property has been attached in execution of a decree but by reason of the decree holder's Determination of at tachment default the Count is unable to proceed further with the application for execution, it shall either dismiss the appli cation or for any sufficient reason adjourn the proceedings to a Upon the dismissal of such application the attachment shall cease

⁽¹⁾ Bank of Upper India v Shee Prasad 19 A 482 (1897) Golam Yaheya v Sham Soon duree, 12 W R 142 (1869) (2) Syud Nadir v Pearoo Thouldarinee, 14

B L R 425 note

⁽³⁾ Gossain Munraj v Deen Dyal, 20 W R

⁽⁴⁾ Shoo Pershad v llua Lal, I. 1 440

⁽¹⁸⁸⁹⁾

⁽a) Bem Pershad t Parbati, 20 C 895 (1897)

⁽⁶⁾ Goonjessur v Luchmee 20 W R 418

⁽⁷⁾ Sorabji Cooyarji v Kala Raghunath 36 B 156 (1911)

"Decree-holders' default."—It was pointed out (1) that the last Code did not contain anything like a complete procedure for proceedings in execution It did not suggest what procedure should be adopted in cases analogous to those which might occur during the hearing of a suit and which were provided for by Chapter XIII of that Code Further, it was clear, both from the Code itself and from the provisions of the Limitation Act, that the Legislature contemplated that there might be a succession of applications for execution (2) Where final orders adjudicating upon the right to have execution have been made, the principle of res judicata is applicable (see sect 11) (3) But under the former practice an application for execution might be made but might not be proceeded The Code did not prohibit an application for execution where a former application to that effect had been withdrawn without liberty to present a fresh one (4) Nor. as stated, did it provide for cases where the application could not proceed for default of the decree-holder Io such cases a practice arose, with the object of disencumbering the files of the Court, of "striking off" applications It was frequently pointed out that this practice was not justified by the Code. (5) and that there were (apart from the question of adjournment) only two ways of judicially disposing of any application, that is, by granting or dismissing it in whole or in part (6) The effect of an order "striking off" was discussed in numerous cases. An attachment was not necessarily at an end because the execution case was struck off the file The effect of such an order depended on the circumstances of the case (7) There was no general rule as to the effect of striking off an execution case from the file (8) Such an order did not necessarily put an end to the attachment, and it was competent for the Court to make such an order and at the same time continue the attachment (9) It was open to the decree holder to revive the execution proceedings and continuo it from the point where it had previously stopped (10) Where hy a mistake of the Court

(1) See Edge, CJ, in Dhonkal Singh v Phakkar Singh, I5 A 84 (1893), at p 94

(2) Thakur Pershad v Sheikh Faku ullah, 22 I A 44, 50 (1894)

(3) Ram Kirpal Shukul v Rup Luari, H I A 37 (1883), followed in Subba Chariar v Muthuvceran Pillai, 36 M 553 (1912)

(4) Thakur Pershad v Sheikh Fakir ullah, 22 I A 44, 50 (1894)

(5) Dhonkal Singh t Phakkar Singh, 15 A 84 (1893), at p 96, Baroda Sundari v Lorgusson, 11 C L R 17 (1882), Biswa Sonan t Binanda Chunder, 10 C 416 (1881).

(6) Dbonkal Sugh v Phakkar Singh, supra

at pp 94, 95 (7) Zahuran : Tayler, 2 B L R 86, 92 (1868) , Srinivasa Sastrial : Saini Rau, 17

M 150, 182 (1893), Chinfaman Dimodir t Balabastri, 16 B 294 (1891) (8) Wohunt Bhagwan Das a Khetter Meni Dassi, 1 C W N 617 (1896)

(3) Peary Lall Sinhi & Chandi Charm

Sinh ., 11 C W N 163 (1006) , but see Ram

Newaz v Ram Charan, 18 A 49 (1895) (10) Peary Lall Sinha & Chandi Charin Sinha, II C W N 163 (1906), Shukh Kumaruddin v Jawahir Lal, 32 I A 102, 9 C W N 601 (1905), and see generally as to the effect of striking off an execution case, Rajah Muliesh Narija i Kishanund Misr, 9 M I 1 328 at p 337 (1862), Bagram v Wee, 1 B L R 91 (1868), F B , Puddomo nee Dosseo v Roy Motheoranath 12 B L R 111 (1873) P C [it may be presumed that an execution long neglected and finally struck off has ceased to be operative, and in that case a judgment creditor a title will only date from any subsequent attachment which he may obt un Dist m Maharance Indurject kooer : Inchmum Smgh, 24 W R 56 (1875)]. llistu Salm i Ramacharan Lal, J B L R mp 64 (158) [if property is once attached the atta bannat will subsist if not expressly than I and until an order is issued for its with drawd even though no further steps are

an application for execution against attached property was dismissed, but there wis no order removing the attachment, and the decree-holder obtained a review, and the executing Court was directed to proceed, it was held that the attachment subsisted as against a sale made by the judgment debtor previous to the review (1)

The "striking-off" or shelving of an execution application thus admitted of different interpretations according to the eigenmetanees. It might have the effect of killing the particular application without any adjudication on the merits. So if such an order was passed in consequence of some default of applicant not going to the merits of his right to have satisfaction of his decree (eg default in appearance, failure to pay process fees, or to put in copies of papers called for, etc), in such cases though the order might put an end to the particular application in which it was passed, it did not bar a subsequent application for execution if it were made within the period of limitation (2) Further, as sect 158 of the Code of 1882 did not apply to execution-proceedings, there was no statutory provision for cases of decree-holder's default (3) If, on the other hand, such an order was passed on the merits of the application eg by a finding that the decree had been satisfied or that execution was buried by some provious order which would operate as ses judicata then so far as the Court executing the decree was concerned, the application was taken to have been finally disposed of in a manner adverse to applicant's right to have the decree executed, and no further application for execution could be entertained unless in pursuance of a successful appeal (4) In these cases the effect of the order was to render the decree dead and incapable of execution or further execution

Further, as pointed out by Edge, CJ in the case cited,(5) it is necessary

taken on the attachment within a reason able periodl, Sheikh Golam t Mt Shama Sundari, 3 B L R 134 (1869) [mere striking off does not release attachment], Binda Biben : Lalla Gopce Nath, 14 B L R 323 (1874) Istriking off in this case extinguished attachment] Chamun Lall : Domun Lall, 9 W R 20s (1867), Syud Nadir Hossem t Pearoo Thoyadarince, 14 B L R 425 n (1873) [striking off affects only the files of the tourt, and application for sak not attachment], Baroda Sundan : Fergusson, 11 C L R 17 (1582) [striking off is not in accordance with the Code, but for convenence of Court], Bisna Sonau t Binanda Chunder, 10 C 416 (1854) [proper cause is not to strike off but to dimiss, a case so domissed may be restored]. Surdhare Lall t Girindar Chunder, 1 C L R 475 (1877), Mungal Pershad Dichit e Grija hant Lahiri, S C 51 (1881) Syam Singh r Baidya Nath Rat, 13 C L R 176 (1983) . Soon for Singh r Bulcoris Main 24 W R 30 (1875), Gungagotti Pal : Ram Sun ber Dat, 5 C L R los (1881) [attachment hell

removed), Rangasamı v Periasamı, 17 M 58 (1893), Raghubans Gir v Sheosaran Gir, 5 A 243 (1882), Venkatrav Bapu t Bijesnig \thalsing 10 B 108 (1885), Lakshini t Atchanna, 15 M 240 (1891) In decree holder whose application is struck off for failure to pay process fees may apply a aml. Dhunkal Singh + Phakker bingh, 15 1 84 (1893), Jatmal r Jivila Prasad J A 155 (1898) [struck off trease application infractuous] Rum \cusz Ram (harm, 18 1 1) (18 5) forder striking off and maintaining attachment die all Rattanji i Hari Har Dat 12 A 243 (1835) [1] peal from order striking oil) Krishna Subadhi i Janaki Ram, 19 C L J 318 (1314) (attachment terminable by order of dismissal)

⁽²⁾ Dhenkal Singh v. Phakkar Singh, 15 1 84 (1843) at p. 103, Mandhyan Sheikiya v. Radram Dalm, 17 (1818 - 204 (1912)

إمار (1) الميانة (1) (1) إلى الميانة (1) (1) إلى الميانة (1) (1) إلى الميانة (1) إلى الميانة (1) إلى الميانة (إلى الميانة (1) إلى الميانة (1) إلى الميانة (1) إلى الميانة (1) إلى الميانة (1) إلى الميانة (1) إلى الميانة (

⁽a) 16, a1 p. 55.

7

Investigation of claims and objections

Investigation of claims to, and objections to attachment of, attached property.

58

(1) Where any claim is preferred to, or any objection is made to the attachment of, any property attached in excention of a decree on the ground that such property is not hable to such attachment, the Court shall proceed to

investigate the elam or objection with the like power as regards the examination of the elamant or objector, and in all other respects, as if he was a party to the suit

Provided that no such investigation shall be made where the Court considers that the claim or objection was designedly

or unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Court ordering the sale may postponent pending the investigation of the claim or objection

- 59 The claimant or objector must adduce evidence to Evidence to be adduced by claimant. Show that at the date of the attachment he had some interest in, or was possessed of, the property attached
- 1 60 Where upon the said investigation the Court is Release of property satisfied that for the reason stated in the from attachment claim or objection such property was not, when attached, in the possession of the judgment debtor or of some person in trust for lim, or in the occupancy of a tenant of other person paying rent to him, or that, being in the possession of the judgment debtor at such time, it was so in his possession, not on his own account or as his own property, but on account of or in this for some other person, or pratty on his own account and partly on account of some other person, the Court shall make an order releasing the property, wholly or to such extent as it thinks fit, from attachment
- 1 61 Where the Comt is satisfied that the property was,

 Disallowance of claim at the time it was attached, in the possession
 to properly attached of the judgment debtor as his own properly
 und not on account of any other person, or was in the possession
 of some other person in trust for him, or in the occupancy of a
 tenint of other person plying lent to him, the Comt shall dis
 allow the claim

62 ll'here the Court is satisfied that the property is is continuance of attach ment subject to claim of some person not in possession, and thinks intermediate. Subject to such mortgage or charge.

63 ll'here a claim or an objection is preferred, the party is saving of suits to a significant whom an order is made may institute a suit to establish the right which he claims result of such suit, if any, the order shall be conclusive.

Applicability—It 58 states that the investigation is to take place as if the climant or objector—was a parts to the sut". That is it assumes that the climant is not a parts. Clims of third prices only are dealt with inder that rule. This rule page is statutor in his of suit to the unsuccessful party in claim proceedings (1). Questions between the parties to a suit are dealt with under sect. 17 (2). The cases just cited establish the principle though is regards its application in the instances dealt with by them reference must now be made to the amendments made in sect. 21 of the last Code by sect. 17 of this. Where the case falls under sect. If there is an appeal other uses not. Where a judgment debtor alleged that he was in possession of attached property only as Shebout of a dirty it was held that the case did not fall within sect. 47 (3). A judgment-debtor who is not in fact a party to the claim proceedings does not in the ope of the Irak become such by reason solely of his being the judgment debtor (4). These provisions apply only where the property sought to be sold has been attached in execution but not where the decree has ordered its sale (5).

The provisions of the Code are permissive. They do not impose an obliquion on persons having claims to prefer to property attached to prefer them during execution and annex in ease of future to do so forfeiture of their right

Pearce Dessee 6 W R 61 (1860) [claim by alleged representative of property as his owal contro Shankar Dail t Am r Ha Ir 2 A 752 (1850) Watthu in ah t Parame swaran 17 M L J 377 (1906) [decree against Larmanan objection to execution by mem bers of toward] s c 3 30 H 215 Hara Dhan halka v Pena Clundra Mondul H C W N 145 (1906)

(3) Kartick : Ash itosh 14 C L J 42ω 428 (Γ B) (1911)

⁽I) Annapurani t Subramanian 31 W 347 (1508)

⁽²⁾ Mikarrab Husain v Hurmat un nissa 18 1 32 (1895) Rahimuddi Sirkar t Lall Meah 29 C 696 (1902) Ram Lershad t Jagannath Ram 30 C 134 (1902) Rama nathan Chettiar : Levvai Marakayar 23 M 13a (1898) Bhajahari Pal t Ram Lal Das 6 C W N 63 (1901) Mohamed Kahimadd n 1 Lall Weah 6 C W \ 727 (1902) Beg Raj Maruari v Sri Kun lali Debya & C W V 353 (1902) Dayaram t Govardhandas 28 B 408 at p 409 (1904) but see Benode Lall Pakrasl eev Gircedhur Chuckerbutty 22 W R 392 (1874) Sundar Singh & Ghasi 18 1 410 412 (1896) Punchanun Rando pa fhya v Ral ta Bibi 17 C 711 at P 719 (1890) Maharajal Mahatab Chand i Mt

^() Hukam Snah t Raghalar Saran 27 A 700 (190)

to establish their title to the property by a regular suit (1) These provisions do not deprive a claimant of his iemedy by suit but give him a more speedy and summary remedy (2) If he avails himself of it the Court is bound in a proper case where the claim is made at a proper time that is before sale, (3) to make an inquiry, and can be compelled by application in revision to do so (4) His remedy by suit is also optional, and if he does not choose to avail himself of it, a sale will give him a fresh cause of action with a new period of limitation (5)

These provisions were held not to apply to the case where a person served with a prohibitory order applies to have the attachment raised on the ground that the debt attached did not exist (6) It has been held that the application of the Official Assignce to release the property of an insolvent debtor falls within these provisions (7) If the dobtor is declared insolvent and a receiver is appointed this does not prevent a person claiming (8) It was beld that seet 170 of the Bengal Tenancy Act bars a claim under these provisions to a tenure or holding attached in execution of a decree for arrears due thereon, in all cases and its operation is not confined merely to claims to the tenure or holding but extends to claims based on the ground that the property claimed does not form part of the tenure or holding attached (9) The word "suit 'in sect 55 of the Court of Wards Act includes miscellaneous proceedings, and therefore if a claim is preferred by the Manager of the Court of Wards without the sanction of the Court of Wards the order disallowing the claim is not hinding upon the Ward of Court (10) As to whether the amendment of sect 28 of the Presidency Small Cause Court Act by Art IV of 1906 affects these provisions in relation to claims to tiled huts, see case cited (11)

An objector may raise an objection to an attachment not only on the ground that he is in possession of the property attached, but also on the ground that he has an interest in it, and it has been held that where an executing Court dis illows a claim under sect 231 of the last Code (now represented by r 61 of this Older) it has mirelation to do so, not with studing that it erroneously reframe

Krishin bhupati Dovit i Vikraim Devu 18 M 13 17 (1894) see Ram Indomati v Jageshar, 23 A 644 (1906), but see Wan Kuart Tara Singh, 7 A 583 (1885), Sankar , Yadan 14 C W N 298 (1909)

⁽²⁾ Sundar Singh v Chasi, 18 A 410 (1890) Rughunath Mukund v Sarosh Kama 23 B 266 (1893), Kanhaya Lal t National Bink of India, 17 C W A 541 (1913)

P C, 40 C 508 (1913)

(3) Maharajah of Burdwan : Heerdall

⁽³⁾ Maharajan of Burdwalt i Recisian S if 11 W R of (1869) (4) Mt Janucia i Luckmun Panday, 4

C 1 R 74 (1879) As to the extent of the investigation acc Sardham Lal a Ambika 1 crsl 4 | 15 C 21, 526 (1888)

⁽⁷⁾ Annat Brazu Caru e Naras a irazu Caru 3 / M 383 (1911)

⁽⁶⁾ Hardal Amtialhant VI sang Meru

⁴ B 323 (1880)

⁽⁷⁾ Kashi Prasad t Miller 7 A 752 (188a) Sarlarmal Jagonath v Aranvayal Sabhapathy 21 B 20. 212 (1896), but see notes on representatives in sect. 47

⁽⁸⁾ Paras Rum : Kurum Singh 9 1 232 (1887)

⁽⁹⁾ Amutt Lall Boso t Aemat Chand Wakhopadhya 5 C W N 474 (1901), I' B , werruling Jegabandhi Clattopi lhya t Deenu Pal 4 C W N 774 (1887) But seo Bipra Das v Rajatam, 13 C W N 238 (1909) Amili t kalachan I 25 C W N

^{920 (1010)} (10) Him Cl in Ira Mookerjeo i Riji Rancit Singh, 4 C W N 405 (1819)

⁽¹¹⁾ Cunapatty R 3 Agarwalia a 11 skir lb. Hakuram 34 I 823 (1907)

from going into the question of possession and disallows the objection on some other ground (1). Rules 58 and 60 of this Order speak of claims to attached property and the release of property from attachment, but they do not justify the conclusion that if moveable property of a perishable nature has been attached and a claim has been preferred to it, the claim must prove nugatory if the decree holder can induce the Court to sell the property before the claim has been investigated (2). The true aim of an attachment is to place the property in the custody of the Court so as to make it available for the realization of the decree. If by reason of the dismissed of the suit or the default of the decree holder the Court dissolves the attachment, the property ceases to be in its custody. The Court cannot take it back into its custody so as to prejudice a title acquired in the interval (3).

Property.—The rules relate to claims preferred to and objections made to the attachment of "any property" attached Sect 266 of the last Code (now 60) specifies a debt as one species of property which is hable to attachment, and sect 268 of that Code (now O XXI r 46) prescribes the mode in which a debt is to be attached Debts and other species of intangible property are therefore not excluded (4) such as an equity of redemption (5)

The word "property" as applied to land does not simply mean land but the share or interest in land attached. It includes undivided shares in land So where property belongs to two persons jointly, and in execution against one anything more than his right and interest in the property are attached, the other joint holder has a right to come in and claim that the attachment may be removed quoed his share (6)

The section in the last Code was held inapplicable to claims to property directed to be sold by a mortgage decree (7) and provision was made in sect 283 of that Code (now r 62) for the continuance of attrehment subject to claim of

⁽¹⁾ Blagwan Das + Raj Nath 34 A 305 (1912)

⁽²⁾ Rusik : Jitendra I5 C L J 167 (1910)

⁽³⁾ Latrings v Madhavanand 14 C I J 476 (1911)

⁽⁴⁾ Chdumbara Patter v Ramssamy Patter 27 M of 771 (1003) doss from Pasta vayya v Syed Abbas 24 M 20 (1000) The Codo of 1859 was leld to apply only to immoveable property or to specific most all property and not to a d bt due 1M Ram buttv Koort t Annitsour Pershad 22 W R 20 (1674) Kunvil Parkim Putfukkay; v Jarina Kot Holts 150 (1874)

⁽⁵⁾ Amrata t Pan Barunth 2 Bom L P 134 (1900) As to sale of equity in execution of deric see Mt Saraswati D Lie Naliad wip Chandra Gossain 5 B L R 380 (1870) (b) Cowar Rajkun ar Roy r Ka lambini (c) Cowar Rajkun ar Roy r Ka lambini

Del i, 4 B T R F B 175 (1870) See Khub I al i Run Loel in 17 C 200 (1884) Ram

Dayal v Dirga Singh, 12 1 209 (1890) Ransandan v Rajagopala 12 M 309 (1889) and the Court should investigate the claim Issur Chander v Mohines Mohin 17 W R 74 (1872) however the title is derived Hurrish Chander v Broje So nd ir 0 W R 164 (1860) and whether it v projectiv is moveable or immoviable D anuth Biswas v Issur Gine 14 W R 12 (1870)

⁽⁷⁾ Deefholts r. Peters. 14 C. 6.31 (1887). Himatram v. Khaisl al. 18 B. × (1837). J. y. Prekash S.rgh r. Abboy Kumar (bund. I. W. N. 701 (1897). and if the Goard d. W. N. 701 (1897). and if the Goard d. y. Hy a procedure which was inapplicable there was no statutory bar r.x. lul. n_{o.} a suit is either party. Joy Prokash S.ngh. r. Abboy kumar (hund. I. W. N. 701 (1897). take sul ject. t. mortgage. see Sha Nagindar Halal k. r. Nathwa. S.B. 470 (1881). Dali chand. r. Ramki kon Sungh. 7.1. G.S. (1881). Shantajas. (I edumkarava. r. Sultrso Ram. Lad. r. 18 L. T. 4 (1881).

incumbrancer Though the execution of mortgage decrees is expressly incorporated in the Code the Select Committee were of opinion that claims and objections arising out of the execution of such decrees should not be the subject of summary procedure under these rules, but should be determined in the ordinary course. This, however, does not imply that the procedure under the later rules as to resistance to possession or dispossession does not apply. I mortgagee who was in possession of the mortgaged property when it was attached in execution of a decree against the mortgage, was held intitled to claim that the ittachment should be withdrawn (1). Where certain property was attached under sect. 13 (3) of the Promerial Insolvency Act of 1907 before the petitioner was declared an insolvent and a receiver appointed, it was held that under 158 the Court was bound to hear and adjudicate upon any claims preferred by persons alleging themselves to be the owners of such property (2).

The Court -As to junisdiction (3) and Small Cause Court (4) of cases cated

"Shall proceed to investigate "-Under the Code of 1859 the Court was to investigate with the like powers as if the claimant had been originally made a defendant to the suit, words which were held to mean that the Court was to have the same powers of investigation as if the claimant was a party to a suit which would give it power to summon the claimant and to dispose of the case ignist hun if he should refuse to attend (5) Sect 278 of the last Code did not provide expressly for the judgment debter being summened (6) but directed the Court to investigate with the like power as regulds the examination of the claimant or objector, and in all other respects as if he were a party to the suit R 58 expressly provides that no investigation shall be made where the Court considered that the claim or objection was designedly or unnecessarily delayed Where the order was that the plantiff came in too late for inquiry (7) or the property was simply released without inquity, (8) there was held to be no order under the section Before any claim can be investigated it is necessary to ascort un whether the claim was head in a suit organizing before or when the attachment made by the decree holder (9) Where there are several independent clums each must be heard separately (10) The application ought either to be dismissed or numbered and registered as a suit (11) In an investigation the

⁽¹⁾ Kassisa v Vithal las 10 B H C R 100 (1873), Ganesh v Purshottom 33 B 311 (1998)

⁽²⁾ Hashmet Bibi a Bhagwan Dis 36

^{4 65 (1913)}

⁽³⁾ In lir Chan ler Do gar e G pal Chander Sanha 11 W R 577 (1869) Vishna Dikshit a Nasangrao 0 B 384 (1882)

⁽⁴⁾ D no Nath Batabysh t Naffu Chunder Nandy 1 (W N 500 (1810) 26 (778 8 c in pipeal 4 (W N 410 (1500)

^(*) Not Her Burn 11 W R 1 B 8 (1868), Inner trun Bret pally v Ral a Lite 17 (* 71) (* 131 71) [20 (180)

⁽⁶⁾ Shivapa t Dod Nagaya 11 B 117 118 (1881) And as to res 2 idicala, vide ib

⁽⁷⁾ Roghoonath Doss t Bydonath Doss 11

⁽⁸⁾ Jagobandhoo Boso t Sachya B bt. 10 W R 22 (1871) S B L R ppp 39 Sec Sah Mukhan t Sah K ondan 21 1 210

⁽⁹⁾ Rechee Saheb Johan v Syal Shah

W R Mrsc 28 (1806) (10) Sharod's Meyeo's Nobin Chin ler, 11

W R = 5 (1804) 2 B 1 R 333 (H) Saloo (kul+ Mt Zyril) V H C R = (1804)

1 1247 CGE0 () 21, r 63

Court has to determine the question of possession only, and cannot go into the question of title with respect to the property taken in attachment (1). If the possession of the person holding the property is on his our account the fact that the judgment-debtor may have a beneficial interest or some title in it cannot be gone into (2). The worlds "possession" and "possession in the last Code were held in it to be used in a restricted sense as relating to more tangible or playsical possession, but to include constructive possession or possession in law of debts and other intangible property (3). The onus is on the applicant to prove this claim, and he must begin (1). His explaned which may be of any kind sufficient for the purpose (3) and must be received (6) should be confined to his own claim and not to establish the right of a third party (7). Where in objection has been made and disable of it cannot be renewed by the same person in the same attachment (8).

Order of Gourt.—Rules 60 and 61 specify the cases in which the Court is to allow or disallow a claim. R 59 deal with the evidence to be addited by the claimant, and it was held that to reconcile the sections the words, "some interest, were to be till in to imply such in interest as would make the possession of the judgment-dichter possession not on his on a account but on account of or in trust for the claimant. The rules relating to claims to attached property provide for a summary investigation into possession. The question of till is required to be gone into only so fir is may be necessary to determine whether the person in possession was so as agent of or as trustee for another (9). Seet 280 of the last Code (now r 60) was held to refer to cases in which the possession of a claimant as trustee was of such a character as to be really the possession of the debtor and not to eases in which intrease questions of I'm might arise as to whether or not valid trusts on the result in particular instances the real question to be determined being that of possession (16)

⁽¹⁾ Monmohiney Dassee : Radha Kristo Dass _J (543 (1902) Khelat Chunder v Bhu_ol utty 14 W R 144 (1870)

⁽²⁾ Monmoline, Dassec t Radha Austo Dass 29 C 543 (1/02) See Subhapito Chetti t Narayanasam (hetti 25 M 555 (1901) where it was hell that a beneficial interest was as much an unterest within the meaning of sect 2/9 of the list (ode as a lical interest in the properly attached

⁽³⁾ Chedambara Patter t Ramasamy Patter, 27 M of (1993) d as from Bassavayy, a Syed Abbas 24 M 20 (1990) and m Amrata v Pandharmath 2 Bom L R 134 (1990) the section was held not limited physical possession See Kunzul Parlam Pathukkayi t Varnakot Illeth 35 M 168 (1911)

^{(4) \(\)\ \}Lambda \text{R is a Flat Burn II W R I B 8 2 B L R JI (1878) Penchanun Bun lopadhya r Ribri Bibee 17 (711, 719 720 (1890) (r) D sai R y r \(\)\ \text{sur W net D saia} \)

²⁰ W R 345 (1873) Harrish (hun kr t Bloobun Moye 4 W R 13 (1865)

⁽⁵⁾ Benode Lall Pakrashet t Gree Hur Chuckerbutty, 22 W R 392 (15-4)

⁽⁶⁾ Bhostarmee Dabee : Not Monee Singh, 24 W R 422 (1875)

^{(7) \}ga Tha v Burn sima

⁽⁸⁾ Khilat Chunder Ghose v Bhuggobutty Chum Mookerge 14 W R 144 (1870) See Kunyil Parkum l uthukayyi v Varanakot Illoth 35 M 168 (1911)

⁽⁹⁾ Woh int Bhagwan Ramanuj Das t Khetter Woni Dassi 1 (W N 617 622 (1896)

⁽¹⁰⁾ Hannel Bahh; Mozum Iar : Bukten Chand Vahh; 14 t. 617 (1887) foli in Sheoraj Aandan Singh : Gopal Saran Aarain Singh. 18 C. 2.0 (220) (1891) [possess in Of person in traint for judgment debtor], and see Burgory D raby; Dh inl at 16 B. 1 at p. 12 (1891).

Under 1 60 the conditions upon which the property is to be in whole or in part released are. (a) that the property was not when attached in the possession of the judgment debtor, or of some person in trust (1) for him, or in the occupance of a tenant or other person paying rent to hun, or (b) that being in the posses sion of the judgment debtor at such time it was so in his possession, not on his own account or as his own property, but on account of or in trust (2) for some other person or party (3) in his own account and partly on account of some other person. It is not necessary (to defeat the claim) to prove that the trust is one capable of enforcement by law (4). The claim is disallowed under r 61 if the property was in the possession of the judgment debtor as his own or was in the possession of some other person in trust for him, or in the occupancy of his tenant.

The Court has to "make an order for releasing the property wholly or to such an extent as it thinks fit from attachment" The order is passed after investigation of the claim of the objector (5). It must be made before the sale has taken place, for upon the sale the application terminates upo facto (6). When the property of the insolvent judgment debtor, which was attached, had vested in the Official Assignee during the pendency of claim proceedings, it was held that the latter was not a necessary party and that the decree ought only to declare that the property belonged to the judgment debtor and not to declare it liable to attach ment (7). Where the claimant paid the amount of the decree and got the property released, the Court was held to have no jurisdiction to make an order for repay ment (8). Where the Court was, after such investigation, of opiniou that the property attached ought not to be sold, the proper order was one simply releasing the property from attachment, (9) the order being one made with reference merely to the particular claimant who has obtained the order (10). The rule contemplates

⁽I) See Hureehur Vookerjee v Noban Chunder Doss, 20 W R 202 (1873) [clamant alleged to be bernmidar of debter]. Ahellat Chunder Ghose v Gour Churn Vojeomdar, 18 W R 402 (1872), Kassurav Saheb Holkar v Vithuldas Mungalji, 10 B H C R 100 (1873) Velji Hinji v Blarmal, 21 B 287 (1896) As to position of Administrator Generi, see Bhanji Bhimi v Administrator Generil 31 B 428 (1898)

⁽²⁾ See Bishen Chand Basawat a Kadir Hossen 15 C 329 (1887) [property held by pudgment debtor in trust for a specific purp is e-attempt to attach sur his after fulfill min of trust) is c, 15 1 A 15, Bhuphari Pal a Ram Lal Dis 6 C W N 63 (1901) [property held as schaff] hartick a Ashu tesh 16 C W N 26 (1911) F B , McIntosh t Bidhn, 16 C W N 599 (1912)

⁽³⁾ Sitanath Koer v Lan I Wortgage Bink, 10 888-813 (1883) [joint finish property], Ru a Krishna v Namisicaya, 7 M 235

^{(1884),} Timmappaya v Lakshminarayun 6 M 284 (1883), Misree Begum : Punnoo

Singh, S W R 362 (1867)

(4) McIntosh v Bidhu 16 C W N 979 (1912)

⁽⁵⁾ Bishen Chand Busawat v Nadir Hossom 15 C 429 (1887) As to the amount of inquiry whole constitutes an investigation, see Koyyana v Doosy, 29 M 225 (1904), Rahim Bux v Abdul Kadir, 32 C 537 (1901) Bibi Aliman : Daleshuur, 1 C L J 236

^{300 (1904)} (6) Gopul v Nitobar, 16 C W N 1023

<sup>(1912)
(7)</sup> Annapurani v Subramanini 31 M

<sup>347 (1908)
(8)</sup> Varajial Motichan I v Kachia Garl i k
22 B 473 (1891)

⁽⁹⁾ Bhyrub Lali Bhukut : Meer Mild

Hossem S W R 93 (1876)
(10) Wt Imam Banker Wirza Wilem I

⁽¹⁰⁾ Mt Imam Banke / Mars Wile m Iakee S W R _7 (18) 7)

O 21, r 63

not only the entire release of the property, but also the retention of the attachment to such extent as the Court thinks fit (1). The person against whom an order is presed is the decree holder [2]. If depends upon the facts of each case whether the judgment-debtor is a party against whom an order was made so as to be bound by the special rule of limitation prescribed for suits by such a party [3].

Where, on the other hand, the claimant does not appear in support of his claim (1) or failed to adduce evidence (5) or evidence not worthy of credit, (6) and the Court is satisfied of the existence of the conditions mentioned in sect 281 (now r 61), the proper order to make is that the claim be disallowed been, however, more recently in some cases held that these provisions contemplate an investigation of the ments of the claim, and that an order is not conclusive where the decree, has been disaffound for default (7) or withdrawn (8) In order of disallowance course only to the benefit of the person in whose favour it was passed, that is, the affaching creditor (9) Where the claimant was in neturl possession the effect of an order disallowing his claim was held to be that he was in posse sion without title (10). The effect of in order disallowing the claim is to give the auction purchaser a little as against the claimant unless the claim is established by suit brought within the period of limitation from the date of the order (11) Where intervenors claim a share of attached property, the Court should define the respective shares of the delitor and the intervenor and sell tho debtor's definite share only (12) An order infavour of one of several decree holders un an objection was held not to enure for the benefit of other decree holders who

(2) Sardhari Lalt Ambika Pershad 15 C 521, at n 525 (1888)

⁽¹⁾ Yashwant Shenyi i Vithoba Sheti, 12 B 231 235 (1887) (2) Sardhari Lali i Yinbika Pershad 15 C

⁽³⁾ Geruva (Subharayadı 13 M 106 (1890) , Shirapa (Ibad Nagaya, H B H) (1896) , hedar Vuli Clatterji v Rakhal Das Chatterji, 15 G76 680 (1883), Apitsd Artsinlix (Shirkoli Timapa, 17 B £29 (1842) (unbalathukath (Vali dabblakath, 25 M 721 (1902)

⁽⁴⁾ Bith Aliman t Dakeshuar Pershval C I. J 204 (1904), Triporta Scondurer v Ijatoonnasa 24 W R 411 (1875), Karsan v Ganpatram 22 B 875, 883 (1897), Karsan v Ganpatram 21 W R 400 (1874) Lalla Goon line Lall t Huberbonnasa, 13 W R 311 (1871), ace Dhunpat Singh t Inder Chunder D ogur, 13 W R 122 (1870) ints ec Woladeb Vinndal t Modhoo Wun lal, 16 W R 59 (1871), Jugal Ansbore v Ambha 16 C W N 882 (1912)

⁽⁵⁾ Kursan v Ganpatram 22 B 875 883 (1897), Sreemunto Hajrah t Tajooddeen, 21 W R 409 (1874) Kaminee Debux i Issur Chunder Roy 22 W R 39 (1874)

⁽⁶⁾ harsan t Ganpatram, supra Gooroo Does Rey t Sona Monee, 20 W R 345 (1873)

⁽⁷⁾ Kallar Singh t Toril Mahton, 1 C W N 24 (1805) [dist in Rahim Bux v Abbid Kadr, 32 C 537 (1904)], see Karsan v Ganpatram, 22 B 875, 882 (1897), No hadeb Vundal t Modhoo Mundal, 10 W R 59 (1871)

⁽⁸⁾ Monsami Richli r Armachal; Reddi, ISA '265 (1894) In Gooro Das Ashali Kant, 20 W R 456 (1873) it was held that if a claim was withdrawn it could not be revived, in Kumarasamy i Panna Soona, 7 M H C R 350 (1874), a with Irawal was held not to be a consent to the sale

⁽⁹⁾ Bodiroonnissa Bebco v Kureemoon nsva Ahalooc 21 W R 230 (1873), Khub Lal t Ram Lochun Koer, 17 C 260 (1889) Guiga Narain Ghoso t Haradhun Ghoso 6 W R 157 (1866)

⁽¹⁰⁾ Brijo Kishoro Nag v Ram Dyal Bhudra 21 W R 133 (1874)

⁽II) Khab Lal v Ram Lochun Koer, 17 C -60 (1889)

⁽¹²⁾ Udit Aarsin Singh t Mortaza Khan, 27 A 464 (1905)

were not parties to the proceedings (1) An order for release being only provisional and liable to be set aside by a regular suit, has not the effect of putting an end to an attachment duly made (2)

"May institute a suit."-A party to an investigation is excluded from any other remedy than that expressly provided for hun by rule 63 by a regular suit brought within the period of limitation (3) Where, however, a claim was rejected but the decree holder withdrew his attachment, it was held that the parties were restored to the status quo ante, and the claimant was not required to bring a suit, (4) though a party may proceed to clear his title by suit even though the attachment has ceased to exist (5) The special right of suit conferred is not controlled by the proviso to sect 42 of the Specific Relief Act (6) The right to be established in a suit instituted after an adverse order must be substantially the same right as that for which the party has contended in the execution, (7) and the suit should be determined by ascertaining the rights of the parties at the date of the order (8) Where the same property is attached in execution of different decrees and all the attachments are removed, it is not necessary for each attaching creditor to hring a separate suit. A decree obtained in a suit brought by one eutres to the benefit of all (9) The right of suit is not a personal right confined to the original elaimant, and therefore a suit will be by the purchaser of the rights of a person who had unsuccessfully filed an objection (10) The attachment constitutes the cause of action, and different purchasers of the attached property may be properly joined as defendants in the same surt (11)

The decree-holder may sue to have his right to attach, and sell the property declared (12) All that he has to prove is that on the date of the attachment the judgment dehtor had a subsisting right in the property, and the suit must be tried as if it were a suit for possession by the judgment debtor (13) The claimant may bring a declaratory suit to establish his right, (14) and to obtain any further

- (1) Jagan Nath 1 Ganesh, 18 A 413 (1896), Vadapallı Narasımlam v Dronam rnu 31 M 163 (1907)
- (2) Ram Chandia Marwari v Mudeshwar Singh, 33 C 1158 (1906); Ah Ahmed v Bansidhar, 31 A 3o7 (1909)
- (3) Settiappan : Sarat Singh, 3 M H C R 220 (1866), Phul Kumarı v Ghanshyam, 35 C 202 (1907), Annapurani t Subra manian, 31 M 347 (1908)
- (4) Gopal Purdshotam v Bar Divah, IS B
- 241 (1893) (5) Sreeputty Mirdhar Kartick Singh II
- C L R 181 (1882) (a) Kristnam Sooraya v Pathma Bee, 29
- M 151 (1905) (7) Colvin e Llus, 2 B L R 212, 214
- (186), s c, 11 W R 40, (8) Reushinker lebhar v Nirus Kirusa, 18 B 260 (1894)
 - (9) Chartement, Som r. Issur Charler, 12

- W R 221 (1869) (10) Ganesh Prasad v Kashi Nath Ju in, 26 A 59 (1903)
- (11) Dorasamy Pillus Muthusamy Morp
- pan, 27 M 94 (1903) (12) See Mitchell v Mathura Das, 12 1 A
- 150 (1885) , Total Ahmad & Banco Madhub Mookerjee, 24 W R 394 (1875), Dalla Wal : Hatt Das, 23 A 263 (1901)
- (13) Vasudco : Eknath, 35 B 79 (1910)
- (14) Narayanray Damodar v Balkrishna Mahadev, 4 B 529 (1880), Rangovithal t Rikhivadas, 11 B H C R 174 (1874). Kolasherri Illath & Kolasherri Illath, 4 M 131 (1881), Sukhdeo Prasad t Jamua, 23 A 60 (1900), Bank of Hindustan : Premchan ! Ruchand, 5 B H C R O C J 83 (1868) with a prayer for consequential relati-Kunhamma : Kunhanar, 16 M 140 (1892) . Salu lan Ragha + Ram lan Govard, 16 B 608 (1832) The object is to have the nobt

relief to which he may be entitled,(1) and need not wait until his possession is actually disturbed (2) and as long as a decree is operative, a temporary cessation of the execution proceedings under it does not deprive the execution ereditor of his rights to sue to set aside the order (3) There is nothing in these provisions which limits the plaintiff s right to compensation for his loss, or the defendant's responsibility for his wrongful act, and if the existence of the summary procedure leads to delay, and that delay to further loss, the consequences must fall upon the defendant (4) It has been held that a suit by a claimant under sect 283 of the last Code (now represented by this rule) should be decreed if it is found that the claimant was in possession after a purchase for valuable consideration, but that the defendant in such a suit can set up the defence of fraud annulling the transfer (5) In a suit by a judgment creditor to establish his debtor's title a claimant has up right to set up any irregularities there may be in the execution proceedings, a matter with which he is not concerned, (6) or to impeach the decree as collusive, (7) though this last decision has been dissented from ou the ground that the section does not introduce an exception to the rule that a defendant is bound and entitled to set up every defence available to him (8) When a person fails to establish a prescriptive title in a suit in which he is plaintiff, it does not follow that the defendant is entitled to recover the subject of such suit in an action brought by him (9)

The suits though brought to establish rights negatived in execution proceedings are not appeals from orders but substantive suits to all intents and purposes, and must be tried like any other suits subject to the ordinary rules of procedure and evidence (10). The Judge is bound to find the facts upon the ovidence rendered and taken in the suit and not upon any evidence taken in the summary proceeding, (11) nor is the judgment in the claim case admissible (12). Where a suit is brought by an intervenor the onus is on him to prove bis title, and not on the purchaser to prove that of the judgment debtor (13). In a suit

established not to have the order in the claim proceeding set aside Bibi Uman v Dakeshwar Pershad I C I J 296 (1904) (1) Sadu bin Raghu v Ram bin Govind

- 16 B 608 (1832) (2) Shriyram Chintaman t Jivri 13 B 34
- (2) Surveam Chiniaman Cover 13 B 3: (1888)
- (3) Balan t Moroba 21 B 58 (1895)
- (4) Kishori Mohun Rai e Hursool Das 1_ (696 (1886) 17 (436 (1889)
- (a) 1bdul kader: 1h Wa 16 C W \ 717 (1912), 15 C L J 649
- (6) Tofail Ahmud t Bance Madhuh Mookerice, 4 W R JH (1873)
- (7) Gulibai t Jagamiath Galvankar 10 B (50) (1885)
- (5) \aranayvan t \as swarayyan 17 \bb (1893)
- (3) Shridhar Vinavik + Babaj (B H C R 220 (1803)
 - (10) Isahori Vohau Lair Burscok Das, 12

- C 696 (1855) 17 C 436 which also deals with the question of damages
- (11) LeLhraj Roj v Mutty Widhub Sin 14 W R 95 (1870)
- (12) Kishori Vohun Rai t Hursook Da 12 C 636 '01 (1886) 17 (* 436 43)
- (13) Aufm Andasha i Ramchindra innap a B H C R A C J (1868) Shich Idam i Jammadas Ranchordas 17 B J I(1801) Secanaran (huckerbutty i Miller, 15 W R 7 I O C (1871) Govind Humarum Santas 12 B 250 (1885) Mitchell i Mathura Das 121 A L 20 (1886) As to the cus and exidence of conduction of the control of the c
- Bance Madhab Ghose, 15 W R 155 (1871), Nafur Dass e Nil Maihab 11 W R 467 (1864), Methodral and ve hamilto has 11 W 1 482 (189), Todat e Dess e Mun

brought by the owner against the purchaser, the execution creditor is properly made a party, the object being to restore all parties to the position which they occupied previously to such attrehment and sale, (1) and if the claimant further desires related by partition all the owners should be made parties (2). As to the position of the debtor in a suit by the creditor, see ante.

Whether the suit is to be brought in the Ordinary or Small Cause Court depends upon the nature of the claim and the right sought to be enforced (3) The judgment-debtor is not a necessary party (4) Where an application was decreed with costs to be paid by the decree-holders, and the latter were declared in a subsequent suit to be entitled to sell the property, but no relief was asked in regard to the costs, it was held that they could not be refunded by the Court executing the decree (5) The effect of a successful suit at the instance of an attaching cieditor is to set aside the order of release and to restore the state of things which it had disturbed (6) An application to revive a previous application for execution, which has been temporarily suspended by an order under these provisions, is, according to the Calcutta, Bombay, and Allahabad High Courts, governed by Art 178 of the Limitation Act (7) A Full Bench of the Madras High Court has held that the valuation of the subject matter of the suit is the amount for which the attachment was made (8) The Privy Council have recently determined that a suit under 1 63 falls within clause 1, Art 17, Sched II . Court Fees Act, and a Court fee of Rs 10 is payable thereon (9)

"The right which the plaintiff claims to the property in dispute," means the right which is claimed in the proceeding in respect of the property that is, the right to have it sold or the right to have it released from attachment. They do not mean the right or title to the property. When, therefore, a claimant, being unsuccessful in a claim, has got the property released from attachment by coming to terms with the decree-holder, without notice to the judgment debtors, a suit subsequently brought by him against the judgment-debtors for recovery of possession is not barred (10)

Rukhun, 15 W R 202 (1871), Pemraj v Natajan, 6 B 215 (1882), Ram Dyyal z Durga Singhi, 12 A 209 (1890) [decree vgamet Hundu father—attachment of joint fumily property], Rudhv Persbud v Ram Kheltuwin 23 C 302 (1895) [decree ugamst member of Mitakshara family] Nanni Junt h krum Alt. 30 A 321 (1998)

- (1) Bank of Hindustan v Ahmedblin, 5
- B 11 C R 83 (1868)
- (2) Sadu bin Rijhu v Ram Bin Govind, 16 B 608 (1892)
- (3) See Shiboo Naram v Mudden Ally, 7 C 608 (1831), Akhar Alı tı Jeruddim, 8 C 309 (1882), Mihomed Koja tı Kasanı, 9 M .00 (1885), Chiuşudal Nagardası tı Dal sukhram, 1 3t. 503 (1879), Godha tı Nada Ram, 7 A 152 (1834), Ilahı Bikshı tı Sita, 5 V 162 (1834), ikkund Latı Nasır ud dim tı 110 (18-1) Pagal 1 utep Hannır v

- Varajlal Mulchand, 8 B 259 (1584), Davud
- Beg t Kullappa, 11 M 264 (1887)
 (4) Ghusi Ram v Mangal Chand 28 1 41
- (1905)
 (5) Ragho Nath Das v Badii Prisad, 6 A
- 21 (1883) (6) Mahomed Warris t Pitambur Scn, 21
- W R 435 (1874), Bonomalı Rai v Pro sunno Naram Chowdhry, 23 C 829 (1896)
 - (7) Vitra's Limitation Act, 4th ed 1115 et set, where also the different view of the Madras High Court is given
 - (8) Kruhn wawin Naidu v Som usundarun Chettar, 17 M. L. J. 95 (1907). Sco. Dhan Devic Zumirrad Begum, 27 A. 140 (1905). (9) Bibl Phul Kumaric Ghushyam Mara, 17 M. L. J. 018 (1907).
 - (10) Morshis Barayal t 11th Bux Khan, 3 C L J 381 (1905)

"Subject to the result of such sult."—When property has been released from attachment and subsequently declared hable to attachment by a decree against which an appeal is pending, a sale of such property before the final result of the appeal is not illegal (1)

"The order shall be conclusive."-Where an order has been passed unless a suit is brought, the unsuccessful party cannot assert his right in any capacity, whether as pluntiff or defendant, (2) and he is presented from pleading adverse possession at the date of the order (3) The conclusiveness exists only as regards the particular property in dispute (4) Theorder is conclusive subject to the other provisions of the Code, such as those relating to review (5) and revision (6) On the same principle matters finally heard and decided earnot be reopened on a second application, (7) hut it has been held that where there is no investigation of a claim which is dismissed for default, a fresh claim may be made (8) The discharge of the order of attachment cannot be properly asked for in such suit The intervenor having established his title by declaratory decree, should then carry the decree to the Court by which the uttachment was issued, when such Court, heing bound to recognize the adjudication, will govern itself accordingly (9) An order is not appealable (10) An order passed by a Judge on the Original Side of the High Court dismissing a claim preferred by mortgagees of immoveable property which was attached in execution, was held subject to appeal under the Letters Patent (11)

Attachment before judgment.—By O XXX\III r 9 (formerly 187) this rule applies to attachment before judgment (12)

Mortgage -The distinction between r 62 and r 60 is that in the former

- Fathula t Munyappa, 6 M 98 (1882)
 Nulo Panduragi v Rama Pattoji 9 B
 Sal (1884), Badri Prasade v Muhammad Yusuf
 A 381 (1877), Bapu Khandu v Baji Jiraji,
 B 372 (1889), Achuta v Uamavu, 10 U
 Sal (1886), Surnamoji Dasi v Akhutos
- (3) Velayuthan t Laksmana, 8 V 506 (1885) Surnamoji Dasi v Ashutosh Gos wami, 27 C 714, 721 (1900), [dist Gond Lall Tewari t Denonoth Ram Tewan, 11 C 673 (1885)]

Goswami, 27 C 714, 722 (1900)

- (4) Dmkar Ballal v Hari Shridhar, 14 B 206 (1889), cf Radha Prasad Singh t Lal Sahab Rai, 13 A 53, at p 62 (1890)
- (5) See Cochrane v Heera Lal Seal, 7 W R 79 (1867)
- (6) Although in Ittiachan v Velappan, 8 M 484, 493 (1855) the Court appeared to consider that it had not the power, sed qu (7) Seo Khelat Chunder Ghose v Bhuggo
- butty Churn Mookerjee, 14 W R 144 (1870)
 (8) See cases cited, anic, at p 940, and acc Sarala Subba t hamsal tummaya, 31

VI 5 (1907)

(9) Kolasherri Illath v Kolasherri Illath, 4 M 131 (1881) See Narayanrav Damodar v Balkrishna Mahadov, 4 B 529 (1880)

(10) Dayaram v Govardhandas, 28 B 468 (1994), Salharam Krishna v Gadya, 2 Bom L R 241 (1909), Bhajshari Pal v Ram Lal Das, 6 C W N, 63 (1991), Abdul Rahman v luhammad Yar 4 A 199 (1889) Nimayo Churu v Jogendro Nith Binerjec 21 W R 355 (1874), Rash Behary Wookerjee v Sunnomoye, 9 C L R 79 (1881) [sect 244 of old Codo mappheable as interest was acquired prior to suit], Urjoon Sahoy v Nil Monce Singh, 29 W R 90 (1873)

(11) Sabhapathi Chetti v Varayanasami Chetta, 25 M 555 (1901)

(12) See Java Ramgut Jadavn Aatha, I B II C R 222 (1864), Ex parte Gamble, 2 B II C R 112 (1860), In re Gocool Dass Soonderjee, Bourke, 240 (1865), Kartick Chander Mookerjee t Mookta Ram Surcar, 10 W R 21 (1865) case the Court, after heing satisfied of the existence of the mortgage, sells only the judgment debtors right of redemption, so that the purchaser does not acquire any greater rights than those of redeeming the mortgage. In the latter the Court decides nothing as to the existence of the mortgage. The purchaser buys the property with notice of the mortgage, and subject to such risks as the notice might involve (1). A person who purchases a property in execution of his own decree apparently subject to a mortgage hen as declared by the Court under r. 62, without, however, acquiescing in the order made in favour of the mortgage, is entitled to question the mortgage, if done so within a year of the order in the claim ease by way of defence in the suit brought against him by the mortgage to enforce his hen, although he may not have instituted any suit under r. 63 to establish the right which he claims in the property in dispute (3)

Sale generally

64. Any Court executing a decree may order that any prower to order prolatiached to be said such portion thereof as may seem necessary to

Power to order property attached to be sold and proceeds to be paid to person entitled.

such portion thereof as may seem necessary to satisfy the decree, shall be sold, and that the proceeds of such sale, or a sufficient poinal to the party outsided under the decree

tion thereof, shall be paid to the party entitled under the decice to receive the same

Order for sale—This rule corresponds with sect 242 of Art VIII of 1859, but that section provided only for the sale of such attached property as did not consist of money or bank notes. The present wording save the words in italics, was introduced by sect 284 of Act X of 1877. The words in italics we additions made by the present Code. Where the same property is under itachment by two Courts of different grades a sale effected by the Court of lower grade is not a nullity. Sect 63, ante, is a directory section dealing with procedure, and does not take away the jurisdiction to sell conferred on the Court by this rule (3). Sect 89 of the Transfer of Property Act contemplates a cuttain state of things, but where such state does not exist that section does not exclude other ways of enforcing a decree, and a Court has general jurisdiction to direct a sile, if not under that section, then under this ille (1).

"May "—It is, however, imperative on the Court to act when an application is duly made by a party interested and having the right to apply, but when property has been sold in execution of a decree it cannot be sold again at the instance of another decree holder who attuched it prior to the attachment under the decree m'der which it was sold (5)

⁽¹⁾ Shib hunwar ingh t Sheo Prasad

Singh, 28 1 418 (1306) (2) Shahi Zia uddin e Jaadash Chandra

^{(3) ((1)} Chan | Bother + Kismumicson

³⁴ C 536 (1907)

⁽¹⁾ Abir Paramanik v Jahar Mihammil 6 C L J 95 (1907)

⁽a) Kashi \ till v Surbanand Shaha 12 (317 (158))

"Any property attached "-This does not include a decree for money, which cannot be sold (1)

"Shall be sold."—When a sale takes place, all previous attachments effected upon the property sold fall to the ground (2) As to payment of proceeds to party entitled, see ease sted (3)

Appeal —An appeal lay under sect. 588 (j) of Act X of 1877 from an order refusing the judgment debtor's application that the property be sold in successive shares, the question being one between the parties in respect of the execution of a degree (j). But see now O XLH r 1

65. Save as otherwise prescribed, every sale in execution is sales by whom conducted and how made. of a decree shall be conducted by an officer duted and how made. Court may appoint in this behalf, and shall be made by public anction in manner prescribed.

Sales .- A sale in execution is a sale by the Court which has a statutory power conferred on it of transferring the interest of the judgment debtor to the purchaser, and to that end a certain course of procedure is prescribed terminat mg with the sale certificate (5) As to sales of agricultural produce see rr 74, 75 In order that the sale be good it must have been held under a good decree. (6) and it must have been conducted by a person duly authorized. The words " uhom the Court may appoint in the former section were held to apply not only to the words "any other person, but also to the officers of the Court (7) When a Court postponed a sale, but information not reaching the Nazir in time, he sold the property, it was held that the sale was void (8) In sales under the direction of the Court it is incumbent on the Court to be scrupulous in the extreme and very careful to see that no taut or touch of fraud or deceit or inistepresentation is found in the conduct of its ministers (9) Where a sale was conducted by two officers of the Court, one a chief clerk and officiating bailiff and the other, his deputy, being the auctioneer and the purchaser made a bid on the representation of the latter in the presence and hearing of the former that he was selling the land at the instance of the mortgagees, though a proclamation was read in English (which the purchaser did not understand) to the effect that only the

⁽¹⁾ Copal Nanashet v Joharumal, 16 B 522 (1891), Sultan Kuar v Gulzari Ld., 2A 299 (1879), Truvengada v Vythdinga, 6 U 418 (1883), Jotindro Nath v Dwarla Nath, 2C C 111 (1891) Kashi Nath v Surbanand Shaha 12 C 317 (1885)
(2) Kashi Nath v Surbanand Shaba, Nath v Surbanand Shaba, Nath v Surbanand Shaba,

¹² C 317 (1885) (3) Gayanoda v Butto Aristo 33 C 1646 1046 [payment to Crown]

⁽⁴⁾ Chandhari Sital : Jhumah Singh, 4 C L R 27 (1879) (5) Baroda Kanta Bose v Chander hanta

⁽⁵⁾ Baroda Kanta Bose v Changer I Chose, 29, C 682, 686 (1902)

⁽⁶⁾ Jadu Nath Kundu t Braja Nath Kundu 6 B L App 90 (1871) Golam Asgar t Lakhunani Debi 5 B L R 68 (1870), dist in Najabut Ah Chowdhry t Sheikh Bussee roolah II B L R 42 (1873)

⁽⁷⁾ Judoonath Roy t Ram Buksh Chat terjee, 12 W R 238 (1869) In Omur Chunder Doss t Soommunassa Khatoon, W R 44 (1864) the sale by the Peshkar was by direction of the Vinnuf, who was ill

⁽⁸⁾ Sant Lal t Umrao un missa, 12 A 96 (1859)

⁽⁹⁾ Mahomed Kala Was v Harperink, 36 I A 32

interest of the judgment dobtor was being sold, it was held by the Privy Council that as the interest of the judgment debtor was a mere equity to redeem property mortgaged far beyond its value, the Court could not enforce a bargain so illusory against a purchasi misled by its agents. And it was also held that the chief elerk was right in referring the matter to the Court for direction, and also in not proceeding under sect 306 of the last Code (now represented by r 84 of this Order) (1)

66 (1) Where any property is ordered to be sold by public Proclamation of sales auction in execution of a decree, the Court shall cause a proclamation of the intended sale to be made in the language of such Court

(2) Such proclamation shall be drawn up after notice to the decree holder and the judgment debtor and shall state the time and place of sale, and specify as fauly and accurately as possible—

(a) the property to be sold,

(b) the revenue assessed upon the estate or part of the estate, where the property to be sold is an interest in an estate or in part of an estate paying revenue to the Government,

(c) any incumbrance to which the property is hable,

(d) the amount for the recovery of which the sale is ordered, and

(e) every other thing which the Court considers material for a purchaser to know in order to judge of the nature

and value of the property

(3) Every application for an order for sale under this rule shall be accompanied by a statement signed and verified in the mainer intensibetore prescribed for the signing and verification of pleadings and containing, so far as they are known to or can be ascertained by the person making the verification, the matters required by sub rule (2) to be specified in the proclamation

(4) For the purpose of ascertaining the matters to be specified in the proclamation, the Court may summon any person whom it thinks necessary to summon and may examine him in respect to any such matters and require him to produce any

document in his possession or power relating thereto

Proclamation —It has been held that the object of issuing a proclamation is to give notice to intending purchasers of what is sold and not to the judgment debtor (2)—The Court should be careful to specify in the proclamation the

⁽¹⁾ Mal m | Kala Mar e Harpeink (2) Lack Rurr Moh sh D se 12 W R 36 I N 32 feb (1509) Shakh M do 1 e Saul Jam M e

details given in this rule, for an omission causing substantial injury may form ground for setting aside the sale under r. 90, post (1). Under r. 69 the Court may adjourn the sale. It is necessary in such case to mention the date and hour of sale (2). If this is done for a longer period than seven days a fresh proclamation (3) must issue unless the judgment-debtor waives it (1). Where there is a series of short postponements less than seven days, which taken together in the aggregate amount to more than seven days, a fresh proclamation is necessary (5). Another date should be fixed. Where a sale did not take place on the day fixed in the original notice, it was held that an indefinite postponement could not be regarded as an adjournment from day to day (6). Proceedings mentioned in this rule have been held to be of an administrative and not judicial character. They are not therefore orders within seet. 17 (formerly 211) or appealable. But it a sale does take place objection may be taken on any of the grounds mentioned in r. 90 (formerly sect. 311), some of which may relate to the contents of the proclamation (7). It has been said that the sales contemplated by the rule

18 W R 55 (1872) [on one point dissented from in Mr. Naterent i Moulton Amee roodden, 24 W R 3 (1875), see as to declaratory portion of proclamation, Dwarks Xath 1 Aloho Chunder, 9 C 641 (1883), and as to discrepancy between proclamation and certificate, Uma Churn Sen t Gobind Chunder, 1 C L R 460 (1878)

(1) See notes to section cited, and Aruna chellam : Arunschellam, 12 M 19 (1888), Bhoop Singh v Goureo Mull, S D N W 533 (1860) [omission of jumma and name of decroo holder, sale upheld as no mjury], Thakoor Das v Hardeo, S D N W (1862) 104 [application of same decree holder in five separate cases, entire right of all sharers sold failure to specify right of each judg ment debtor or his liability in each case—no mjury , sale upheld] , Nundceput v Urquhart, 13 W R 209 (1870) [two lots sold as one though proclamation treated them as separate], Babu Luchmeeput t Lekraj Roy, 8 W R 415 (t867) [proclamation not spe cifying numbers and values of promissory notes sold! As to misdescription in the case of a sale under the Public Demands Recovery Act, see Ram Taruk Hazra : Mosaheb Alı Khan, 6 C W N 246 (1901)

(2) Bhikari Misra e Rani Surjamoni, 6 C W. N 48 (1901), Mahabur Pershad e Dhanuk dhari Singh, 8 C W N 685 (1904), 8 c, 31 C 815, 818 (1904), Surmonojeo Debi v Dakhina Ranjan Sanjal 24 C 291 (1896)

(3) See as to necessity for a fresh proclamation after postponement, Shoshee Mookhee v Duarka Nath Biswas, 6 W R Misc 84 (1860), Sauwal Singh v Makhu Panday, 2 A H C R 143 (1870), Okhoy Chunder Dutt v Ershine & Co., 3 W R Wisc 11 (1863), Tekant Bay v Mirza Bandeln, 8 D N W, (1856) 322 [sale taking place on day oru, nally fixed after an order for postponement had been passed] Jhoomude, Chow dhry v Rayah Radha Pershad, 25 W R 328 (1870), Roy Gourco Nath v Fuker Chund, 18 W R 347 (1872), Sui Asmutoonnusa Bibeo v Miudeemoonisas Bibeo, 17 W R 727 (1872) The omission to Issue'a fresh proclamation is an irregularity only Bagal Chundor v Rameshum Mundal, 18 C 490 (1891)

(4) Seo Nooral Hossen v Oomatul Fatuma, 25 W R 34 (1873), Baboo Hurdeo Narani v Gudhaat Singh, 10 W R 227 (1873), Bagal Chunder v Rameshur Mundal, 18 C 490 (1975), Preo Lail Paul v Rulhika Prosad Paul, 6 C W N 42 (1991)

(5) Jumm Mohun Nundy t Chundra

Kumar Boy, 6 (W N 44 (1901)

(6) Jhoumuch Chowdhry : Rajsh Radha Pershad, 25 W R 328 (1876)

(7) Sanagami Ache v Subrahmann Ayyar, 27 M 259 (1903), F B, dascnting from Sivasami Nackar v Batnasim Nackar, 23 M 598 (1900), Lachman v Ganga, 15 C W N 713 (1910), Sakhi Chand v Kulanand, 14 C L J 607 (1911), Ganga Prosad v Raj Coomar Singh, 30 C 617 (1903) In Rajah Ramessur Pershad v Rat Sham Krèsen, 8 C W N 257 (1901), it mas also held that there was an amoreal

are sales in execution of decrees, and the procedure and the rules laid down regarding them are framed on the assumption that the property to be sold his been already attached (1). It has been held therefore that property not attached and not proclaimed cannot be sold, (2) and where plaintiff attached before judgment and the suit was dismissed but decreed in appeal, it was held that a sale without further attachment was void (3). It has, however, also been held that though the absence of attachment is an irregularity, a sale is not to be considered as a nullity increty by reason of the absence of any attachment (4). Publication of a sale proclaimation upon the decree holder's property at a distance of some half-mile from the judgment debtor's property is a material irregularity in the publication of the sale (5). The former section was held to have no application to a case in which property was being sold under a mortgage-decree in which a claimant objected that the property had previously been sold to him at a private sale (6). An order of sale after attachment on a money-decree may create a valid change on the property (7)

"After notice"—The proclamation was in the Mofussil usually prepared without notice to the judgment debtor and behind his back, and he was not therefore likely to receive any intimation of its contents until it was fixed up in the Court house or Collectorate or was published upon the property. The faultiness of this practice was held therefore to excuse objection by the judgment dobtor (8). The Code has therefore been altered to give effect to a practice followed in Calcutta with great advantage of drawing up the proclamation after notice to the parties, who are thus afforded an opportunity of setting the contents correctly, and in a great measure are restrained from subsequently raising obstructive and dilatory objections. If objections are not taken they may be deemed to have been waited (9). The original Bill proceeding on the ground that the object of those proceedings was to give notice to intending purchasers rather

rejections of a claim preferred, or an objection under rule 58, opened up the prospect of litigation, the intending purchases should have notice of the matter

⁽¹⁾ Deno Nauth Ruckit : Unity Lal Paul,

Hydo 158 (1862-3)
 Ram Onoogrobo : Mt Montorun, 6 W
 S23 (1866) , Fida Husam : Kntub Husam,

⁷ A 38 (1884)
(3) Ram Chand : Pitrin Val, 10 A 506

⁽¹⁸⁸⁸⁾ (4) Kishory Mohun Roy t Mahomed

Mujaffir Hossein, 18 C 188 (1830), 22 C 809 (1895), distinguished in Sisirama t Meherban, 13 C L J 243 (1911)

⁽⁵⁾ Januar Mohun Aundy : Chandra Kumar Roy, 6 C W V 44 (1901)

⁽⁶⁾ Himatrum : Khushal Jetherem, 18 B 18 (1833)

⁽⁷⁾ Sirif Bunsi Ixocr v Sheo Pershad

Singh, 5 C 148 (1879), s c, b I A 88, Rai Balkishen v Rai Site Ram, 7 A 731 (1885)

see Madho Parshad t Mehri an Singh 18 C 157 (1890) (8) Rajah Ramessur Pershad t Ru Sham

Arissen 8 C W N 257, 262 (1901)

(9) See as to waiver of mis statements in proclamation. Girdhari Singh i. Hurde)

proclamation Girdhari Singh i India-Naram, 3 I i 230 (1876), Arunachdlam Chetti i Arunachdlam Chetti 15 I A 171 (1888), Pro Lal Pinl i Ridhika Prosaul Paul 6 C W N 12 (1901), Prin Singh i Janardin, 14 C L J 541 (1911)

⁽¹⁰⁾ Laca Ram (M hesh Dis 12 W R 188 (1869), Saadatmand Khan (Phu Kuar, 20 A 112 (1899) | s.c. 2 C W N 5-0

The Select Committee, however, cancelled the proposed clause which provided for information likely to be useful to the public in hidding, and as above stated proposed to require the proclamation to be settled after notice to the parties.

"Time and place of sale."—Property cannot he sold before the expry of the period inentioned in r 68. The proclamation should fix a day for the sale which is not a holiday, or a day on which the Courts are closed hy order of the High Court (1). Both the proclamation of the time and place of sale and the holding of such sale at such time and place are conditions proceeding to the sale being a sale under the Code (2). It was held under the last Code that it was intended that a sale of moveable property should ordinarily be held in some place within the jurisdiction of the Court ordering the sale. Good and sufficient reason must be shown for directing otherwise (3)

"The property to be sold."-The judgment debtor has the right to have the property to he sold described with reasonable accuracy (4) As this is to be expressly stated, where the proclamation set out particulars of the property, but subsequent to such preclamation a portion of the property was released to a third party, it was held that a fresh proclamation must be made (5) If a Court directs the sale of property not warranted by the decree, the person aggreeved may follow the property in a regular suit (6) In a recent case where decree-holders had applied for execution by attachment and sale of a certain encumbered share of a makel, which was fully described in the Schedule, and the share was attached and sold, but the Subordinate Judge granted a certificate stating that a different and unencumbered share bad been purchased, it was held by the Priva Council that there was no power to sell the latter share, since this was not a case of a mere misdescription but of a mistake as to identity (7) The sak of a decree partly executed only enables the purchaser to execute what remains to be carried out (8) In the undermentioned case (9) it was held that the sale of a decree for possession of land did not carry the mesne profits to the debtor. An application to set aside a sheriff's sale or for compensation on the ground of deficiency in the area of land sold was refused (10)

"The revenue assessed."-Not stating the revenue is an irrigularity but

- (1) Haro Jemadar e Jadub Chun br Holdar, 3 W R Mrsc 24 (1865)
- (2) Basharutulla + Uma Churn Dutt 16 C 7.04 (1859), as to place of sale see Govin I Salekar e Bank of India, 4 B H C R A C J 104 (1867)
- (3) Lakshimbar e Santapa Rivapa 11 B
- 22 (1880) (4) Rajah Ramessur Pershad e Ray sham
- hrissen, S.C. W. N. 257 (1901)
 (5) Shib Probash Singh r. Sanlar Doval
- Smalt, 3 C 544 (1878)
 (1) Joseph Albert Nove & Rey Lateknee

- put 4.0. 142 (1578), see Dorab Ali Khan e Khapab Moheesodeen, 3.0. 800 (1578) as to purchaser a right to receive back purchase menes, see r. 43, distinguished in Ram
- humar : Rain (our 37 (67 (1999) (7) Raja Thakur Barmha (Jihan Rain
- (P.C.), 194 L. J. 1/1 (1.13)
 (a) Grad than let that kerbatty r. (made than let that kerbatty r. (made)
- (4) Gancah Lal Tewara r. Bannaram, 6 C. 213 (1880)
- (10) Ram Varager Dwarks Nath Kheitry,
- 4 C W N 13 (15 th)

this objection should be taken in the first Court when seeking to set aside a sale (1) The words "part of an estate" mean an aliquot part of an estate (2)

"Any incumbrance."—In the case of a mortgage the amount of the mortgage-deht unpaid should be stated (3) An absence of the specification of the incumbrance may amount to a material irregularity avoiding the sale (4) If a decree-holder knowing of the existence of an incumbrance does not notify it, the land passes free from it (5) Semble, a third person purchasing mortga_ed property bona fide at a sale in execution of a money decree obtained by the mortgagee against the mortgagor obtains a good title free from the mortgage lien unless the sale is made subject to it (6) Where the holder of two decrees attached property in execution of one of them, he was held to have a right to state in the notification of sale that he likewise claimed the same property in satisfaction of his second decree (7) It was held that claims admitted by the parties or established by decree of Court should be entered in the proclamation as charges upon the property, though they came to the knowledge of the Court in an inquiry under this rule only, and have not been made the subject of an order under sect 282 of the former Code It was also held that mortgages noted in the proclamation as claims upon the property sold, should not necessarily be entered in the certificate of salo, or be computed as part of the purchase money unless they had been admitted by the parties or established by decree, or unless thoy had been declared under that section to be charges on the property, and the Court has seen fit to sell it subject to them, but they should be so entered and computed if they have thus been admitted or established, or if they had been declared under that section and the sale was held subject to them (8)

"Every other thing."—It has been held that the proclamation should specify as fairly and accurately as possible the value of the property, masmuch as it was a material fact for the purchaser to know in judging of the nature and value of the property (9) It was proposed to amend the rule to the effect that no valuation was to be entered in the proclamation But this proposal

⁽¹⁾ Macnighten v Mahabir Pershid, 9 C 656 (1882), Madarshah Maraesyar v Palam appa Chetti, 23 M 628 (1900)

⁽²⁾ Kally Prosonno Bose v Dino Nath

Mulhek, 11 B L R 56 (1873) (3) Wohunt Wegh Lall v Shib Leishad

Inadi, 7 C 34, 41, 42 (1881) (4) Moti Laul Roy v Bhawani kumari Dabi, 6 C W N 836 (1902)

⁽⁵⁾ Kasturi v Vinkata Chalapathi, 15 M 112 (1892), and see \usun, Marun Sun,h Rachoobur Small, 10 C 603 (1881), but in Bombay registration was held to be notice, Dhondo i Rayji, 20 B 230 (1895), which was doubted in Ram Chandra : Jurim, 22 B bsb (31 (1837) As to estoppel on real

own rang Brownt ma Shilipar Pin 49 B St. it p. /1 (1884) (1) Husem r Shankagur Cart, at B 113

^{(1898),} Sahadu Manaji v Derlya Jaba, 14 Bom L R 254 (1911)

⁽⁷⁾ Balakoo Lall v Jahuruckilharco Single 12 W R 79 (1869), where mortgagee sells under separato decrees for instalments of same debt see Dosibai i Ishwardis, 15 B 222 (1891)

⁽⁸⁾ Shantappa t Subr 10, 18 B 175 (1533)

⁽⁹⁾ Saudatmand Khan & Phul Kuar, 2 C W N 550 (1538), a c, 20 A 412, 20 1 A 146, Rajah Ramessur Pershada Rai Sham Krissen, 8 U W N 257 (1901), Gane 1 Prosal r Raj Coomer Smith, 30 C 617 (1903) [roth of appeal) As to whither there should be a mouler myestication into the question of valuation, see Ivishi Penshid Sugh : Jamuna Pershad Suigh 31 C 9-2 (1 101) B.C., 4 (3) \ _01

has not been adopted. If the property of which the sale is sought is a debt. and the Court receives notice from the allered debter that no debt exists the Court should satisfy itself as to the existence or otherwise of the debt, and if it comes to the conclusion that no debt exists should abstain from proceeding to sale (1) Should the Court base reason to believe that the property the sale of which was asked for was held by occupancy tenure, it is its duty to notify that fact in the proclamation as a warning to prospective hidders (2)

"Every application," etc. sub rule (3).—The Code has thus adopted a practice stated to have obtained in the Madras presidency (3) under which the decree holder is required to assist the Court by ascert inning and communic itmg the particulars to be specified in the proclamation of sale

"For the purpose of ascertaining," sub-rule (4) -An objection raised in the course of an inquiry under this rule cannot be treated as a claim under r 58 (formerly 278) the latter rule having reference to clams to and objections to attachment (4) Where a person came forward in response to a notice issued under this rule, and clauned a mortgage hen over the property, which was allowed and entered in the proclamation of sale, and the property was sold, it was held that the plaintiff (whose proper remedy was indicated) could not suo to have the sile set aside and a re-sale ordered of the property freed from the alleged incumbrance (5) The enquiry under this rule should be of the most summary character (6) An order by an executing Court under this rule, determining the valuation of immoveable properties attached and sought to be sold in execution of a decree is not appealable as a decree (7)

- (1) Every proclamation shall be made and published is as nearly as may be, in the manner presembed Mode of making proby rule 54, sub-rule (2). clamation.
- (2) Where the Court so duects, such proclamation shall also be published in the local official Gazette, or in a local newsnamer, or in both, and the costs of such publication shall be deemed to be costs of the sale.
- (3) Where property is divided into lots for the purpose of being sold separately, it shall not be necessary to make a separate proclamation for each lot, unless proper notice of the sale cannot, in the ammon of the Court, otherwise be given.

⁽I) Hardal Amthatbhai v Abhesang Veru, 4 B 323 (1880) , Strinh : Muckanachary, 10 M 194 (1887)

⁽²⁾ Basdeo Perasad v Juthan Ram, 27 A 684 (1905)

⁽³⁾ In Sm Giribala Debia : Vina Kumari, 5 C W N 497 (1900), it was pointed out that there was no express provision requiring the decree holder to notify meumbrances, though under the High Court rules he had to notify the existence of arrears In Ram Chandra t Jairam, 22 B 686, 691 (1897). it

was held that the applicant was bound to disclose his own liens

⁽⁴⁾ Bluku Bal Patul v Khemchand

hulershet, 14 B 369 (1890) (5) Parshotam Manji & Ganesh Vinayak,

²³ B 7.9 (1899)

⁽⁶⁾ Pran Singh v Janardan, 14 C L J 541 (1911)

⁽⁷⁾ Deola v Bansi, 16 C W N 124 (1911) Pauch Duar t Mant Raut, 16 C W. N. 970 (1912)

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"Shall be made "-See notes to last rule and to r 5, and as to fixing in Court House note (1) The words "as nearly as may be" have been inserted because the provision applies generally to sales of both kinds of property, and in the case of moveables the provisions of r 5 relating to immoveables cannot be applied in their entirety. An omission to carry out the provision of this rule is an irregularity, but does not render a sale void (2)

Advertisement -It is right that the Court should permit any advertise ment reasonably required which might have the effect of giving notice to all possible purchasers (3) The power of advertisement is now still further extended, and an option is given not to publish in the Gazette, which is not commonly read by the classes most affected The costs are as under the last Code costs in the sale (4) A want of correspondence between the advertisement and the schedule of the proclamation is an irregularity which night need to be set right by the Court if the sale was otherwise regular (5)

"Lots."—The substance of the decision (6) on the subject of the division of a joint area into lots has been incorporated. It had been previously held, prior to the amendment of the last Code by sect 29 of Act VII of 1888, that where several separate properties are attached there must be a separate proclamation (7)

68. Save in the ease of property of the kind described in the proviso to rule 43, no sale hereunder shall, Time of sale. without the consent in writing of the judgmentdebtor, take place until after the expiration of at least thirty days in the ease of immoveable property, and of at least fifteen days in the ease of moveable property, calculated from the date on which the copy of the proclamation has been affixed on the court-house of the Judge ordering the sale

"Consent"-An application made on the day of sale by the judgment debtor that a part only of the property should be sold, instead of the entirety, is not a consent under this rule (8)

Sale in contravention of rule -There has been a difference of opinion on the question whether contravention of the provisions of the section (230) which this rule replaces, is an illegality vitiating the sale, (9) or as is the case

(I) Moliunt Megh Lal Poorce : Slub Pershad Madi, 7 C 34 (1881)

(2) Nana Kumar Roy v Golam Chunder Dey, 18 C 422 (1831). Janernath Sahai a Dip Rani Koor, 22 C 871, 876 (1835)

(3) Rai Monm lra Bahadoor t Tuchmesh war Sinch I C W N clv (1897)

(1) Thus removing the difficulty dealt with in Krist Kishore e Soorjonath Sircar,

10 W R 3.4 (1508) () Reja Thaker Bermha t Jiban Ram (P C) 13 C 1 J 51 (1317), p 165

- (6) Pedro do Penha v Jalbhoy Ardeshir, 12 B 368 (1887)
- (7) Fripura Sundari v Durga Churn Pal, 11 C 74 (1884)
- (8) Harbuna Sahara Bharo Pershad 5 C
- 253 (1879)
- (9) Bikshi Nand : Wilak Chand, 7 1 -8J (1885), Sadhusaran : Panchdeo, II C 1 (1886), Jaso la t Mathura Des 9 1 511 (1887), Umga Prisa la Ja Lal Rai, H 1 303 (1851)

O. 21, r 69

a mere irregularity,(1) which did not avoid the sale in the absence of proof of substantial injury.

69. (1) The Court may, in its discretion, adjourn any sale (5. 25 Adjournment or stop- hereunder to a specified day and hour, and the officer conducting any such sale may in his discretion adjourn the sale, recording his reasons for such

adjournment:
Provided that, where the sale is made in, or within the precincts of, the court-house, no such adjournment shall be made

without the leave of the Court.
(2) Where a sale is adjourned under sub-rule (1) for a longer period than seven days, a fresh proclamation under rule 67 shall be made, unless the judgment-debtor consents to waive it.

(3) Every sale shall be stopped if, before the lot is knocked down, the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or proof is given to his satisfaction that the amount of such debt and costs has been paid into the Court which ordered the sale.

"The Court."—That is the Court executing the decree A Judge cannot order a Subordinate Judge to postpone a sale in a case pending before the Court of the latter officer (2)

Adjournment.—This is a matter of discretion Whether it should be grauted must be determined upon the particular facts, and proceedents (3) are not profitable. The Court must consider not only the interests of the indigment-debtor, but also the possibility of prejudice to the decree holder. When, however, a sale is adjourned, the provisions of the rule should be followed with exactitude (4). See notes to r. 66, ande, "Proclamation." It is the practice to place all properties intended for sale on a list, and to proceed with the sales from day to day, commencing on an appointed day. As each property is taken up in its turn, an adjournment of the sale of a particular property which is the

(1) Köhl Singh v Edal Singh, 31 C 385 (1904), Tassaduk Rasul Khan v Ahmad Husain, 21 C 66 (1833), 201 A 176, Abdul Nasia v Doohal Dass, 11 C L R 302 (1852), Mobiuth Wagh Lall Pooree v Shib Pershad Vadi, 7 C 34, 39 (1831), Venkata v Sama, 14 M 227 (1890), Bagal Chunder v Hame shur Mundal, 18 C 496 (1891), held also that it was not necessary that seet 290 of former Codo must be equally followed when adjournment under seet 291 of that Codo unloss all the judgment debtors was end fresh proclamation], Rahchandar Bahadur v Kamta Prasad, 4 A 300 (1882)

(2) Jaistee Ram v Bijai Kooer, 5 A H C R 177 (1873)

(3) Janakee Nath Mookerjee : Radha Mohum Chatterjee, 20 W R 130 (1873), Ahmed Reza e Khuporroomsea, 13 W R 281 (1870). Venkata Narasumha e Venkata Krishna, 5 M H C R 410 (1870), Govind Valckar e Bank of India, 4 B H C R 1A. C. J 164 (1877) [sala need not be closed on first day], Jastice Bam r Bijai Kooer, 5 A. H C R 177 (1873)

(4) Venkata Subharaya r Zammdar of Karvetmagar, 20 M. 159 (1896)

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consequence of such procedure is not an adjournment within the meaning of this rule (1)

"Any sale "-The rule applies to mortgage sales (2)

"Specified day and hour "-See notes to r 66, " Proclamation ' Assum ing that a fresh proclamation is necessary, an omission to issue it is only an irregu larity, and if it involved no loss to the judgment debtor, it cannot be set aside Thus where a sale was postponed and a fresh proclamation was issued directing it to be held on a certain date, but owing to the absence of the presiding officer on that date it took place some days later, the Privy Council held that it was not in contravention of sects 289 and 291 of the last Code (now represented by rules 66 and 69 of this Order) and that even if there had been any irregularity in it it could not be set aside in the absence of substantial injury (3) In such case the judgment debtor should object to the confirmation of sile and not seek to impeach it by suit (1)

"Fresh proclamation "-See notes to r 66, " Proclamation "

"Knocked down "-A bid may be withdrawn until the lot is knocked down (5)

Payment -An assignee after decree in a mortgage suit is entitled to deposit and where this was refused and the judgment creditor bought himself, the sale was set aside (6) A payment made to prevent a sale is not a voluntary payment whether made by the debter or a third party claiming the property (7)

- Nothing in rules 66 to 69 shall be deemed to apply to any case in which the execution of a decree Saving of certain has been transferred to the Collector sales
- Any deficiency of price which may happen on a re sale by icason of the purchaser's default, and all purchaser Defaulting expenses attending such re sale, shall be certianswerable for loss on re-sale. fied to the Court or to the Collector or subordinate of the Collector, as the case may be, by the officer or other person holding the sale, and shall, at the instance of either the decree holder or the judgment debtor, be recoverable from the

⁽¹⁾ Lal Mohun Chowdhry & Nunu Moha med, 17 C 152 (188J)

⁽²⁾ See Rajah Ram Singhja v Chunna Lal 19 1 205 (1837) Harjas Rai v Rameshwar, 20 A 354 (1898), see Bibi Jan Bibee v Sachi Bow & SC W N 684 , & c 31 C 863 , Bupun Waterindra 37 C 897 (1310) (1) "hakur Ran, Lal v Ravaneshwar

[/]with in tes C H C W A 1 (1711), 38

⁽¹⁾ Raja Tha 1c rain t Mar Hossam, (2) 13 C I J w), s c, J B m 1 R

^{83. 34} I A 37, 20 A 196, 11 C W N

⁽⁵⁾ Agra Bank v Hamlm 11 M 230 Kenaram v Kailash Chandra 18 C L J 53 (1913)

⁽⁶⁾ Bihari Lal & Ginpat Rat 10 A I (1887)

⁽⁷⁾ Omrito Lal Sucar : Ramdhun Clakee 18 W R 503 (1872) 1 atum a Khatoon v Wilhome I Jan Chowdry 12 W I 1 65 (1868) Act IN of 1872 sect 6J

O 21, r 71

defaulting purchaser under the processors relating to the execution of a decree for the payment of money

"Purchaser's default"—Sect 25t of Act VIII of 1859, so far as it relates to the subject matter of the present rule, rin "If the proceeds of the sale which is cientually consummated be less than the price bid by such defaulting purchaser the difference shall be leviable from him under the rules for enforcing the payment of money in satisfication of a decree of Court". The present wording was adopted by sect 230 of Act X of 1877, saw as indicated in italies. Of the alterations so indicated the only important ones are the addition of the words "or to the Collector or subordinate of the Collector, as the case may be, and "or other person" which were inside by the present Code.

The rule applies to re sales in consequence of default in payment of deposit under O XXI r 83, or in payment of purchase mency under O XXI r 83 and O XXI r 86, (1) and under O XXI r 87. (2) and whether the property be moveable or immoveable (3) even when the property is resid forthwith, owing to the judgment creditor repudiating the bid of his sgent, (4) also where the purchaser refuses to pay the purchase money owing to the same property being sold the next day in excention of a decree of another party who had a previous lien on the property, (3) but the re sale must be of the same property as first sold and under the same description and any substantial difference in matters required by O XXI r 66, disentitles the decree holder to recover any deficiency of price (6). It does not apply to a case where the purchaser makes default and a re-sale is ordered but does not take place owing to the property being sold in execution of another decree at the instance of another judgment creditor at a lower price (7)

"Any deficiency of price "-Does not melade interest on the price (8)

"Shall be certified '—The absence of a certificate will not prevent the decree holder or the judgment debtor from recovering the deficiency from the defaulter (9)

"At the instance of either the decree holder or the judgment debtor"—The judgment debtor is not bound to proceed under this rule and it does not debar him from having the re-sale set aside on the ground of irregularity, (10) nor does it debar the judgment creditor from proceeding inpon his decree against any other property of the judgment debtor than that ori_mally

Javherbarv Haribhar 5 B 575 (1881)
 Ramdhani v Rajram, 7 C 337 (1881)

⁽²⁾ Ramdhani v Rajrani, 7 C 337 (1881), Rajendra Nath v Ram Charan, 2 C W N 411 (1898)

⁽³⁾ Ramdhani t Rajrani, 7 C 337 (1881) (4) Vallabhan v Pangunni, 12 M 454

<sup>(1883)
(5)</sup> Sooral Buksh t Sree Kishen 6 W R

Vis 1.0 (1866)
(6) Baijnath Sahai t Moheep Varam, 15

C 535 (1883) Cf Gangadas t Bai Suraj, 36 B 329 (1911) 14 Bom L R 2.0 (7) Bisokha Mojeev Sonatun, 16 W R 14

<sup>(1871)
(8)</sup> Soory Bulsh v Sreekishen 9 W R.

⁽⁸⁾ Soorj Bulsh t Sreekishen 9 W R. 500 (1865)

⁽⁹⁾ Tapesi Lal t Devki Nandan, 19 A. 22 (1836)

⁽¹⁰⁾ Bepin Chunder v Modhoo Sudun, 12 C L. R 316 (1882)

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sold (1) He has not to wait till the deficiency is realized, (2) nor can the amount bid at the first sale be deducted from the decretal claim; (3) but the Calcutta High Court held that the judgment-debtor was entitled to credit for the full amount bid at the first sale (4)

"Defaulting purchaser."-The principal and not the agent hidding at the sale is liable, and recourse should be had against the principal, and on his proving his repudiation, the agent can be proceeded against on hreach of contract or for a false representation (5)

Suit.—A suit will lie to set aside an order under this rule (6)

Appeal.-An appeal, it was held, lay from an order rejecting a petition to recover from a defaulter who was the judgment-creditor, (7) and even where the defaulter was not a party to the suit (8) The Allahabad High Court, however, held that no appeal lay, (9) while the Calcutta High Court held that hoth an appeal and a second appeal lay from an order directing a defaulter to make good the deficiency (10)

(1) No holder of a decree in execution of which property is sold shall, without the express Decree-holder not to permission of the Court, bid for or purchase bid for or buy property without permission. the property.

Where a decree-holder purchases with such permission, the purchase-money and the amount due on Where decree-holder the deenee may, subject to the provisions of purchases. amount of section 13, be set off against one another, and decree may be taken as

payment. the Court excenting the decree shall enter up satisfaction of the decree in whole or in part accordingly.

(3) Where a decree-holder purchases, hy himself or through another person, without such permission, the Court may, if it . thinks fit, on the application of the judgment-debtor or any other person whose interests are affected by the sale, by order set aside the sale; and the costs of such application and order, and any deficiency of price which may happen on the re-sale and all expenses attending it, shall he paid by the decree-holder.

⁽¹⁾ Khiroda Moyee r Golun Somdanes, 21 W R 119 (1874), 13 B L, R 114

⁽²⁾ Gour Chunder: Chunder Coomir, SC

^{201 (1882) . 10} C L. R 236 (3) Anandrey Bapup r Shekh Bilu, 2 R.

^{102 (1878)} (4) Joobra Smg c Cour Buksh, 7 W R

^{110 (1567)} (5) Hune Ram e Hur Pershi I, 20 W R

⁵⁰ and 307 (1873)

⁽o) Papest Lal t Deckt Nandin, 19 1 22 (1536)

⁽⁷⁾ Vallabhan 1. Pansunm, 12 M 454 (1851). Amir Baksha i Venkatachala, 18 V 4 *3 (1 / 12)

⁽⁸⁾ Barnath Sahar v M heep Narum, 16

C. 535 (1881)

⁽d) Halu Isaksh v Raij Nath, 13 A 509 (1841). Dooki Nandan a Tapesi Lal, 14 1 201 (1532)

⁽¹⁰⁾ With Kish rea Guru Priced, 25 C 11 (1847), 2 C. W. N. 408, Rajen Ira Nath r. Run Charan, 2 C W N 411

1) 21, r 72

Bidding by decree holder. This rule is smular to sect. 201 of Act X of 1877, save that the last clause has been added by Act XIV of 1882, and the wints in italies by the present Gole. Of these, the words "adject to the promuting faction 73" have been substituted for "if he so desires," and the words "adject to treate are affected by "at "intensity in."

"Holder of a decree "—An as a preo of a decree under an oral agreement, the consulcration of which was not paid till after the sale, as not a decree holder and it is unnece ary for him to obtain permission to bal (1)

"Where a decree holder purchases."—He is bound to exercise the most scrupulous furness, if he or his agent discussible others from purchising, or opink dispurates the property (2) it is sufficient ground to set aside the sale (3). The Price Council have held that that is too sweeping in its terms and leave to hid puts him in the same position as any other purchaser (4). It would be different if the dispurating remarks were made by a purchaser who was not the desire holder (5). If the decree he teversed the sales under it to decree holders fall through but not the sales to bom fide purchasers who were not parties (6). A decree holder purchasing with leave to bid and set off must pay the decree holder repirately as the decree he teversed the sales under it to decree holders fall through but not the sales who have to bid and set off in the parties (6) to decree holder purchasing with leave to bid and set off must pay the deposition of the set aside for definit where all parties (nellading the Government as represented by the other or definition of the sales and the deposition (as he should be set as the deposition (as he should be set of the deposition (as he should be set as the deposition (as he should be set as the deposition (as he should be set as the deposition (as he should be set as the sales and the deposition (as he should be set as the sales and the sales are the sales as the sales and the sales are the sales and the sales are the sales as the sales are the sales and the sales are the sales are the sales and the sales are the sales are the sales are the sales are sales are the

"With such permission" - The decree holder is it olately bound to during permission before he can purchase (8). Leave to bid puts the decree holder in the same position is any other purchase (9).

"Be set off" This was not allowed where the provisions of sect 205 of the former Code applied (10) the set off being monaded to prevent trouble and into once the control of the substantial nature of the transaction, (11) and the set off can only be necepted for so much of the judgment debt as the assets applicable to its discharge may suffice to satisfy (12). The purchaser can only be compelled to refund the rateable amount due to the other stacking criditor, either by summary process in execution or by suit, or he may be given the option of electing a re-sale (13). The terms of the present rule make the set off subject to the provisions of sect 73. A mortgaged decree holder, with

- (1) Dakshma Mohan s Basumati 4 (W N 474 (1900)
- (2) Rukhmee Bullubh v Brojonath, 5 C 308 (1879)
- (3) Woopendro Nath : Brojendro Nath 7 C 346 (1881)
- (4) Mahomed Mira v Savvasi Vi aya 23 M 227 (1899), 27 I A 17, 4 C W N 228 Dakshina Mohun v Basumati, 4 C W N 474
- (5) Lalmohun v \unu Mohamed, 17 C 152 (1889), Cunga Naram v Annada Moyee, 12 (, L. R. 404 (1883)
- (6) Zain ul Abdin v Muhammad Asghar, 10 A. 166 (1887), 15 I A 12 Sct Umedmal

- v Srinath, 27 C 810 (1900) 4 C W V 632 (7) Gopal Singh v Roy Bunwari, 5 C L R
 - 181 (1879) (8) Rukhmee Bullubh 1 Brojonath, 5 C 308
 - (8) Rukhmee Bullubh i Brojonath, 5 C 308 (1879) (9) Mahabir Persha I i Magnaghten, 16 C
- 682 (1889 P C), 16 I A 107 p 114, Maho med Mira v Saviasi, 23 M 227 (1899 P C)
- (10) Shrinivas v Radhabai, 6 B 570 (1882) (11) Taponidi v Mathura Lall, 12 C 499 (1885)
- (12) Viraragava v Varada Ayyangar, 5 M 123 (1882)
- (13) Wadden v Chappani, 11 M 3 to (1887)

permission, purchasing the mortgaged property in execution of a decree, and setting off the price, which was insufficient to satisfy his decree, was not bound in subsequent execution proceedings to give eredit for the market value of the mortgaged property, but only for the actual purchase price, (1) but where the property sold was the equity of redemption, and after purchase the mortgagee decree holder applied for execution of the balance of his decree against the assignee of the mortgagor, he had to give credit for the price set off, plus the mortgage debt, that heing what an independent person would have had to pay if he had purchased (2) It would be otherwise if he had sold the mortgaged property (3) The mortgagee decree holder purchasing does not stand in a fiduciary position towards his mortgagor, (3) and is only obliged to give credit for the amount of his bid (4) In the Mofussil the purchaser may give a receipt for the amount due under his decree, instead of paying cash into Court (5)

"By himself or through another person "-A purchase by the undivided son of a decree holder is presumably with joint funds and is the purchase of the decree holder (6)

"The Court may "-It is discretionary with the Court to set aside a sale, and it will not do so if no substantial injury has resulted (7)

"On the application of the judgment debtor."—This cannot be done by suit as the dispute falls within sect 47, (8) even where the sale was procured by fraud, and purchased by a person who was not a party, a suit will not lie, at all events as against the judgment-creditor, (9) likewise where the sale was brought about secretly and the purchasers were benamedars of the decree holders, (10) nor will a suit for possession he after the sile has been set aside (11)

"By order set aside the sale "-A purchise by a dicree holder, without permission, is not apso facto void, it is a good sale until set uside, (12) but where he applied for permission and it has been refused and not be purchased benami, the sole use set uside (13)

Appeal -An appeal has from an order under this rule under O XLIII r 1 (f) But it was held that no appeal by from an order refusing permission

⁽¹⁾ Muhammad Husen : Thakur Dharam,

¹⁸ A 31 (1895) Janakammal, 18 M (2) Krishnasami

^{1.3 (1893)}

⁽³⁾ Sheenath Diss : Jinki Prosad, 16 (132 (1888), Mahabir Pershad e Macna hien, 16 C 682 (1883 P C), 16 I A 107, p 114

⁽⁴⁾ Gunga Pershad v Jouahir, 19 C 4 (1891)

⁽⁵⁾ Khellat Chunder : Keshub Chunder, 16 W R 46 (1871) This decision was before there was any provision for set off in the

⁽⁶⁾ Narayan + Anaji 5 B 130 (1880) (7) Mathura Dave Nathum Lall, 11 C 731

⁽¹⁸⁵⁰⁾

⁽⁴⁾ Vierrahare i Venkata largar, 5 M

^{217 (1882),} Genu i Sikharim, 22 B 271

⁽¹⁸⁹⁶⁾ (9) Sikhiram t Dimodir, 9 B 468 (158), Mohendro Naram r. Gopal Mondal, 17 C 71 1 (1890)

⁽¹⁰⁾ Durga Knoware Balwant Sung 23 A

^{478 (1901)}

⁽¹¹⁾ Viraraghava e Venkati, 16 M 287

⁽¹²⁾ In the matter of Vierapah Chetty, 14 W R 495 (1870), s c, n B L R VIP 37, Lacherban : Hariblan, 5 B 575 (1881) . (hustamanray : Vallaba, 11 B 588 (1897)

⁽¹³⁾ Wahemed Gazer t Ram Loll, 10 C 757 (1881) I H wed in Thatha Ninck i Kon la Red L. 32 M 242 (1909)

to a decree biller to bill but it did acting an order confirming or setting issue or refusers to set ande a side (1). No second appeal has from an order on appeal under this rule acquit standing that seet 17 hars a senarate suit in such 2 Care 121

No officer or other person having any duty to perform is 29 in connection with any sale shall, either Pratrict on on 6 dd no directly or indirectly, bid for, acquire or er purchase by officers attempt to acquire any interest in the property sold.

Bldding by officers.-This rule corresponds with sect 292 of Act X of 1577, ave if it the words ' or other person ' have been added by the pre ent Code which dea substituted ' the property off for ' any property sold at such , ile

'No officer' - The plender of a party is not an other, (3) but where such a therder acted unproperly, a sale to him was set aside (1). The Calcutta High Court have however held it was nanroner for a vaked acting in execution are colings to male himself in any way interested in the purchase. (3) and in the North West aleaders are directed by circular orders not to nurchase projects sold in execution of decrees in which they are concerned and it was inexpedient that they should by purchase become the persons entitled to execute decrees in such suits (6) The words added give the rule a much wider scope No Indee legal practitioner, or officer connected with any Court is allowed to deal in actional le claims by sect 136 of the Transfer of Property Act (7)

Sale of moreable property

(1) Where the property to be sold is agricultural produce. Sale of amountural the sale shall be held .-

(a) if such produce is a growing crop, on or near the land on which such crop has grown, or,

(b) if such produce has been cut or gathered, at or near the threshing floor or place for treading out grain or the lile or fodder stack on or in which it is deposited

Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

Loduce

⁽¹⁾ Durga Sun ları t Govinda Chandra 10 (368 (1883) Jodoonath t Brojo Mohun, 13 C 174 (1886), ho tha linjung Wa Hum 15 C W N 862 (P C 1911) . 38 C 717 14

⁽ L J 241, 38 I A 126 (2) Bhagbut Lall v Narku Roy, 21 C 789

⁽³⁾ Alagurmann : Ramanathan, 10 M 111

⁽¹⁸⁸⁶⁾

⁽⁴⁾ Subrarayu lu v Kotayya 15 V 389

⁽¹⁸⁹²⁾

^{(5) \}undecput v Urquhart, 13 W R 209 (1870) 4 B L R 181 see also Wajed Hossein v Hafiz Ahmed 17 W R 480 (1872)

⁽⁶⁾ Gosham Jag Roop t Chingun Lal, 2 N W P II C R 46 (1870)

⁽⁷⁾ Secalso Rathnasamı v Subramanya, 11 M 56 (1887), and Singaracharlu v Sivabai.

¹¹ M 498 (1888)

permission, purchasing the mortgaged property in execution of a decree, and setting off the price, which was insufficient to satisfy his decree, was not bound in subsequent execution proceedings to give eredit for the market value of the mortgaged property, but only for the actual purchase price, (1) but where the property sold was the equity of redemption, and after purchase the mortgagec decree holder applied for execution of the balance of his decree against the assignee of the mortgagor, he had to give credit for the price set off, plus the mortgage debt, that being what an independent person would have had to pry if he had purchased (2) It would be otherwise if he had sold the mortgaged property (3) The mortgagee decree holder purchasing does not stand in a fiduciary position towards his mortgagor, (3) and is only obliged to give credit for the amount of his bid (4) In the Mofussil the purchaser may give a receipt for the amount due under his decree, instead of paying each into Court (5)

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- 153 (1893) (3) Shonath Doss 1 Junks Prosad, 16 C
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- (1631)(5) Khellat Chunder : Keshub Chunder, 16 W R 46 (1871) This decision a is before
- there was any provision for set off in the (6) Narayan t Anapt 5 B 130 (1880)
- (7) Mathura Dave Nathani Lall, 11 C 711
- (8) Virginhays a Venkatichary ir. 5 M

- 217 (1882), Genu & Sakharam, 22 B 271
- (1896)(9) Sakharam a Damodar, 9 B 468 (1881) Mohendro Naram z Gopal Mondul, 17 C 7(1)
- (1890)(10) Durga Kunwar & Balwant Smg 23 A
- 478 (1901) (11) Vararaghava v Venkata, 16 M 287
- (1892)
- (12) In the matter of Veerapah Chetty, 11 W R 405 (1870), s c, 6 B L R App 37. Jacherbar v Haribhu, 5 B 575 (1881) . Chintamanray v Vith ib ii, 11 B 588 (1887)
 - (LI) Mahome I Gazenv Ram Loll, 106 7 7 (1851) fellowed in Thathu Naick t Konlu Red h. 32 M 212 (1903)

to a decree holder to hal, but it did against an order confirming or setting aside or refusing to set aside a side (I) No second appeal has from an order on anneal under this rule, not with standing that seet 17 bars a separate suit in such a case (2)

No officer or other person having any duty to perform is in connection with any sale shall, either Restriction on bidding or purchase by officers directly or indirectly, bid for, acquire or attempt to acquire any interest in the property sold.

Bidding by officers -This rule corresponds with sect 292 of Act X of 1877, rave that the words " or other person" have been added by the present Code, which also substituted "the property sold for " any property sold at such cole

"No officer "-The pleader of a party is not an other, (3) but where such a pleader acted improperly, a sale to him was set aside (1) The Calcutta High Court have, however held it was improper for a vakeel acting in execution proceedings to make himself in any way interested in the purchase (5) and in the North West pleaders are directed by circular orders not to purchase property sold in execution of decrees in which they are concerned and it was inexpedient that they should by purchase become the persons entitled to execute decrees in such suits (6). The words added give the rule a much wider scope No Judge legal practitioner, or officer connected with any Court is allowed to deal in actionable claims by sect 136 of the Transfer of Property Act (7)

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Provided that the Court may direct the sale to be held at the nearest place of public resort, if it is of opinion that the produce is thereby likely to sell to greater advantage

15 C W N 862 (P C 1911), 38 C 717 14 C L J 241, 38 I A 126 (2) Bhagbut Lall t Natku Roy, 21 C 789

(1894)(3) Alagursami t Ramanathan, 10 M III

(5) Nundeeput : Urqubart, 13 W R 209 (1870), 4 B L R 181, see also Waged Hossem v Hafiz Ahmed 17 W R 486 (1872)

(6) Gosham Jag Roop t Chingun Lal, 2 N W P H C R 46 (1876)

(7) Stealso Rathnasamı v Subramanya, 11 M 56 (1887) and Singaracharlu v Sivabai.

11 M 498 (1588)

⁽I) Durga Sundarı v Govinda Chandra 10 C 368 (1883) Jodoonath : Brojo Mohun 13 C 174 (1886) Ao Tha Haym v Ma Ham.

⁽⁴⁾ Subrarayudu + Aotayya 15 W 389

sect 252 of Act VIII of 1859 By sect 298 of Act X of 1877, the words "publishing or conducting" were inserted, and instead of the words "by reason of such irregularity may recover damages by a suit in Court," the words "by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property and for compensation in default of such recovery" were substituted

"Irregularity"—The omission in the sale proclamation of the amount of the deerce is not an irregularity, (1) not the omission of the service of the notification of sale on the judgment debtor or in his village (2). The fact that the amount really due is overstated will not invalidate a sale in execution, (3) but if the sale proclamation warrants a title the injured party may apply to set the sale aside, (4) it not being a more irregularity, (5) and the owner can follow the property in the hands of the purch-ser (5).

"Any person"—If a person sucs to recover possession of what was taken in excess of the interest of a judgment debtor, without seeking to interfere with the sale in execution of the interest of the judgment debtor, he need not sue within the period of limitation prescribed by law for a suit to set aside a sale (6)

"At the hand of any other person"—A decree holder is hable to be soud by the rightful owner for the value of property not belonging to the judgment debtor sold in execution (7) The latter part of this rule codifies the decision in Mohanund Haldar v Akial (8)

79. (1) Where the property sold is moveable property of moveable of which actual seizure has been made, it shall be delivered to the purchaser.

property in the possession of some person other than the judgment debtor, the delivery thereof to the purchaser shall be made by giving notice to the person in possession prohibiting him from delivering possession of the property to any person except the purchaser.

(3) Where the property sold is a debt not secured by a negotiable instrument, or is a share in a corporation, the delivery thereof shall be made by a written order of the Court prohibiting the creditor from receiving the debt or any interest thereon, and

⁽¹⁾ Kassee Nauth : Hullodhur, 2 W R 60 (1865)

⁽²⁾ Romesh Chunder : Jadob Chunder, 6 W. R. Civ. Ref. 14 (1866)

⁽³⁾ Chutter Singh t Dhurrum, I & W P II C R 1 (1869)

⁽⁴⁾ Framji Besanji i Hormsejf, 2 B 2 J (1877)

^{1 (51.3 %} R 1

⁽⁵⁾ Wohanund Haldarı Akial, 9 W R 118 (1568)

⁽⁶⁾ Sharafat t Lachimi Narain, 8 \ W P H C R 288 (1875)

⁽⁷⁾ Kanaye Pershad a Hur Chan !, 14 W R 1.0 (1870)

⁽b) JW R 118 (15(8)

the debtor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the corporation from perimiting any such transfer or miking any such payment to any person except the purchaser.

Notice -Sub rule (2) has been slightly remodelled. For form of notice unl r this section, see Form No. 116, Schedule IV, of former Code

Delivery of debts and shares, sub rulo (3)—In the under mentioned case (I) the Court sail, "No question has been raised as to whether the order required by sect 301 of the Code was served. The presumption, therefore, is that this order was served, and it may be a question whether, if the order after sale required by sect 301 were served, the service of the prohibitory order, which is the form of attachment before sale required by the Code, is unaterial or is wholly muniteral." See Schedule IV, I orms 117, 118 of last Code. In this as in other parts of the Code the reference to public complimes in connection with shares has been omitted, it being presumably considered that the word "corporation" sufficiently covers the ease.

80. (1) Where the execution of a document or the endorse-satisfies the negotiable instruments and shares. Instrument or a share in a corporation is standing is required to transfer such negotiable instrument or share, the Judge or such officer as he may appoint in this behalf may execute such document or make such endorsement as may be necessary, and such execution or endorsement shall have the same effect as an execution or endorsement by the party

(2) Such execution or endorsement may be in the following

form, namely -

A. B. by C. D., Judge of the Court of (or as the case may le),

in a suit by E. F. against A B.

(3) Until the transfer of such negotiable instrument or share, the Court may, by order, appoint some person to receive any interest or dividend due thereon and to sign a receipt for the same; and any receipt so signed shall be as valid and effectual for all purposes as if the same had been signed by the party himself

Transferof negotiable instruments and shares—This rule corresponds with sect 267 of the Code of 1859 and (with slight alterations) 302 of the last

⁽¹⁾ Debendra Kumar Mandil v Rup Lall Das, 12 C 546, 548, 549 (1886)

sect 252 of Act VIII of 1859 By sect 298 of Act X of 1877, the words "publish ing or conducting" were inserted, and instead of the words "by reason of such irregularity may recover danges by a suit in Court," the words "by reason of such irregularity at the hand of any other person may institute a suit against him for compensation, or (if such other person be the purchaser) for the recovery of the specific property and for compensation in default of such recovery" were substituted

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(157.)

⁽¹⁾ Nasseo Nauth v Hullodhur, 2 W R 60 (5) Mohanund Haldar v Akial, 9 W R 118 (1865) (1868)

⁽²⁾ Romesh Chunder v Jadob Chun Icr. 6

W R Co Ref 14 (1866)
(3) Chutter Singh t Dhurrum, 1 N W P

H (R 1 (1869) 4) Framji B sanji t Hormasji 2 B 2"J

⁽⁶⁾ Sharafat v Lachmi Naram, S N W P

II (R 258 (1875)

⁽⁷⁾ Kanaye Pershad v Hur Chan l, 11 W R 120 (1870)

⁽S) J W R 118 (1868)

the deltor from making payment thereof to any person except the purchaser, or prohibiting the person in whose name the share may be standing from making any transfer of the share to any person except the purchaser, or receiving payment of any dividend or interest thereon, and the manager, secretary or other proper officer of the conporation from permitting any such transfer or making any such payment to any person except the purchaser.

Notice —Sub rule (2) has been slightly remodelled —For form of notice under this section, see Form No. 146, Schedule IV, of former Code.

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Transfer of negotiable instruments and shares.—This rule corresponds with sect 267 of the Code of 1859 and (with slight alterations) 202 of the last.

As to reference to corporation, see notes to last rule A held shares in a company which were duly seized and sold in execution of a decree against him to B The Judge, acting under the corresponding section of the Code of 1859, executed deeds of transfer to the purchaser, and the company was ordered to register the transfer in their hooks, but refused to comply with the order The purchaser was unable to ohtain from A the certificates of the shares Held that, although the company's deed of settlement (under which the Act of Parliament declared that the company should be regulated) gave to the Board of Directors power of approval or disapproval of intending shareholders, they had no option as to registering a shareholder who purchased a share in execution, and that they were bound to grant him, under the circumstances, new share certificates (1)

In the case of any moveable property not herem Vesting order in case before provided for, the Court may make an of other property. order vesting such property in the purchaser or as he may direct, and such property shall vest accordingly

Sale of immoreable property

82. Sales of immoveable property in execution of decrees may be ordered by any Court other than What Courts may order sales. a Comt of Small Causes.

"Sales of immoveable property"-This rule is similar to sect 304 of Act X of 1877 A decree charging land is an interest in immoveable pro perty (2) Huts are immoveable property (3) A decree declaring a decree holder's hen on property without distinctly declaring his right to sell the same may be executed against that property either by attachment and sale or by attachment and management (4) A debt secured by a mortgage hen upon immoveable property, more especially if the mortgages is not in possession, is not immoveable property (5) A Munsif cannot sell property lying outside his jurisdiction (6)

"Court of Small Causes"—If such a Court sells immoveable property the purchaser acquires no title (7) The rights and interests under a mortgage of munoveable property is not saleable by a Court of Small Cruses (8)

⁽¹⁾ Toolsce Dass Nundy : East Indian Rulway Co , I Ind. Jur N S 258 (1862)

⁽²⁾ Bhawani Kuar t Gulab Rat, I A 348 (1877), Sami lyyarı Krishnisami 10 U 16J (1856)

⁽³⁾ Nattoo Weah : Nun I Ranes, 17 W R 209 (1872)

⁽⁴⁾ Nu ldyalasheo t Reza, 15 W R 337 (1871)

^() Debendra Kumarı Rup Lall, 12 € 546

⁽¹⁸⁸⁶⁾ See Nataraya Iyer v South Indian Bank of Tmovelly, 37 M 51 (1914) and notes

on O 21, r 46 and 51 a ile (6) Syud Nowab Ali & Shaikh Uzir, 23 W

R 233 (1875)

⁽⁷⁾ Nattoo Meah t Nund Rance, 17 W R 309 (1872)

⁽⁸⁾ Bullo Mull t Maharoop 6 \ W P

H C R 120 (1874)

83. (1, Where an order for the sale of immoveable is. property bas been made, if the judgment-

Postponement of sals to enable judgmentdebtor to raise amount of decree.

debtor can satisfy the Court that there is reason to believe that the amount of the decree may be raised by the mortgage or

lease or private sale of such property, or some part thereof, or of any other immoveable property of the judgment-debtor, the Court may, on his application, postpone the sale of the property comprised in the order for sale on such terms and for such period as it thinks proper, to enable him to raise the amount.

(2) In such ease the Court shall grant a certificate to the judgment-dehtor authorizing him within a period to he mentioned therem, and notwithstanding anything contained in

section 64, to make the proposed mortgage, lease or sale :

Provided that all mouses payable under such mortgage, lease or sale shall be paid, not to the judgment-debtor, but, saic in so far as a decree-holder is entitled to set off such money under the provisions of rule 72, into Court:

Provided also that no mortgage, lease or sale under this rule shall become absolute until it has been confirmed by the

Court. (3) Nothing in this rule shall be deemed to apply to a sale of property directed to be sold in execution of a decree for sale in enforcement of a mortgage of, or charge on, such property.

Postponement of sale.- I ue first clause of this rule corresponds with part of sect 243 of Act VIII of 1859 The rest, save the last proviso in the second clause, and the portions in italies, was added by sect 305 of Act X of 1877 That Act also appended a clause . " When such certificate has been granted and so long as it remains in force the provisions of section 248 shall not apply " This was repealed by Act XIV of 1882, which added the last proviso in the second clause, and also added the words, "and notwithstanding anything contained in sect 276 [sect 64]" to the second clause The words in italies have been added by the present Code The Bombay High Court held that the corresponding section to this rule applied to a mortgage decree, declaring that certain properties be sold in satisfaction of the mortgage debt , (1) but the Calcutta High Court held otherwise; (2) and by notification such section was made applicable to proceedings after decree in mortgage suits, but now the third clause of the rule distinctly excludes such proceedings, so far as Bengal and Assam were concerned (3) The rule does not apply to suits for rent in Bengal (4)

Krishnaji v Mahadev, 25 B 104 (1900)

⁽²⁾ Womda Khanum t Rajroop, 3 C 335 (1877), 1 C L R 295

⁽³⁾ See Calcutta Gazette of 13th April, 1592.

Part 1 p. 414, Assam Gazette of 16th April, 1892, Part III p 272

⁽⁴⁾ Bengal Tenancy Act, VIII. of 1885, s. 148 (a)

"Sale of immoveable property."—This was held to include all sales of immoveable property, the decision being given in reference to a decree on most gage, (1) but property directed to be sold in execution of a decree for the enforcement of a mortgage or charge is now excluded by the third clause of the present rule.

"The amount of the decree"—That is, the whole amount due on the decree No mortgage will be sanctioned, or certificate granted, or the mortgage confirmed, unless the decree can be fully paid off (2)

"The Court may postpone the sale "-This is an enabling rule, and qualifies the prohibitions contained in sect 64. On compliance with the con ditions of this rule a private alienation, notwithstanding sect 64, becomes absolute, even against all claims enforceable under the attachment (3) Post ponement is discretionary with the Court (4) It should exercise its discretion, and if it finds that a fair case has been made out, it should postpone the sale, (5) but the judgment debtor must most distinctly show that the money due can be well raised in some way other than by immediate sale, and that the ereditor will not be put to loss, (6) and that the debt will be paid off in a reasonable time, (7) twenty years, (7) two or three years, (8) and even one year are un icasonable, (9) but six months has been considered reasonable (7) Where, however, the property has been put up to auction in execution and bids have been made, the Court cannot postpone the sale merely on the representation of a judgment debtor that he can obtain a higher price by private transfer, there being no reasonable ground to believe that the judgment debt would be realized thereby (10)

"Authorizing him"—The authority is only to the judgment debtor to whom it is granted, and the sale in pursuance thereof does not affect the share of another judgment debtor (11) Where the defendant is the guardian of a minor under the Guardian and Wards Act of 1890, the authority under this rule will not give him power to mortgage unless he also gets the permission of the Court which appointed him guardian (12) The Court cannot itself give a lease or mortgage. It can only giant the debtor time to do so himself (13) The rule is enabling, and qualifies the provision contained in sect 64. On compliance with

⁽¹⁾ Krishnaji i Mahadev, 25 B 104 (1900) (2) Gurus imi v Venkatsami, 14 M 277

⁽¹⁸³⁰⁾ (3) Shivlingappa v Chanbasappa, 30 B 337

^{(1905), 8} B L R 10

⁽⁴⁾ Bulkenman t. Land Mortgage Bank, II C. 211 (1881), 12 1 N 7, p. 10

⁽⁵⁾ Kishen Co marcot Colub Coomarce, I.

⁽⁶⁾ Ram Ruttun t Land Mortgage Bark, 17 W. R. 103 (1872)

⁽⁷⁾ Mohin o Mohun t Rum Kunt, 15 W R 322 (1971), see also Relmum t Khaja Mal i d, o M H C 272 (1870)

⁽⁸⁾ Suhuj Naram v Ram Pershad 21

W R 146 (1874)

 ⁽⁹⁾ Ram Ruttun v Land Mortgue Bank,
 17 W R 1/3 (1872), 1 yaz ood deen t
 Giraudh Singh, 2 N W P H C R 1 (1870)
 (10) Iuchinto Naram t Bhyroe, 1 N W P

^[11] C. R. Mas. 11 (1960) (11) Danappa. t. Yammall 1, 20 B 37J

⁽¹³⁰²⁾ (12) Dittiram v. Cangaram ad B a57

⁽¹⁵⁹⁸⁾

⁽¹³⁾ Inchreque e Jugul Indir, W 1.

1 irst Schld. 0. 21, r. 84

the conditions of the rule, a private alienation, notwithstanding sect. 64, becomes absolute, even against all claims enforceable under the attachment (1)

"Until it has been confirmed."—When in pursuance of a certificate to sell granted by two Courts the attached property was sold, and the sale confirmed by the superior of the two Courts, confirmation by the other Court was unnecessary (2)

Appeal.—See sect. 17.

84. (1) On every sale of immoveable property the person [s. Deposit by purchaser and re sale on default declared to be the purchaser shall pay immediately after such declaration a deposit of the officer or other person conducting the sale, and, in default of such deposit, the property shall forthwith be re-sold.

(2) Where the decree-holder is the purchaser and is entitled to set off the purchase-money under rule 72, the Court may dispense

with the requirements of this rule.

"Deposit."—The officer conducting the sale cannot mist upon a deposit being made before acceptance of a bilding, but if it appears that persons without means have been put forward to make sham bildings, and fraudulently frustrate the sale, he would be justified in inquiring into the frustworthiness of the hidder before accepting his bid (3). A decree-holder of the party to whom the lot is knocked down is equally bound to make the prescribed deposit as any other auction-purchaser (4). But where all parties interested waived their right to a deposit, it was held the sale should not be set aside (6). A relaxation of the rule is now made in the case mentioned in the second sub-rule. If there is any dispute as to whether the deposit was offered or not it should be decided by the Judge before commencing a second sale (6). There has been a conflict of opinion whether, if the deposit is not made as required, the sale is no sale at all, (7) or whether this circumstance is an irregulantly only (8). The first opinion is no longer law (9). But it has been recently held that if the balance of purchase-

197 (1883)

⁽¹⁾ Shivim_oappa t Chanbasappa, 30 B 337 (1903) (2) Andanapa t Bhimrao, 19 B 539

⁽¹⁸⁹⁴⁾ (3) Rajah Muhesh Naram t Kishanund Misr, 9 M. I. A. 324, 328, 341 (1862). and

Misr, 9 M. I. A. 324, 328, 341 (1862), and the sham hidder would be hable under seef 223 of the Penal Code for obstructing the sale. In the matter of Woheah Chunder Wookerjee, 1864, W. R. Wise 3

⁽⁴⁾ Chulkoo Dutt Jhr e Leclanand Smgh, 1864, W R Misc 30

⁽⁵⁾ Gopal Singh r Roy Bunwaree Lall, 5 C. L. R 181 (1873)

⁽t) Kuppayyan t Ramasami Ayyan, 6 M.

⁽⁷⁾ Intizam Ali Khan t Naram Singh, 5 A 316 (1883)

⁽⁸⁾ Venkata v Sama, 14 M 227 (1850) In Buspeen Chunder Shiekdar v Purtshnath Biswas, 9 C 93 (1852), it was held that there was such substantial injury that the sale should be act aside, Bhun Singh r. Sarwan Singh, 16 C 33 (1855)

⁽⁹⁾ Minnad Baksh e Lalta Prasad, 25 A 235 (1905), overruling Intiasin Ali Khan t. Naram Singh, supra In Amir B guin e Bank of Upper India, Ltd., 30 A, 273 (1908) in which the latter cas was followed, the former was not cited

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money is not piid, there is no sile under the Code (1). The more making of the last bid does not conclude the sale, for the conclusion of a sale it is necessary for the sale officer to accept the final bid and to make a declaration who is the purchaser and to order him to pay him the deposit under this rule (2)

"Default"—The sale is to be held "forthwith,' so a fresh proclamation of situment of the hour of sale is not necessary (3). The sale is not to be adjourned. The putting up of the property again, and soliciting fresh bids is a continuation of the original sale a part and parcel of the proceedings which had their origin in the first putting up of the property, and which do not come to an end until the property has been knocked down to a purchaser, and that purchaser has made the statutory deposit (4). An officer conducting a second sale is not bound to commence from the next highest bidded had that made by the defaulter. He may do so if the next highest bidder is willing to abide by his bid otherwise he should commence the sale de nevo (5).

Loss on re-sale —Under r 71 a defaulting purchaser is inswarable for loss by 10 and . It has been held that the corresponding section in the last Code upplied to 10 and shere dealt with and that the first purchaser could be compelled to pay the difference between the first and the second sales (6)

85 The full amount of purchase money payable shall be time for payment in maid by the purchaser into Court before the court closes on the fifteenth day from the sale of the property

Provided that, in calculating the amount to be so paid into Court, the purchaser shall have the advantage of any set off to which

he may be entitled under rule 72

Shall be paid. The provisions of the rule in imperative and must be given effect to (7). In default of payment the deposit is forfested if the Court thinks fit under the next rule (8) and the property resold under r. 85, and the defaulting purchas reconservable for loss by resale (9). The proviso to the rule is now.

- (1) Munshi Mahon ed Ali t Kibria 15 C W X 350 (1911)
- (a) Munshi Lal t 1 am Naram 35 1 65 (131.)
- (3) Vallabhan t langunni, 12 W 454 458 (1889)
- (4) Bhun Sugh : Sarway Sugh 16 C 33 is (1858), but see Vallabhan : I mgunni L. It dol at p 4 S (1889) when it was 1 H that for He purposes of r 11 thre is a reale
- (a) Gour Mockh Sigh t Lalls Cour Su k r l W l Miss II (15t4)
- Su k.r. I.W. I. Miss. II (1864) (Randta i Sahart Lajram Koost 7 C

- 337 (ISSI) Vallabhan : Purgunni 12 M
- 454 (158J)
- (7) Sambasiya Ayyar i Vydinadasin i -5 M 535 (1501) Munshi Mahomed Mi i Kibria L. C. W. N 350 (1511)
- (s) See Mathura t Gauri Shankar 3. A NO (1310) (this Code gives the Court a discretion as a forfeiting deposit) and a tat r bb
- (i) dash right Harthar off o (1881) Landhatt Salair Lajrant hoort "(33" (1881) Vallall in r Lar₀ nm L. M. 4.4 (1881)

"Into Gourt"—These words have been inserted to render it clear that the purchaser is bound to see that the money reaches the Court in time. The nost office is not the acent of the Court (1)

Date of payment.—Sect 307 of the last Code, which the rule replaces, rule before the Court closes on the fitteenth day after the sale of the property exclusive of such day, (2) or f the fifteenth day to a Sunday or dute holiday, then on the first office day after the fifteenth day." Instead of the words "after" and "credusic of such day," the present rule uses the word "from," which will have the same effect. The provisions relative to the occurrence of a Sunday have been omitted because the matter is sufficiently covered by sect 10 of the General Clauses Act of 1897. In these two respects, therefore, the former section and the present rule are the same. Under the last Code, however, it was held that days (as during the vacation) when the Court was closed but the office was open were not holidays within the meaning of the former section (3). The practice of the Original Side of the High Court is that payment of interest follows as a matter of course, when the purchaser of property at a Registrar's sale is out of time in paying into Court the balance of his purchase mony (4).

86. In default of payment within the period meutioned is procedure in default of in the last preceding rule, the deposit may, payment of the Court thinks fit, after defraying the expenses of the sale, be forfeited to the Government, and the property shall be re-sold, and the defaulting purchaser shall forfeit all elaim to the property or to any part of the sum for which it may subsequently be sold

Default —This rule corresponds with a portion of sect 254 of Act VIII of 1859 and with sect 308 of Acts X of 1877 and XIV of 1882, save that the words in italics have been substituted for the word "shall" appearing in the earlier Codes The former section has been applied to proceedings in execution under a mortgage decree in Bengal and Assam (5)

"In default of payment."—Under the rules of the Madras High Court payment into the Government Treasury is sufficient payment, (6) likewise, it is a sufficient compliance with the decree, if the judgment debtor bring the mone into Court within the specified time and diligently take the necessary steps required by departmental rules for the actual payment into the Treasury (7)

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⁽¹⁾ Ram Chandra Krishnapa v Subrao Jithoha, 22 B 415 (1893)

Vithoba, 22 B 415 (1893)
(2) See Amance c Koorban Ali, 3 Agra

⁽³⁾ Motiram Raghunath v Binraj, 20 B 745 (1895)

⁽⁴⁾ hange Lall Dass r Shama Churn Dawn, 21 C 566 (1834), which deals also with costs as reasons the purchaser when

there has been delay on the part of the party having carriage of the proceedings

⁽⁵⁾ Calculia Gazette of 13th April, 1892, Part I. p. 414. Assam Gazette of 16th April, 1892, Part III p. 272

⁽⁶⁾ Srimvasa r Malayacha, 7 M. 211 (1883)

⁽⁷⁾ Gujadhur v Naik Paurce, 5 (525 (1882)

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"Be forfeited to Government"—This is imposed in order to prevent waste of the Court's time in conducting re-sales. The fact that the decree holder and the judgment debtor do not ask for a re-sale was held to be no reason why Government should forego the forfeiture, (1) but the wording of the Code was then imperative, "shall be forfeited". The modification introduced by the present Code makes it discretionary with the Court to direct the forfeiture or not, and has been inserted to prevent hardship caused in such cases as the last mentioned (2)

Appeal.—An appeal under the last Code lay from an order under the corresponding section where the defaulting purchaser attached the decree in execution of which the property was sold to him, and a petition for revision was held not to be maintainable (3) According to this decision an appeal lies under sect 47, ante

Notification on re-sale, payment of the purchase-money within the period allowed for such payment, shall be made after the issue of a fresh proclamation in the manner and for the period hereinbefore prescribed for the sale.

"Fresh proclamation"—This rule is sect 309 of the last Code A fresh notification is not prescribed in the case of every re sale, but only when the re sale is in default of pryment of the purchase money within the time allowed for such payment (4) The rule does not apply to a postponed sale (5) or to a case in which the property is put up again and sold forthwith under r 84, ante (6)

88. Where the property sold is a share of undivided im
Bid of co-sharer to moveable property and two or more persons, of whom one is a co-sharer, respectively bid the same sum for such property on for any lot, the bid shall be deemed to be the bid of the co-sharer.

Bidding by co sharer—Ihis rule modifies the terms of sect 11 of Act XXIII of 1861, which provided that where "a share of a putticidarce estab proping recenue to government" was sold, "if the lot shall have been knocked down to a stranger, any co sharer other than the judgment debtor, or any other member of the co parcewary, may claim to take the share sold at the sum at which the lot was knocked down. Provided that the claim be made on the day of sale and that the claimant fulfil all the conditions of the sale." The rule was altered to its present form by seed 310 of Act X of 1877, sive that this rule omits the words "in execution of a decree" after the words "property sid" ind substitutes the words but the same sum for

⁽¹⁾ Sambasiva v Vydinadasami, 23 M 535 (1901)

⁽²⁾ Mathum : Gauri Manker, 32 A 380

⁽³⁾ Sah Man Mull t Kanapasabapati 16 M . + (1832)

⁽⁴⁾ Vallabhan : Pu gunni 12 M 451, 158 (1599)

⁽¹⁾ He ire : Nath Bhutt v Rajah Chund r Schhar I W R Mise 3 (1861)

⁽⁶⁾ Rajen ira Nath Roy (Rum (haran Sinha, 2 C W N 111 (1838)

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such property or for any lot, the bid shall be deemed to be the bid ' for " advance the same sum at any bidding at such sale, such bidding shall be deemed to be the bidding " as it appeared in the Code of 1877

"Is a share of undivided immoveable property "-This does not in clude the interest of a mortgageo in such a share, and this rule does not apply to the sale of such interest (1) Sect 14 of Act XXIII of 1861 was held not to apply to land sold in execution of a decree of a Resenue Court (2)

"Co sharer "-An officer conducting a sale of land which was a share of a nutteedarce estate had to take notice of a claim made by a person under sect 14 of Act XXIII of 1861 and to receive the purchase money as a fulfilment of the conditions of sale, subject to any question which might be raised by any party interested as to the claimant's title (3) If his right were clear the sale might be confirmed in his favour, if doubtful, the sale might be confirmed in fayour of the other hidder, leaving the co sharer to his remedy by suit, (3) he ought not to have been substituted for the actual purchaser His position was that he could advance his claim to pre emption, which would be adjudicated on later (4) Under that Act a co sharer having preferred his claim to pre emption, the sale could not be held as void merely by the failure of the person to whom the property was knocked down to make the deposit (5) The right of pre emption can only he claimed by those who are co sharers or memhers of the copercenary at the time the auction sale takes place (6) A title which is still defeasible at the date of the sale is not sufficient to support a claim under this rule (7) A decree holder, who under Mahomedan law would be entitled to pre emption, is not entitled to that right on sale in execution of his decree (8) Where the judgment debtor's rights in a puttecdarce estate were sold and purchased hy his son in the name of his father in law, who was not a co sharer and who after the sale waved his rights in favour of the judgment debtor, held that a co sherer who had fulfilled requirements was cutifled to pre emption (9) A suit by a person claiming pre emption for possession is premature and unmaintainable He should sue to set aside the order confirming the sale in favour of the auction purchaser and to have hunself declared cutifled to pre emption and to be sub stituted for the auction purchaser (10) Where a revenue sale has been caused by the default of a co-sharer and the property is purchased at that sale by him, there may he such relations between him and his co sharer as would justify the Court in treating such sale as for the benefit of both (11)

⁽¹⁾ Jarram Das t Bent Prasad, 3 4 15 (1880)

⁽²⁾ Naram Smoh t Muhammad Laruk, 1 A 277 (1876)

⁽³⁾ Tasuduk Alit Muksud Ali, 6 \ W P IL C R 272 (1874)

⁽⁴⁾ Syud Abdool v Kalee Koomar, 6 W R

Mrs. 3 (1860) (5) Dabee Pershad r Bisheshur, 6 X W P

H C. R. 289 (1874) (o) Dwarka Parshadr Ram Autar, 7 A W P H. C R. 281 (1875)

⁽⁷⁾ Abdul Ghafur r Ghulam Husam, 3.

A 236 (1313), Kamta Prasad t Mahan Bhagat, 32 A. 45 (1903) Nabihan Bibi t haukshar Ras, A. L. J. 351 (1907)

⁽⁸⁾ Sheik \uzmoodeen r hanye Jha Marsh, am (1863)

⁽⁹⁾ Gunga Ram : Mool: 2 \ W P H (

R 200 (1870)

⁽¹⁰⁾ Shib Sahare Thika Ram 7 \ W P

H C R 97 (1875) (11) Fairer Rahman r Mimana Ahatun.

¹⁵ C L J 111 (1913), Ram Praced v Pawan Singh, 18 C L. J 97 (1913)

"Bid the same sum"—Even when the section ran "advance the same sum, it was held that this contemplated a distinct bid by the co sharer in the ordinary manner. It was not sufficient if he asserted his right of pre-emption and offered a sum equal to that hid by the purebaser (1)

Appeal —No appeal hes under O XLIII r 1 It was held that the auction hidder, not being a party, could not appeal from an order confirming the sale in favour of a co sharer, (3) and that a co sharer aggreed under the former section, not being a person mentioned in sect 311, now O XXI r 90, could not appeal objecting to the sale being confirmed in favour of the auction purchaser and ask its confirmation in his own favour, and an application for revision was also refused (3)

A] 89 (1) Where immoveable property has been sold in Application to set aside execution of a decree, any person, either our ing such property or holding an interest therein by writtee of a title acquired before such sale, may apply to have the sale set aside on his depositing in Court,—

(a) for payment to the purchaser, a sum equal to five per

cent of the purchase-money, and

(b) for payment to the decree holder, the amount specified in the proclamation of sale as that for the recovery of which the sale was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decree holder

(2) Where a person apphes under rule 90 to set aside the sale of his immoveable property, he shall not, unless he with draws his application, be entitled to make or prosecute an applica

tion under this rule

(3) Nothing in this rule shall behave the judgment debtor from any liability he may be under in respect of costs and interest not covered by the proclamation of sale

Object of rule —This rule affords a special indulgance to the judgment debtor. It gives him yet one more chance of saving his property (4). It also confers a right upon certain persons other than the judgment debtor. See post, note, "Who may apply." A Court has no power to set acide a sale under this rule unless the applicant has strictly complied with its provisions (5). It

1 674 (1881) (3) Bisheshar Kuar v Hari Su_oh 5 1 42 (1882)

(I Church Charan Man Lil r Bucke B hary Mar Lil at C 443, 4.2 (1833) Lakshim Amrial't Sankaran Nair 4 M I J -05 (1913), Ishar Dis t Asaf Mi, 34 M 186 (1911) Banko Behary i Krislas Chandra, 18 C L J 170 (1913)

(5) Trimbul, Narayan (Ramchandra Narasin, rio 1 B m. L. R. 21) (1879). Rahin i Bux (Nii 1) Lal (Saini, 11 C 3.1 (1887).

⁽¹⁾ Hira t Unas th J t 827 (1881) [14] * 1 5h r Gobind Singh 2 t 5.0 (1880) (2) Muniruddin Khan v Abdul Rahim, 3

was the subject of conflict under the last Code whether the former section did,(1) or did not,(2) apply to sales of mortgaged property under the Transfer of Property Act The section was held to apply to sales of holdings in exceution of decrees for arrears of rent, (3) hut not to sales under the Public Demands Recovery Act (I B C of 1885) (4) The former section was held to apply even if the execution proceedings be referred to the Collector, who had no power to set aside a sale under the provisions of the Code. It was also held that there was nothing which precluded the Court from setting aside the sale merely hecause it had been confirmed (5). When money has been deposited under this rule, it is not liable to rateable distribution under sect 73 (6)

Who may apply.—Under the last Code any person might have applied, "whose immoveable property has been sold under this Chapter" A beaundar of a person whose immoveable property was sold could apply (7) These words gave rise to a conflict of decision. It could hardly he that these words referred to the judgment debtor alone or the Legislature would have said so. The question then arose to whom else the section did apply. It was not even every judgment-debtor who could apply, but only those whose property had heen sold under the Code (8). It was held that a simple mortgages of a tenure on holding sold for arrears of rent, such sale being with right to purchaser to a out incumbrances, could apply, (9) but not a second mortgages not a party to the suit whose interest had not passed under the sale (10). The purchaser of a share of an occupancy holding transferable by custom could apply, (11) as also a judgment debtor who has effected a private sale of his property during the

⁽¹⁾ Krishnaji v Maĥadov Vinayek, 25 B 104, s o, 2 Bom L R 635 (1900) Malhhar junadu Sotti v Lungamarti Pantule, 25 M 244 (1900), Tirumal Rao v Syod Dastaghir Miyah, 22 M 286 (1893), Raja Ram Singbij v Chunni Lal, 16 A 205 (1897) The point was queried in Sham Ial v Bashir ud din 28 A 778 (1900)

⁽²⁾ Kedar Nath Raut v Kalı Churn Ram, 25 C 703 (1898), F B , s c , 2 C W N 353

⁽³⁾ Janardhan Ganguli v Kah Kristo Thakur, 23 C 393 (1895). Bungshindhar Haldar v Kedar Nath Mandal, I C W N 114 (1896) Benodum Dassi v Peary Mohan Haldar, 8 C W N 55, 56 (1903). Hammal Hud v Matanguni Dassi, 2 C W N celvin (1898), dist in Nitya Nunda v Hima Lai Karmakar, 5 C W N 63 (1900) In Hartsh Chandra Ghose v Ananta Charan Patra, 2 C W N 127 (1897), the section was held not to apply to sales under Act X. of 1859, dissented from in Chatan v kunya, 13 C W X 563, 870 (1911), 14 C L J 284

⁽⁴⁾ Bepin Behary Bera v Sosi Bhusan Datta, 18 C L J 6_S (1913), p 632

⁽⁵⁾ Pita t Chum Lal, 31 B 207 (1905). s c, 9 Bom L R 15

⁽⁶⁾ Harat Saha v Fazzlur, 17 C W N 636 (1913)

<sup>(1915)

(7)</sup> Bası Poddar v Ram Krishna Poddar, I
C W N 135 (1896), doubted by Rampini, J,
in Paresh Nath Singha v Nobogopal Chatto
podhya 29 C 1 (1901), at p 16

⁽⁸⁾ Ram Singh v Salig Ram, 28 1 84, 85 (1905)

⁽⁹⁾ Paresh Nath Singha t Nobogopal Chattopadhya, 29 C 1, s c, 5 C W N 821 (1901) [see Abdul Rahaman e Matyar Rohaman, 30 C 425, 427 (1902), Mahadeo Chintaman e Vasudev Airthar 23 B 181 at p 184 (1839)] In Nitya Nanda Patra thura Lal Karmalan, 5 C W N 63 (1900), it was held that a simple mortgygee could not apply

⁽¹⁰⁾ Maliharjunadu Setti t Lingamurti, 20 M 332 (1902) In Seminasa Ayjangar r Ayyathora Pilia, 21 M, 416, it was held that a mortgagee who was affected by the sale could apply, Ah Miah r Ramjan, 13 C W \ 224 (1908)

⁽¹¹⁾ Benodini Dassiv Peary Mohan Haldar S.C. W. N. 55 (1903), Kunja Behary Mondal e. Sambhu Chandra Roy, S.C. W. N. 232 (1903)

pendency of the attachment-proceedings; (1) or a donee under a gift made while the property was under the attachment, or a durmolarandar where the molarari tenure was sold for arrears of rent, (2) a purchaser subsequent to attachment and prior to sale (3) In short, any one whose interest is bound by a sale might apply though he be no party to the suit or to the decree under which the sale took place (4) An application by a person entitled, together with a person not entitled, was received, and payment made jointly by those persons was held to be a sufficient payment (5) Where under sect 310A of the former Code a reversionary heir applied for and obtained leave to make a deposit, it was held that he made it as a person interested in the payment of money within the meaning of sect. 69 of the Indian Contract Act (6)

It was held that the following could not apply .- An under raisat, (7) but this has since been dissented from, (8) houladar under tenure holder, (9) a purchaser at a private sale from the judgment dehter after the sale in execu tion, (10) a purchaser prior to sale in execution of decree against his vendor, (11) nor on the same principle a person claiming a share in immoveable property sold in execution of a decree against his co sharers, (12) nor a person who has contracted to purchase land, such contract not creating in itself any interest in or charge upon the property, (13) an attaching creditor, (14) nor an owner or holder of an interest who has parted with his title since the sale or has acquired such title since the sale (15) Even before the passing of the Bengal Tenaacy Amendment Act of 1907, this rule did not apply to a tenure or holding attached in execution of a decree for arrears (16)

It is not quits clear what the effect of the amendment is (17) The words

- (2) Naram Mandal v Sourmdra Mohan 1 agore, 32 C 107 (1904)
- (3) Mulchand Dagadu v Govind Gonal, 10 B 575 (1906), but see post
- (4) Frode Mandkoth v Puthiedeth Chem bakkosen, 26 M 365 (1902)
- (5) Cal H C R 1058, 25th May, 1904
- (6) Pankhabati Chowdhurani v Nani Lal,
- 19 C L J 72 (1913) (7) Abid Mollah v Diljan Mollah, 23 C
- 15) (1902) (8) Chandra Aumar Nath : Kamme
- Kumar Glose, 11 C W N 742 (1907) (9) Abil Mollali v Diljan Mollah, supra,
- at p 460 (10) Hazart Ram t Badai Ram, I C W N 27.) (18 17), for at the time of the sale the property was not the property of the apple cant, dissented from in Appaya Shottle
- Karahall Bears, 17 M L J 127 (1 KH). 30 M 214. Manikka Odayan s Raja

- gopala Pillat, 17 M L J 291 (1907), s c 30 M 507
- (11) Ram Chandra Dhondo v Rakhmabas 23 B 150 (1898), for his interests were not affected by the execution sale, fell Arjun Wollah v Jadu Nath Roy Chowdry, 7 C W N 243 (1902), and in case in next note, but see Mulchand Dagadu v Govind Gopal, 30 B 575 (1906)
 - (12) Abdul Rahaman : Watiyar Rahaman,
- 30 C 425 (1902) (13) Mahadeo Chintaman v Vasudev Kirti
- Lar, 23 B 181 (1898) (14) Kedar Nath Sen v Uma Charan, 6
- C W N 57 (1900), but see notes to sect (15) Ishar Das v Isal Alı Khan, 31 1 186
- (1911)
- (16) Asıruddı v Mokhada, 35 C 543 (1308). an I see Muhammad t Ahmad, 33 1 4-1 (IJII), a mortgageo who is also the holder of a decree for money and his hal a part of the property sold
- (17) See Lakshini Ammale Sankaran Nati. 24 F M 1 205

⁽¹⁾ Maganlal Mulji v Doshi Mulji, 25 B C31 (1901), for the private sale would not bocome operative unless and until the auction sale was set aside, Omar Alt & Moonshi Basirudeen, 7 C L J 282 (1908)

I write to he property or believe an extensial determined that plans is consequent there is no leave to the relative force of the property stell as distinguished from the real claims against others relative force of a by themselves device ough it may be according to the relative force of the relative force

The date of sale is the date when the property is actually sold (3)

"Depositing"- If the applicant does not make the deposit within the a rescribed period the Court has no purisdiction to set aside the sale (4). If the in la nt debter has been misted by a mistake of the Court the consequences of that mustake ought not to fall upon him, as where the amount was fixed by in order of the Munsif himself in the presence of and with the assent of the the less of both parties (5) but an application has been refused where the Court dil not d clare the amount to be paid and it did not appear that the officer of the Court from whom the applicant was said to have received certain information in regard to the amount to be deposited was the officer who was charged by the Court with the duty of supplying that information (6) When the petitioner, owing to the fact that the presiding officer left the Court earlier than usual, could not make the deposit that day it was held that the deposit was made validly on the following day (7) Where the owner of immoveable property suplies he is under shability to deposit a sum equal to 5 per cent on the purchase money for payment to the purchaser even where the land has been purchased by the decree holder (8) In applicant who had fulfilled the requirements of

In Poresh Nath Singha σ Nabagopal (hattopadhya, 29 C 1, at p 13 (1901), Dullim Mathura τ Bansulhar, 16 C W N 904 (1911)

⁽²⁾ Ram Chandra Dhondo v tlakhmabas 23 B 450, 45t (1898)

⁽³⁾ Chowdhry Kesha Sahay : Giani Roy, 2) C C21, a c, 5 C W N 770 (1902) This is now enacted by sect 6 5, but in another case under the former Code, Banka Bichary e hruhna C n draft, 18 C L J 170 (1913), it was recently held by Chatterge, J, that the words 'date of sale in the Benga Tenancy Act mean the date on which the sale is confirmed But see Yusuf Gazi e Payaranessa Bowa, It C L J 131 (1912)

⁽⁴⁾ Chun li Charan Mandal v Bunko Behary Man lul 26 C 449, 452 (1899), ordinantir at least for condensating 457

ordinarity at least for see also at p 457
(5) Makboot thined Chowdhry v Bazle
Sabhan Chowdhry 25 C 609 (1898)

⁽⁶⁾ Chundi Charan Manlal v Banko Behary Mandal, 26 C 449, 459, s c, 3 C W N 283 (1899)

⁽⁷⁾ Dulhin Mathura v Bansidhar 16 C W N 904 (1911), 15 C L J 83 and see Mahomed v Sukhdee, 13 C L J 467

see Mahomed v Sukhdeo, 13 C L J 467 (1911) (8) Trumal Rai v Syed Dastaghir Miyah,

⁽⁸⁾ Trumal Rai v Syed Dastaghir Miyah, 22 M 286 (1898), and see Chunde Charan Mandal v Banko Behary Mandal, 26 C 449, 451 (1899)

clauses (a) and (b) of this section of the last Code, was held (1) entitled to have the sale set aside even though something more on account of the poundage was recoverable from him, under the head of costs provided for in the last clause of A deposit under this rule must be unconditional (2) Where the that section applicant prayed that the money should be kept in deposit until the disposal of an appeal, and the money therefore could only be received on the condition expressed in the application, the deposit was held not to be good under sect 174 of the Bengal Tenancy Act (3) But where money was duly deposited under the former section, and a petition which might have been refused was made later, it was held a good deposit (4) A mere application without an actual deposit is not sufficient compliance with the law (5) Where there was only an offer to pay, but no actual deposit, and the prayer to set aside the sale was joint with another which could not be entertained under the Proviso, it was held that no second appeal lay (6) A mortgaged making payments to save the mortgaged property from being sold in execution of a rent decree has an additional lien on the property for the sums so paid by him (7)

The deposit under this rule must be made within thirty days from the date of the sale But it is not necessary that the notice under r 92 should be made

within that time (8)

"For payment to the purchaser."-It has been said that 5 per cent is given partly as a solatium to the purchaser for the loss of his hargain (9) It inakes no difference that the purchaser is also the decree holder (10)

"For payment to the decree holder "-These words mesu that the decree holder is the person solely entitled to the money paid into Court (11) Sect 295 (now 73) does not apply to a deposit made by a judgment debtor under this rule (12) It was also, therefore, held that it was sufficient to deposit only the amount of the decree for the satisfaction of which the sale was proclaimed and took place (13) In this rule the term decree holder means only the person for satisfaction of whose decree the sale has been ordered, and does not include other persons who would have a right to claim rateable distribution out of the sale proceeds under sect 73 (14)

Under the rule, the amount deposited is that " specified in the proclamation

⁽¹⁾ Mutha Ayyar v Ramasami Sastrial, 20 M 158 (1896)

⁽²⁾ Dulhin Mathura v Bansidhar, 16 C W N 901 (1911), 15 C I J 83

⁽³⁾ Mt Shakotı v Jotin Ira Mohun Tagore, 1 C W N 132 (1890)

⁽⁴⁾ Hanooman Singh v Luchman Sahoo, 8 C W V 355 (1904)

Mar v Sikhde, 13 (5) Mahomed C L J 467 (1911)

⁽⁶⁾ Yarayena r Rasul Khan I Bom L R 33 (1533)

⁽⁷⁾ Rakhohari Chattaraj t Bijra Das

Doy, 31 C 375 (1301)

⁽⁸⁾ Gan sh r Vithal, 15 Bom L. R 244 {1 +1-2

⁽⁹⁾ Chundi Charan Mandal v Backe Behary Mandal, 26 C 449, 451, 452 (1899) (10) 1b , Turumal Rai v Syed Distight

Mryah, 22 M 286 (1898)

⁽¹¹⁾ Ganesh v \ thal, 37 B 387 (1912) (12) Roshun Lall v Ram Lall Mullick, 30

C 262, s c, 7 C W V 341 (1903), sec Behart Lall Paul v Gopal Lal Scal, I C W N 695 (1597), and next note, Harai Saha i Farlur Rahman 40 C 619, 18 C L J 111 (1913)

⁽¹³⁾ Harr Sundari : Shashi Bala, I C W Y

^{135 (1590)} (14) Ganesh e Vithal, 15 Bem L. R 214

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of sale as that for the recovery of which the sole was ordered, less any amount which may, since the date of such proclamation of sale, have been received by the decreeholder."

It has been held that the word "received" ought to be construed to mean sums of money either actually received by the decree holder, or which he was in a position to credit to his account, and that this was not the case as regards amounts deposited by other purchasers (1) It has been held also that the payment to the decree holder need not be in eash, and that it is enough if he is satisfied with regard to the whole of the amount due to him (2). The Bonnhay High Court held that what the former section contemplated was an actual receipt by the decree holder, and that nothing else would satisfy its require ments (3).

"Or prosecute "-The addition of the words "or prosecute" was intended to give effect to the undermentioned ruling (4)

Impleading parties—It was proposed, morder to give effect to two rulings of the Allahabad High Court (5) in applications under the following rule, to emact a clause declaring that an applicant under this rule should be bound to implead the purchaser and decree holder as parties to the application which should in their absence be disamssed. It had been also held in the Calcuta High Court that an auction purchaser is entitled to notice before an order is made under this section (6). The proposed clause has not been enacted.

"Unless he withdraws"—This rule prevents a person who has preferred an application under r 90 from making or prosecuting an application under this rule, until he has withdrawn the other, but the converse is not provided for (7) This rule and r 90 permit of applications hy persons who could not have applied under sects 310 and 311 of the last Code

Appeal—Sect 588 of the Code of 1882 did not provide for an appeal against an order under sect 310a corresponding with this rule (8). It was, however, held that if and when un order under that section fell under sect 214 (9) (now 17) it was appealable,(9) and where it did not fall within that section,

- (1) Aripa Nath Pal v Ram Laksmi Dasya, 1 C W N 703, 705 (1897)
- (2) Lakshmi Ammal v Sankaran Nair, 24 M L J 205 (1913), Vedala Lakshminara
- 24 M. L. J. 205 (1913). Vedala Lakshmanara Sinha v. Pacha Lakshmia Uma, M. W. N. 756 (1912).
- (3) Trumbak v Ramchandra, 23 B 723, s c . 1 Bom L R 215 (1819)
- (4) Rajendra Nath Haldar v Mirattan Mitter, 23 C 958 (1896) As to application under next acction after rejection under this section, see Ashruf Ah Chowdhry v Net Lal Saha, 23 C 682 (1896)
- (5) Gauliar Ali Khan t Bansidhar, 15 A. 407 (1893), Katamat Khan v Mir Ali Ahmed, W N 1891, p. 121, see next section.
 - (t) Bungshidhar Haldar r heder bath

- Mondal, I C W N 114 (1896), Nitya Nunda Patra v Hua Iali Karmahar, 5 C W N 63, 64 (1990), contra, Bhairab Pal v Prem Chand
- Ghose, I C W \ clrr (1897)

 (7) Basuuddun v Faunulla 17 C W \ 476 (1911)
- (8) Assumuddi e Pron Mohini, 15 C. W A 844 (1911)
- (9) Pria v Chunial, 31 B 207 (1906), Magan Lal Mulp v Doshi Mulpi 25 B 631, s. c., 3 Bom L R 255 (1901), Murin Dhar v Anandrao, 25 B 418, s. c., 3 Bom L. R 100 (1900), Panduran, Govind Puran daro v Arahnabai, 1 Bom, L. R 74 (1899), Phul Chand Rain v Aurshim, Parshad Missir, 25 C 75 (1990) [Joll in Intiaza Begain v

Dhuman Begam, 29 A. 275 (1907)], heder

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as in the case of an auction-purchaser stranger, the order was subject to revision (1). It was held that no appeal lay from an order refusing to restore to the file an application dismissed for default of appearance (2). And it has been recently held that an order on an application to set saide a sale under this rule is not a decree within the meaning of sect 2 (3). The true nature of the order must be examined and the character of the parties affected by it must be ascertained before it can be determined whether the order falls within the scope of sect 47 (4)

Application to set aside sale on ground of irregularity or fraud person entitled to share in a rateable distribution of a seets, or whose interests are affected by the sale, may apply to the Court to set aside the sale on the ground of a material irregularity or fraud in publishing or conducting it.

Provided that no sale shall be set aside on the ground of irregularity or fraud unless upon the facts proved the Court is satisfied that the applicant has sustained substantial injury by

leason of such fregularity or fraud.

"May apply"—An application under this rule is limited to the grounds set forth in it, and a Court cannot set aside a sale under this rule upon grounds which have not been pleaded by the applicant (5). The former section, according to a Tull Bench of the Madras High Court, applied to sales of mortgaged property in execution of mortgage dicrees (6). It was held that there was no provision in Act X of 1859 entitling a party to have a sale set aside on the ground of non attachment and non proof of publication of sale proclamation (7). Appainently, the application should be made to the Court executing the decree.

It was held

Nath Sen v Uma Charan, 6 C W N 37 (1900), Srunavasa Ayyangar : Ayyathorai Pillar, 21 M 416, 417 (1897), Bungahulhar Pillar, 21 M 416, 417 (1897), Bungahulhar Haldar v hedar Nath Mondal, 1 C W N 114 (1896), Kripa Nath Pal v Rana Lalsan Lasyan, 1 C W N 703, 705 (1897), Manikka Olayan v Raji-qopala Pillar, 17 M L J 231 (1907) In Kuber Singh v Shib Lal, 27 A 263 (1904), the Allahabrad High Court dissented from the view that there was an appeal mider s 244, Harr Har v Ramu Pandu, 33 B 698 (1904), Anndi v Ajudhin, 30 A 374 (1908)

(I) Nedar Nath Sen t Uma Charan, 6 O W N 57 (1900), Beshir ud din t Jhori Sr.,b, 19 4 149 (18,09) where the case was hell not to fall unler s 244, now 47, the restion being better a the julgment 1 bt r unl the jirches r Amir Rai i Basdo last case but one in last note
(2) Ghasiti Bibi v Abdul Samad, 29 1

596 (1907)
(3) Assmuddi v Pran, 15 C W A Sil

(1911) (4) Wahomed Akharı Sukhdoo, 13 C L J 467 (1911)

(5) Harbans Lal v Kundan Lal, 21 A 140 (1898)

(6) Malikarjunadu Setti t Lingmurti Pantulu, 25 M 244 (1900)

(7) Patal Shahu : Harr Mahanti 27 C. 75J (1909), Bibi Sharifan : Mahoned 13 C L J 5.35 (1911), 15 C W N 685, Lakshun : Sris 13 C L J 102 (1910), Iawas v Widholmoni, 11 C L J 484 (1910)

Singh, 5 C L J 204 (1906) See, however,

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that where execution of the decree had been transferred to the Collector, application had to be made to him, (1) but that decision had reference to the Rules of the NWP and was not followed in Bombay (2). A beneficial owner is not a necessary party to a proceeding for setting aside an execution rule. It is competent to the Court to be traide the sale finally and conclusively as against the beneficial owner, although his benam der only and not be is made a party to the proceeding (3). The decree holder is a recessary party to an application under this rule (4) as also the auction purebaser (5) and judgment debtor (6). The issue which arises when a petition is referred under this rule is a judicial proceed.

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ıc, the necessary evidence on or before that day (7) If an application is made within time it must be dealt with, and cannot be summarily rejected on the group I that it might have been made eather (8) When the application has been duly presented, framed and heard each objection should be taken up separately and determined. Specifically distinct findings should be come to on each point, and the reasons for the findings duly recorded (9) Where there has been no fraud, application to set aside a sale under this rule must under Art 166 of the Limitation Act, be made within thirty days of the date of sale Where. however, arregularities affecting the sale have by the fraud of the judgmentcreditor or other parties to the sik been kept concealed from the judgmentdebtor, he is entitled, whether the sale has been confirmed or not, to apply , the time for making the application being computed from the date when the fraud in t became known to him (10) But if proceedings to set aside a sale were under sect 17 (formerly 211) then the period of thirty days does not apply, but the three years limitation (11) I rand with regard to the knowledge of the

- (1) Keshabdeo e Radho Frasad, 11 1 34 (1858)
- (2) Narayan c Rosul Khan 23 B 531 (1833)
- (3) Baroda Kanta Boso : Chunder Kauta Chose 29 C 682, s. c. 6 C W \ '06
- (4) Alı Gauhar Khan t Bansıdhar 15 1 407 (1853)
- (5) Karamat Khan e Mir Mi Mmed Mi W N (1891) p. 121 cited ib see Gopal Singh v Dular Kuar, 2 A 352 (1879) Kanti Ram t Bankey Lel 2 A 396 (1879), Ganga thata v Ruthabat, 6 M 237, at p 238 (1882)
- (6) Alı Gauhar Lihan v Bansıdhar, supra (7) Brojo Mohun Thakoor : Shah imeen
- (7) Brojo Montu Innavort zona intenoodden, 20 W R 424 (1873), see Sanarii Sungh : Makhun Pandey, 2 A H C R 143, 144 (1870) [Incecsaty of allowing evidence in support of mjury], Rethbunjan Sungh v Mittrijet Sin, ii, 4 W R Mise 9 (168a) [zamo as to nregularity], Khodeja Bisce v

- Ram Varain Dass, 12 W R oll (1864) [same] Sookh Raj Singh t Moofite Luffoz zool 2 A H C R 142 (1870) [the Court should take endence and not merely rely on
- (%) Synd \upmooddeen \text{thmed } \text{\$\sigma} \text{\$\exitit{\$\text{\$\text{\$\tex{\$\exitit{\$\text{\$\text{\$\text{\$\text{\$\text{\$\text{\$\text{\$\tex{
- (9) Sookh Raj Singh v Mooftee Tuffezzool, 2 A H C R 142 (1870) Mt Parbutty i Girdharce Lalf G W R 125 (1866)
- (10) Mohendro Naram Chatura) : Gopal Mondul, 17 C 763, 776 (1890), F B [dbss from Gobard Chandra Majumdar v Charan Sen 14 C 679 (1887)] followed in Raj Chandra Do v Baldar Rahiman, Rulo 1249 of 1914, 7th May, 1915 (Woodroffe, J and Michael, J], hatlash Chandra Halder i Bussonath Paraname, 1 C W \ 67 (1896)
- (11) Luchmpat v Mt Mandil Kocf, 3 G W N 333 336 (1899)

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be set aside, while in the cases to which the rule does apply the sale is merely voidable at the instance of the party affected thereby, and, therefore, can be set aside A plea, therefore, to the jurisdiction of the executing Court is not admissible on an application under this rule (1) The rule is thus confined to irregularities in the particular incidents of execution following a valid decree, which are men tioned in it Where the whole suit is attacked another suit is maintainable, notwithstanding unsuccessful applications under O IX r 13 (formerly sect 108) and this rule, and omission to appeal against orders on such applications, for the existence of a real suit is assumed (2) A Court, however, may, to use the language of sect 115 (formerly 622), act illegally, or with material irregularity, in the exercise of a jurisdiction which it does possess. The present rule refers in express terms to irregularity only It has, however, been said (3) that though the term "illegality" does not include "irregularity," the latter word as used in this section is wide enough to include illegality. The question is not one of importance unless the illegality is held to be of such a character as to affect the validity of a sale in a manner making it absolutely void. This has been held to be the result in the case of cortain illegalities (4) The view taken in some of

(1) Shuna Begom v Agha Alı Khan, 18 A 141, 145 (1893), ref Behart Singh v Mala Singh, 28 A 273 (1905), dissenting from bukhdeo Rai v Shee Ghulam, 4A 382 (1882) In Moulvee Abdool Hyo v Macrae, 23 VR 1 (1874), and other cases cited in last not other than Sant Lal v Umrao un missa (where the case was held to be without the section), and Badur Persad v Saran Lal (where the Court interfered in revision), the question of jurisduction appears also to have been dealt with under this section

(2) Khagendra Lath Vahata v Frun Nath Roy, 29 C 395 (1902) P C, s c, 6 C W N 473, 4 Bom L R 363, and see Radha Raman v Pran Nath Roy, 5 C W N 757 (1901)

(3) Pr Brodhurst, J. in Ganga Prasad v. Jag Lal Rao, 11 A. 333, at p. 342 (1889). A distinction is drawn between illegably and irregulantly, at p. 337, see a marks in Narayana Kothan v. Kalianasundaran, 19 N. 219, at p. 207 (1890). The distinction has not always been kept to A. salo has been set and on the ground of irregulantly, where it was held to be null and tood. Manjia Sing. Jhow Lall, 6 V. H. C. R. 354 (1874). Nonadh Singh, t. S. hun Kooer, t. A. H. C. R. 135 (1874). Parish Charan Das. t. S. uff. iden. If sam. 17 C. W. N. 1133 (1914).

(1) Lab Husan : Natub II sam, 7 A JS (1881), Ram Chan I: Pitam Mal, 10 A cod (1888), foll Mahal o Duboy : IR 18 Nath Dah t 5 A 86 (1888) I B, white it was

held that as an attachment is an essential preliminary to sale a sale of property without a previous attachment is void, of Raja Thakur Barmha v Jiban Ram, P C, 19 C L J 161 (1913) (only the attached pro perty can be sold) [contra Kishory Nohun Roy v Mahomed Mujaffur Hossem, 18 C 188 (1890), Tincour: Debya v Shib Chan dra Chowdhury, 21 C 639 (1894), She odhyanı v Bhola Nath, 21 A 311 (1899)], Velayutha Muppan t Subramanian M L J 70 (1912), also where no notice was given to legal representative Ramessuri Dassee v Doorga Dass Chatterier 6 C 103 (1850), where property was sold before the advertised time, Chedami Lal t Amir Beg, 7 A 676 (1885), and where sale took place before expiry of thirty days, Bakshi Nan i Kishere v Malak Chand, 7 A 289 (1880) Gauga Prasad v Jag Lul Rat, 11 A 333 (188J) [contra Venkatz : Saua, 14 M. 227 (1890). Fassaduk Rasul t Ahmad Husam, 20 I A 176 (1533)]. Sathurayyan v Muthusama 12 W 325 (1888) [sale contrary to the pro visions of the Transfer of Property Act] the Privy Council have, lowover, pointed out that n sile is a sale in I not a nullily. whether there be an uregularity or a direct contrascution of express provisions Gobin l Lal R 3 t Ram Janam Musser, 21 (70 (15 3) lo kil Sugh t 1 tal Smith 31 (355, 311 (1904), Rall a Charan Das a Sharfallia Hesain, 17 C. W. A. 1137 (1913)

these cases that the act or omission was an illegality vitinting the sale was dis sented from in others. In certain cases there was probably nothing more than an irregularity It is clear that where a party professes to apply under this rule. then by such application he admits that the case must be treated as one of material irregularity to be redressed pursuant to its provisions only upon proof of injury (1) Ordinarily at least such irregularity will make the sale voidable only Assuming, however, that there may be an illegality, which apso facto renders the sale void, then it must be held either that the rule covers such a case, in which event injury must be established, or the ease is one without the rule. In the latter case it has been held that the Court has apart from the former section, an inherent right to set aside all illegal proceedings provided that the interests of third parties are not affected (2) or it might have refused to confirm a sale on grounds other than those on which a party may apply to set it aside under this rule (3) The case being ex hypothesi outside the section it has been held that no proof of injury is necessary (4) The tendency, however, of modern decisions is to check judgments holding sales to be nullities on account of what are really mere irregularities in procedure (5) And unless it can be established that the sale is for want of jurisdiction or other cause absolutely void, the case will, when there is an irregularity of the kind described fall within and he subject to the provisions of the rule

As the former section was confined to cases of mere irregularity of the nature described, it did not apply where the sale was sought to be set aside on another ground such as fraud (6) Where, however, fraud in the oxecution proceedings was alleged and attempted to be substantiated and the question arose between parties (7) an application lay under sect 47 (formerly 244) and

limitations

Seo Tassaduk Rasul v Ahmad Husain,
 I A 176, at p 182 (1893), Venkata v
 Sama, 14 M 227, at p 223 (1890)

⁽²⁾ Ramessuri Dassee v Durgadas Chat terjee, 6 O 107, at p 106 (1850) see Shaa kumar Roy t Golam Chunder Dey, 18 C 422 at p 423 (1891), Birj Mohun Thakurt Roy Uwa Aub, Chawdike, 20 C. S at p 2 (1892) Sant Lol t Umrae un mass, 12 A 96 (1889)

⁽³⁾ Sant Lal t Umrao un nissa, supra Ganga Prasad t Jag Lal Rai, 11 A. 333 at p. 337 (1889)

⁽⁴⁾ Run Chand t Pitam Mal, 10 A. 506 (1888) fit was also inconsister thy left that there was a material iringularity 1, Ganga Prasad t Jag Lai Roy, 11 A. 233 (1889). Blashi Manl t Malak Chand, 7 A. 299 (1880). The pulyment in Harbana Lai r Min hal al. 1 \ 140 (1892), misses the joint. The eather d casons referred to did 10 thold that a sale could be set aside under a 111 with out proof of loss, but that slike, slily of the character of fred to was outside the section, and therefore it a. Sect. 4 13 in as

⁽⁶⁾ Seo Mallarjun v Narhart 25 B 337, 346 (1900), ref Mharaymal v Dum, 32 C. 266 (1904), dist case of want of juncheton, a c., 5 C W N 10, 2 Bem L R 027 Tassaddul Razul Mhan v Ahmad Huzan, 21 C 66 (1803) the principle of Gebund Lai Rey & Rama-Horan Muzan, 21 C 704(1872), equally applies to execution gates hold Singht to Edal Singh 5 31 C 355 at pp 311 302 (1904) Lepun Behary v Sosi Bhusan, 18 C L J 63, 41913)

⁽⁶⁾ Umbida Churn i Dwarla Nath Ghose, bW R. 290 (1867) Subbaji Rau i Srimdara Raw 2 M 204 (1850) Nund Lali r Dilawar Ali H W R 214 (1850) Virsing, a jipa r Shadashrapjia, 7 B H C. R & 274 (1850), Raghubana bahar r 1 fool humara, 32 C H 130, 1140 (1850) or that the decree staff has been set ande, Ramyad Sahu r 1 r le saara, 6 C L J H 224 (2017).

⁽⁷⁾ See Loy Luch reput hingh r 11 yto tham Mullich _4 W R 402 (1075), where the application was by a third person not a party

no separate suit would lie (1) And an application was held maintainable under that section after a sale had been confirmed (2) A purchas by the decree holder benami at a price less than that at which he was permitted to bid constitutes fraud (3) If the decree itself which is the real basis of the title was fraudulently and collusively obtained, the sale at which a purchase was made never became absolute (1) See, however, now as to fraud the next paragraph

The following have been considered material irregularities -

Delay in making the deposit required by sect 300 of the last Code, (5) the adjournment of the sale from time to time without sufficient ground, (6) non-publication or improper publication of sale-proclamation, (7) such as an omission to state the amount of revenue, (8) or to put up a copy of the proclama tion in the Collector's office . (9) a sale subsequent to insanity of the judgment debtor, (10) omission to state or misstatement of Government revenue in notifica tion of sale, (11) misstatement of the value of the property in the sale proclama tion calculated to mislead intending bidders, (12) selling before thirty days have expired after notice of proclamation.(13) or without a fresh proclamation where there has been a postponement, (14) or after a portion of the property has been released to a third party, (15) or issuing a sale-notification without notifying in it that the property would be sold on a day named or as soon thereafter as it

- Kokil Singh v Edal Singh, 31 C 385 (1604), Rojoni Kanta Bagchi v Hossain Uddin Ahmed, 4 C W N 538 (1899) notes to s 4, as to pleading fraud, see Mahomed Mira Rayuthar & Savvasi Vijaya Raghunadha, 23 M 227 (1894), and as to the necessity of the auction purchaser being a party to it. Abbubaker v Mohidin, 26 M 16 (1896), and effect of fraudulent sale on rights of third parties Sidheo Nazeer Ally v Opcodhyaram Khan, 10 M I A 540
- (2) Colam Ahad Chowdhry v Judhster Chundra Shaha, 30 C 142 (1962), s c, 7 C W N 365

(3) Sm Sarat Kumarı v Nimali Chura Dey, 5 C W N 265 (1906)

(I) Banke Lal : Jagat Naram, 22 A 168, 179 (1900), Nanda Kumar v Ram Lishore,

- 19 C I I 157 (proof of fraud vitiating dicrie)
 - (5) Venkata i Sama, 14 M. 227 (1890) (b) Venkata r Sama, surra
- (7) Macnaghten & Mahabir Pershad Singh, 94 656(1882), Krishna Presad t Motichand, 10 1 A 140 (1013), 17 C L J 57 I
- (S) Ib (i) Nina Kumar Riy i Golain Chun ler
- Dev. 18 (422 (1831) (lb) Narayan Kotlan i Kallana Sun
- laram, L. W. .. 11 (1535)

- (11) Madarsah Meracayar v Palamappa Chetti, 23 M 628 (1906), Gridhar Singh t Hurdeo Narain, 3 I A 230 (1876), s. c. 26 W R 44, Olpherts v Mahabir Pershad, 16
- I A 25 (1882), 6 C 656 (12) Stadatman I Khan v Mt Phul Kuar, 2 C W N 556 (1898), 25 I A 140, 26 A 412, Cal H C Appeal from order 439 of 1961, 17 March, 1963, Stradurga v Rajono han, 15 C W. N 577 (1916), Prun Singh t Janardan, 14 C L J 541 (1911), desenting from Abdul Kashim a Benede, 12 C W V 757 (1908)
- (13) Tasadduk Rasul Khan v Ahmad Hugam, 21 C 66 (1893), Abdul Nossia t Doolal Doss 11 C L R 303 (1882), Hurbans Sahare Bhauo Pershad, 4 C L R 23 (1879) , Venkata v Sama, 14 M 227 (1890)
- (14) Goopeo Nath Dobey t Roy Luchmee put Singh, 3 C 542 (1877), Shoshen Mukhee . Dwarks Nath Biswas, 6 W R Misc SI (1906), Kishen Prosunno v Nurduma Dossee, 17 W R 339 (1872), Mohant Megh Lall: Slub Pershad, 7 C 31 (1881), Sanwal Singh & Wakhun Pandey, 2 A 11 C R 143 (1870) [no order of postponement or fresh pre lametem), see Jamini Mohan Nundy r Chandra Kumar Roy, 8 C W N 14 (1901)

(15) Shib Prokash Singh i Sardar Doyal

5mgb 3 C 541 (1878)

might came up in the list. (I) or advertising property of A and B for sale, and sub-equently and without fresh proclamation selling A's rights and interest only; (2) or assort to beat drum at time of sale, (3) notifying that the decreeholder held a charge for a greater amount than was the fact, (1) sale of half the property after whole was proclaimed, (5) or not affixing copy of sale proclaimation , (6) selling a debt secured by a mortgage of immoveable property under the provisions applicable to moveable property, (7) or selling without fixing an hour for the sale , (8) or when the proclamation is not issued in the prescribed form, and does not state the extent of the property and the revenue assessed on it or the amount of income derived from it, and omitting an order of the High Court containing directions for the sale , (9) or selling after proclamation of sale five days prior to date of sale, particulars of a mortgage not being given, (10) s lling after notice wrongly served upon person not legal representative of judgment debtor s estate , (11) selling upon a notification so vague in its description of the property as to be miskading; (12) publication of sale-proclamation upon decree holder's property it a distance of some half mile from the judgmentdelitor's property, (13) non specification of adjourned hour of sale. (14) absence of specification in sale proclamation of incumbrances and statement of value of property in such proclamation, (15) the omission to specify the hour of sale (16) clling on day previous to that fixed in the order of postponement (17) or at an hour not mentioned in the notification (18) changing the specified order of sale without notice, (19) selling properties in one lump advertised to be sold in lots, (20) selling without previous attachment, (21) refusal by the Court upon warver of fresh proclamation by judgment debtor to issue such proclamation if applied for by the judgment creditor, (22) onursion to bring on the record

Shah, 6 C. L. R. 237 (1850) (3) Trimbak Ravii r. Nana, 10 B. 504

(1886) (4) Kanji Mal t Bibi Saile, 8 A 116 (1886)

(1886)
(5) Pannah Lat t Sri Rum Bannerjee 1
Shomo 10

(6) Kalytara Choudhrani t Ramcoomar Goopta 7 C 466 (1881)

(7) Stinath Dutt: Gopal Chundra Matra 9 C 511 (1883) dist Sami Ayyari Arishni

ami 10 M 169 (1886)
(8) Surno Moyee Debi : Dakhira Ranjan

Sanyal 24 C 291 (1890)

(9) Athappa Chetti : Rama Krishma

Nayakan, 21 M 51 (1897) (10) Mohunt Megh Lati t Shib Proshad

Mait: 7 C 34 (1881)
(11) Malkarpun: Narhari, 25 B 337 (1900)

(11) Malkarpin t Narnari, 25 is 337 (1900) (12) Banko Lal v Jagat Naram 22 1 168 170 (1900)

(13) Jamini Mohun Nundy i Chandra

Lumar Roy, 6 C W 3 44 (190t)

(14) Bhilari Misra t Rani Surja Moni, 6 C. W \ 48 (1961)

(15) Note Laul Roy & Bhawani Kumara Deha 6 C W N 836 (1902)

(16) Mahabir Pershad Singha Dhanakdhari Singh, S C W N 686 687 (1904) s c, 31 C 815, 818

(17) Jhoomuel Chowdhry v Rajah Radha Persad 25 W R 328 (1876) (16) Khodeja Biber v Johad Roheen 14

(18) Ahodeja Biber i Johnd Roheen 14 W R 320 (1870)

(19) Polihraj Singh i Gossain Minraj Poorce 12 W P. 281 (1869)

(20) Sreekunt Dass i Ramjeebun Roy, 18 W R 342 (1873) Urqubart v Nundeeput Vahaputtur 12 W R 492 (1869) as to selling property in lots though attached and proclaimed in its entirety see Abdool Hye v

Macrae 23 W R 1 (1874)
(21) Sheodhyan i Bhola Nath 21 A 311

(1899) (22) Chakrapani Chattiar : Dhanji Settu,

24 V 311 (1900)

⁽¹⁾ Rykunt Nath Sandyater Juggut Wobun Shaha, 24 W. R. 246 (1875) (2) Mohing Mobun Dass et Ilhoclunjos

the legal representative of a judgment-debtor who has died after attachment and before sale, (1) basing a decision on evidence not taken in accordance with the law (2)

The mregularity, however, if any, must be material (3)

The following have been held to be either not irregularities or material ırregularıtıcs —

Issuing notices of attachment and sale together, (1) holding a sale for a larger sum than was actually due, (5) omission to deposit 25 per cent of purchase money at date of sale, (6) entering the wrong pergunnab in the proc lumation if it be served in the right village and the estate has been identified, (7) publishing the notification of the sile at an inferior cutcherry, the sudder cutch city of the zeminder being beyond the Court's jurisdiction, (8) omitting to state the reut of a tenure brought to sale, (9) selling at an madequate price, (10) sub dividing one of the lots advertised for sale , (11) a District Judge postponing a sale in obedience to an injunction issued by a Subordinate Judge, (12) sale of immoveable property on a close holiday, (13) or without issue of fresh pro elamation , (14) selling portion of estate within jurisdiction, although the greater part falls within another district (15)

"Or fraud."-These words have been added Under the previous law fraud was not within the rule (See page 1016) As to this amendment, the Select Committee said, "We think that the existing law as contained in sect 311 of the Code is defective, t

setting aside a sale! . setting up fraud as ...

under sect 311, a decree and open to second appeal (16) This result, which often involves a considerable prolongation of these proceedings, is in our opinion

(1) Bepin Behary Bera v Sosi Bhusan, 18 C L J 625 (1913)

(2) Peary Lal Das : Peary Lal Dawn, 18 C L J 646 (1913)

(3) Dakshina Mohun Roy t Sar Basumata

Debi 4 C W N 474, at p 477 (1900)

(4) Huro Soonduree Debee 1 Brojo Gobind Shaha 4 W R Mise 12

(5) Chuttur Singh : Dhurrum Koonwur, 1 A H C R 61 (1869)

(b) Ahmad Baksh t Lalta Prasad, 23 A 235 (1905)

(7) Nooral Hossein v Pam Coomar Sabee, J W R 326 (1576)

(8) Hubeebool Hossem t Allender, 14 W R 44 (1570)

(9) Mohendro Coomar Dutt : Islaneswary Dasce, 7 C 723 (1881) (10) Lakelmi i Krishnabhat, 5 B 421

(ISSI) (II) Sami Pilları Kruhnasamı Chetti 21

M 417 (150°) (t.) In ir l) ilhin. I in mutrator (en tal. 23 C 351 (1895)

(13) Bisram Mahtone Sahib un missa, 3 1 333 (1880), sed que the observation was obiler as no inquiry was proved Contra Har) Jemadar v Jadub Chunder Haldar, 3 W R Mr.e 24 (1865), as to proceedings on closed hobdays, see Ram Das Chakarbati t Official Liquidators, 9 A 366 (1887)

(14) Gajrajmati Teorain v Akbar Husain

29 A 196 (1906)

Bt

the present Code came into force, but the order on the application was passed after it came into force it was held that there was no second appeal under the provisions f the last Co le Ray Wohan 1 Cobinda 17

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"In rithishing or conducting. It was ; - I team of the section have thing to tendent it actors that demonstrate dydent (2) I this last then to east hime, landy carrit affect the piece. The care in critical the rice was 1.11 to include any proceedings celu bet at alcase peat of the sale, Latterche to the action aviational attitude a little atting to carterefert to the The decarely chart at the plants attached and a Massact by lawer alterward. He titalmanel, et ince templatelly this section fulwith the pair of below right lave taken at the tile of attachment tott rale (1) bragan anelgett i by a representative el a judgmentrthat le lalm' relret aftern brit et le ra ed lefte tle sale ; 1(4) So to an elect in that execute near lared must be taken lut a the sale (i) All that the Court can il er le ur fer this rule is whether the rate tallibe at as for pention or before gularity my distingue cor being protect the react to make granted deritered and mert had been estimated (6) erry Her Call (i) Thew the enforce after the embrace all acts which that the propertied to self rind with the cheef the eale which terminates at a thel tasks sked down to the balest lader. The magalanty must not, there is a section which takes place after the sale such as the receipt of payment by the C untailer the fifteenth day from the date of sale (8). The are all any raist be in confucting the sale and the whole responsibility of heting the sale is in the Court In agreement latween parties not to lider divining others from lidding is not an irregularity within the meaning of the citi n. and unless the acts dere amount to fraud is neground for otherwise with garde ande (9)

Substantial injury —Under the present as under the last Code there must have occurred substantial injury that is loss which is wrongful,(10) by mass in dithe irregularity complained of There less hawver been considerable confinet is to the mainter in which the connection between the two had to be established and inferred. The Prevy Council held that there must be

(1) Benode i Ram Sarup 16 € W N 1015 (1312)

⁽²⁾ See MacNa₀I ten t Mahabir Persha I Su₀h, 3 C 6.6, at p 660 (1882), Patil Shahu t Hett Mahanti, 27 C 783, 732 (1900)

⁽³⁾ Ramchhadur Misr t Becku Bhagat 7 \ 641 (1885)

⁽⁴⁾ Chowdhry Wahrd Ah t Jumaye 6 W R Misc 116 (1866)

⁽⁶⁾ In re Digumburca Dabee R L R.

¹ It 138 at p 945 (1868)

⁽⁷⁾ Huldalı kanlai Lal, 7 A 355 (1885) (8) İlm la Delee Dosseev Gope Soon lurce

Dossia 6 W. R. Misc. 82 (1566) (J) Mahomed Mira Ravuthar i Savvasi Anjaya Raghunadha, 23 M. 227 (1593), s.c.,

¹C W \ 228, nor of course are disparaging remarks of bysanders irregularities Lalmohan Chowdhuri t \unu \underschammed, 17 C 162 (1859), but see Rukhinee Bullubh

[•] v Brojonath Sircar, 5 C 308 (1870)

⁽¹⁰⁾ Shosi Bhusan Sa Ihu : Ahmed Hussein,

⁷ C N N 439 (1903)

evidence,(1) and that that evidence must be direct (2) and that a Court could not without evidence, and upon a mere supposition, find that an irregularity did cause an injury by causing an inadequate price to be hid at the sale amount or nature of the evidence required in any case depended upon its own circumstances (3) Difficulty was felt as to what was meant hy "direct" evidence Sometimes it was considered that this meant that persons should he called to testify that had it not been for a particular set of circumstances they would have done so and so, would have given a greater price, that they were willing to bid hut were deterred and misled, and so forth. In other cases it was considered sufficient that there should be evidence of circumstances which would warrant the necessary, or at least the reasonable, inference that the sale was the result of the irregularity complained of (4) The Select Com mittee stated that the language of the rule has been altered in order to meet the doubts raised as to the evidence upon which the Court can act, and they refer to the Privy Council decision Tasadduk Rasul Khan v Ahmad Husain Apparently it is intended to affirm that ruling, but the difficulty hitherto has been as to its construction Proof, of course, will be required, and this proof may, it is submitted, on a true construction of the Privy Council decisions consist of "direct" evidence in the narrow sense stated, or of evidence of facts which warrant an inference that the irregularity was the cause of the inadequate It has been held that where the property is sold at an inadequate price owing to irregularities in the conduct and publication of the sale there is substantial injury within the meaning of this rule (5)

Appeal -An order dismissing an application under this rule on the ground of the non appearance of the applicant is appealable (6) If a judgment debtor has made an application under this rule, he can (if he withdraws it) apply under sect 174 of the Bengal Tenancy Act (7)

3] Application by pur chaser to set aside sale on ground of judgmentdebtor having no sale

able Interest.

91. The purchaser at any such sale in execution of a decree may apply to the Court to set aside the sale, on the ground that the judgment debtor had no saleable interest in the property sold.

Application by an auction purchaser -The rule is limited to the calc stated Therefore a purchaser cannot apply to set aside a sale on the ground of deficiency in are i in the land sold, (8) or of misrepresentation or concealment in the sale notification inducing purchase at a price more than the property is really worth (9) If the purchaser knew that the debtor had no saleable

⁽¹⁾ Olpherts : Valiabir Pershad Singh, 10 I 1 25, 30 (1882) s c 9 C 656

^(.) Fasa Iduk Rasul : Ahmad Husam

_1 C to, s c, 20 I \ 176 (IS93) (3) See Ismail Man t Abdul Aziz Mhan,

³² C 502 (150) (4) M habir I rsha I Singh t Dhan ikdhari Sigh St W N (50 (150)) are 31 (\$17 . Bl karı Mora e Rani Surja Mont & C W N 48 (1 01) where early r cases will be cited

⁽⁵⁾ Santo Prosad : Slaw Naratt 1

C W Y 1022 (1912)

⁽⁶⁾ Braja : Moti 14 C W V 573 (1910) (7) Sital Ruis Nan la Laf 13 C W N ~91 (1909)

⁽⁸⁾ Rum Naram : D varka Nith Kh ttr)

⁻⁷ C - 4 × c, 4 (N N 13 (18))) (J) Dura Sundari Devi t Covilla (handra 111), 10 (318 (1883) when at p 152 the trin ly was and to be by sut

I IRSI SCHED O 21, r 92

interest the sale should not be set aside (1) The second paragraph of sect 313 of the last Code, which this rule replaces, has been transposed to the next rule

"No saleable interest "-The words "no saleable interest" have been said to refer to cases where a purchaser buys a property which turns out to have no existence at all or to be of no saleable value whatever (2) It may be questioned whether the substitution here of the word "value" for interest The words mean "nothing to sell," and are not intended to confine the cases in which the application may be made to those in which the judgmentdebtor though baying an interest such interest is by probibition of law or otherwise unsalcable (3) After a vesting order the debtor has no interest (4) The rule does not apply where the judgment dehtor has no saleable interest in a portion only of the property, (5) nor is the fact that the property is subject to a mortgage sufficient to support an application, (6) or the fact that one of two judgment debtors has no interest if the other debtor owns the entire interest (7) Although default has been made in the payment of revenue, ownership of the property continues in the defaulter until a revenue sale takes place A purchaser, therefore, of an estate in execution of a decree, after default has been made in paying revenue for it, cannot, in the event of a subsequent revenue sale, seek to set asido the sale under which he had made the purchase on the ground that the judgment debtor had no saleable interest (8) See also notes to 1 93, post Under the Code of 1859 a sale under a second attachment was valid and would provail over a sale subsequently held under a prior attachment and passed all the interest of the judgment debtor (9) Now bowever, when property is sold in execution it cannot be sold again, and when a judicial sale takes place all previous attachments effected upon the property sold fall to the ground (10)

(1) Where no application is made under rule 89, rule [ss, 3 90 of rule '11, or where such application is Sale when to become absolute or be set aside made and disallowed, the Court shall make an order confirming the sale, and thereupon the sale shall become absolute

(1) Mahabir Prasad v Dhuman Das, 3 1 527 (1881)

(2) Durga Sundarı Devi t Govinda Chandra Addy, 10 C 368 (1883) In Kunlu Moidin t Terayil Moidin, S V 101 (1884), the judgment debter was found to have no interest In Sant Lal & Rampi Das, 9 1 167 (1889), it was pointed out that the fact that the property may fetch little or nothing if sold does not affect the question.

(3) Munna Singh t Gajadhar Singh, 5 A J77 (1583)

(4) Ram Soondur Dey t Shoshi Mohun Pal Chowdhry, 11 C L R 353 (1882), Dinobundhoo Pal t Shoshee Mohun Pal, 9 C 217 (1552)

(5) Ram Coomar Deve Shushee Blocshun (.lo.c. JC 626(1873), Muhammad Lahmat

ullah v Backcho, 27 A 537 (190)

(6) Protab Chunder Chuckerbutty : Pamoty, 9 C 506 (1883), even if the mount branco covers the probable value of the property Sant Lal : Ramp Das 9 1 167 (18S9)

(7) Fazzuddin Mi Khan r Fincouri Salia, 22 C 565 573 (1895)

(8) Harr Charan Bose : Harrdas Roy, 2 C L J 503 (1905)

(J) Obhoy Churn Coundoo t Golam Mr. 7 t 410, 413 (1581) Narharmul Marwart : Sadut Mr. 8 C L R 408, 4,0 (1881). doubted in Durga Sundari Devi e Covinda (handra Addy, 10 (36s, at p 373 (1883)

(10) hashi Nath Roy Chowdhry r Surla

nand Shaha, 12 C 317 (1885)

evidence,(1) and that that evidence must be direct,(2) and that a Court could not without evidence, and upon a more supposition, find that an irregularity did cause an injury hy causing an inadequate price to he bid at the sale. The amount or nature of the evidence required in any case depended upon its own circumstances (3) Difficulty was felt as to what was meant by "direct" evidence Sometimes it was considered that this meant that persons should he called to testify that had it not been for a particular set of circumstances they would have done so and so, would have given a greater price, that they were willing to bid but were deterred and misled, and so forth. In other cases it was considered sufficient that there should be evidence of circumstances which would warrant the necessary, or at least the reasonable, inference that the sale was the result of the irregularity complained of (4) The Select Com mittee stated that the language of the rule has been altered in order to meet the doubts raised as to the evidence upon which the Court can act, and they refer to the Privy Council decision, Tasadduk Rasul Khan v Ahmad Husain Apparently it is intended to affirm that ruling, but the difficulty hitherto has been as to its construction Proof, of course, will be required, and this proof may, it is submitted, on a true construction of the Privy Council decisions consist of "direct" evidence in the narrow sense stated, or of evidence of facts which warrant an inference that the irregularity was the cause of the inadequate It has been held that where the property is sold at an inadequate price owing to irregularities in the conduct and publication of the sale there is sub stantial injury within the meaning of this rule (5)

Appeal —An order dismissing an application under this rule on the ground of the non appearance of the applicant is appealable (6). If a judgment debter has made in application under this rule, he can (if he withdraws it) apply under sect 174 of the Bengal Tenancy Act (7).

91. The purchaser at any such sale in execution of a decret happlication by pur chaser to set aside sale may apply to the Court to set aside the sale, on the ground that the judgment debtor had no saleable interest in the property sold.

Application by an auction purchaser—The rule is limited to the crestated. Therefore a purchaser cannot apply to set aside a side on the ground of deficiency in area in the land sold, (8) or of insrepresentation or concealment in the ale notification inducing purchase at a price more than the property is really worth (9). If the purchaser knew that the debtor had no salable

Olplerts : Malabir Pershad Single,
 10.1 \ 25, 30 (1882) , s c , 9 C 6.6

⁽²⁾ Fracillak Risul t Umrad Hussam,

²¹ C 66 , 8 C , 20 J A 176 (1893) (3) S c Ismail Ki an c Abd il Aziz Klian,

<sup>12 (302 (130))

(1)</sup> M hal rP who Poin, by Dhanul Harr

(a) Sy W N + 24 (1901), we, 71 C S15 =

18 and Mara i hand sirja Mod 6 C W N

13 (130), where can't reason will be cited.

⁽⁵⁾ Santo Presad t Shen Narum 16

⁽W N 1022 (1912) (6) Braja : Moti, 14 C W N 573 (1916) (7) Sital Rai : Nan la Lal, 13 C W N

^{91 (1909)} (8) Ham Versing Disarks Nath Khelley,

^{27 (} _(1 s c, 4 (W \ 13 (183)) (3) Duras Sandari Desi i (sym)

Chandra 111s, 10 C 305 (1883) wher at p 372 th term by wearful to be by and

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(1) Mahabit Prasad t Dhuman Das, 3 1 527 (1881)

- (2) During Sun Lett. Davie Govinder (1 in Ira Addy, 10 C. dos (1888). In Month Morlin v. Teravil Morlin, 5 M. 101 (1884), the ju lyment d blor was found to Lave ion interest. In Sun Lade 2 han ji Dan, 3 A. 107 (1888), it was junted out that the facthat the jury extra safeth if there is that if sold does not affect the junter.
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- (4) I am See her Deer South Sound Lal Casu three Hole Lot 1 (589-182) I'm hundred Lal (South Moham Lal 19 (-217 (1882)
- () I suite of the sunt of a to the termination of the termination of the street of th

- ullab t lla licho at 1 off (1 stat
- (6) Protab. Chunder. Chu kerbatts. c. Lamott. 3 C. 505 (1883) even if t. e.m. um. Fran e covers the probable value. It? [1] perty. Sart. Lab. e. Lar. p. Da. (1884) (1884).
- "Flackellin 1 host Im att Sain all ofte of 3 (15)
- (*) Hats (Lanu less Harries hat 2 (L.J. #5 120)
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for the sale

which a sale has taken place has itself been set aside is not sufficient (1). Nor where a stranger to the proceedings purchases property bona fide, can the sale to him be set aside on the ground that the decree had already been satisfied out of Court at the time the sale was held (2) Nor is there a distinction between sales in execution of money and mortgage decrees (3) Where there is fraud on the part of the plaintiff, the validity of the sale is not affected, if the purchaser is not implicated in the fraud, (4) aliter where the purchaser is so implicated (5) The reason for this rule is that a purchaser is not bound to inquire into the correct ness of the order for execution or of the judgment on which it issues If he were, there would be little inducement to buy (6) There is, however, a distinction between decree holders who purchase under their own decree which is after wards reversed, and bona fide purchasers at a sale in execution of a valid decree to which they were no parties As regards the latter the rule is as just stated but a judgment creditor who is also a purchaser, purchases subject to the result of the litigati time he purel

A sale cannot be set aside because the judgment debtor has applied to be declared an insolvent (9) " Notice "-The second paragraph of sect 313 of the former Code referred only to the judgment debtor and decree holder Notice must now be given

sco also Rum Jowan Lall & Sham Lall

Missir, 20 W R 123 (1873) (1) Chunder Lant Sarmah v Bissessar Surmah, 7 W R 312 (1867), Pearce Monee Dissec t Collector of Beerbhoom, S W R J00 (1867), Jan 1li v Jan Ali Choudry 1 B L R A C 56 (1868), Jugal Kisher Bannerico v Abhaya Charin Sarma, 1 B L R 1 C 81, 86 (1868), Assamathem Acssa Bibco : Roy Lutchmeeput Singh, 4 C 142, 171 (1878), Beharco Lall : Rajah Ram, 6 \ H C R 231 (1874), Murari Singh t Prvs. Smch. 11 C 362 (1885). Maclintosh kaleo Dass Mullick, 19 W R 234 (1573) . Basappa Malappa t Dundaya Shrilmgaya, 2 B 540 (1878) [where Court's sale under decree reversed in uppeal before confirmation , foll Mul Chand t Mukta Prasad, 10 1 83 (1557)], Mahoined Hossein t Kold Singh, 7 (Jl (1881), Banko Lal : Japal Naram, 2 1 105, at p 175 (1500), Gones's Lershad t 1 azul Lmam Khan, -J C 557, 561 (1536) to sale under deter unresented ace Kishen Sahal i Bakhtawar Singh, 20 1 - 17 (1535)

(2) Yellapper I mel inder, -1 B 163 (15)

(3) Mill els Diest r Copul Clur le

Dutta, 26 C 734 737 (1809)

(4) Mobish Chunder Bagchee : Duarka

Nath Mostro, 24 W R 260 (1875) (5) Jugal Kishor Bannerjee t Charan Sarma, 1 B L R A C 84, 86 (1868), Gohand Chunder Mookerjee v Ram Komal Chatterjee, 25 W R 364 (1870), Lishore Chunder Sein v Lally Linkur Paul, 20 W R 333 (1873), Lall Bunscedhur v Koonwar Bindeserce, 10 M I A 151, 473 474 (1866)

(6) Mukhoda Dassa t Gopal Chunder Dutta 26 C 734, 737 (189J)

(7) Zam ul Abdan Khan t Muhammad Asghar M., 10 1 166, 172 (1573), b c, lo I 1 12, Sadasiya a Sabapathi, 5 W 100 (1881) Chandan Singh t Ramdem Singh, JI C 133, 501 (1301), as to purchase ly creditor with notice of previous proceeding between hum and the debtor, see Pettacht t Chanatambar, 10 \1 211, _00 (1550). Damoodar t lawar, 15 (W \ 78 (1310)

(8) Gonesh Pershada Lazul Emam Khan, -3 (507, 501 (1530), where the ju inment ere liter was held not to be a jurity as le was ot in les party to the appeal

(J) Ishuar Lakhim lat i Harjii in lait J -I B (51 (IS t)

to all persons affected (1) In the event of the death of the judgment debtor application must be on notice to his representative (2) It is not necessary that the notice under this rule should be given within thirty days of the date of the sale (3)

Sub rulo (3).—This clause in the last Code ran "no suit to set aside, on the ground of such irregularity, an order passed under this section shall be brought by the party against whom such order has been made." The words "on the ground of such irregularity" are omitted, as the rule applies to all the three pieceding rules. If an application has been made and disallowed under this rule the order subject to appeal under O XLIII is 13 is final, and cannot be the subject of a suit.

The preceding law may be summarized as follows — A sale of land being a proceeding in execution, a question which arose as to the setting aside of such a sale was a question relating to execution, which, if it arose between the presons mentioned in sect 211 (now sect 17), had to be determined by order of the Court executing the deeree, and not by a separate suit (4) As to the procedure to be followed in such cases in execution, that depended upon the grounds which were put forward to impeach the sale. If the sale was impugued on the ground of irregularity (5) then the degree holder, judgment dobtor or other person whose property was affected by the sale applied under sect 311 (now r 20). If the sale was sought to be set aside for any other cause than irregularity, such as fraud (6) or want of jurisht tion (7) in the executing Court (8)

Surendra Mohan e Amaresh Chandra 39 C 637 (1912), Bibi Sharifan e Mahomed,
 C L J 535 (1911), Menajuddi e Toam Mandal, 39 C 881 (1J11)

⁽²⁾ Bala hadar t Gulam Mohidin, 7 B 421 (1883), and generally as to notice to judoment-debtor huppayan t Lamasami Ayan, 6 M 197 (1883)

⁽³⁾ Ganesh Bab t Vithal Jaman, La Bom L. R 244 (1912)

⁽⁴⁾ Saroda Churn Chuckerbutty r Maho med Isuf Meah, 11 C 376 378 (1889), Mohemido Naram Chaturaj t Gopal Mon dal, 17 C 769 (1880), Sua Pershad Manty t Nundo Lall Bar, 18 C 139 (1899) erasighava r Venkata Charyar, s M 217 (1882) [all casts of fraud] But see Ganga Pershad Sahu t Gopal Singh, 11 C 136 (1884), Chunni t Lala Raim, 16 A 5 (1893)

⁽⁵⁾ See Raghubar Dayal t Hahi Baksh, 7 \ 450, 452 (1885) [suit only lies if sale invalid for cause other than irregularity]. Abdul Hayo t Navab Raj B L R F B 911, 913 (1868)

⁽⁶⁾ See cases in last note but one. In Prangour Mozoomdar t Hemania human Debys, 12 C. 597, 600, a separate suit was beld to lie as it was not possible to raiso the

question at execution proceedings, Raghu bans Sahat v kulkumart, 1 C L J 542, 549 (1905) [the only suit barred by s 312 is one to set aside a sale on the ground of irregularity]

⁽⁷⁾ Chamu t Lala Ram, 10 A 5 (1893), Prem Chard Dey t Mokhoda Debt, 17 C 699 (1890), Gopi Mohan Roy t Doybali Aundan Sen 19 C 13 (1891), Tugoum Debya v Shib Chandra Pal, 21 C 639 (1894), Sulhaut & Daryan, 1 A 374, at b 376 (1877)

⁽⁵⁾ An order for sale and a sale under such or ler by a Court of execution which has no jura-diction is void Chunni a Lala Ram, 16 4 5 (1833) forder for sale under decree previously saturfied and see Digam burco Debia v Lahan Chunder Seni 15 W R 372 (1871)], Balwant Rao : Mahammad Husain 15 A 324 (1893) [no court fees due for which sale held] Subbaya t Yellamma, 9 M 130 (1885) [order for possession made after order in appeal]. Sant Lal r Umrao un Nasa, 12 A 96 (1889) [sale held after urder of postponement) \arayanasawmy Nascl v Saravana Mudaly, 6 M H C R 58 (1871) [territorial jurisdiction and see cases in last note;

or non hability of property to sale, (1) or other ground, then an application lay under sect 244 (now 47) If objection came from the purchaser on the ground of want of saleable interest in the judgment debtor, then he applied under sect 313 (now r 91) Though the auction purchaser could not apply under sect 311 (now seet 90), if the sale was confirmed under the following section the order of confirmation bound both the parties and the purchase (2) The result of this was that these persons could not, alleging irregularity, sue to set aside an order of confirmation whether such order was passed without (3) or after an application uuder seet 311 An auction purchaser might, however, alleging that there wis no irregularity, have sued to set aside an order setting aside and refusing to confirm a sale (4) While, therefore, a suit would not lie to set aside a sale on the ground of existence of irregularity, a suit would lie to confirm a sale on the ground that there was no irregularity Suits also lay to impeach the validity of sales on a ground other than that of mere irregularity, provided that the question did not arise between parties within the meaning of sect 244 (now 47) Subject to the remarks made in this and the allied sections, the law appears to be the same now In cases where sales are sought to he impeached on grounds other than those of mero irregularity, proceedings under sect 47 must be taken As regards irregularities, if no application has been made under r 90, then this rule applies If an application has been made to set aside a sale and refused then, subject to an appeal against such order, the same result would seem a fortion to follow If, on the other hand the sale is set aside, then the auction purchaser may appeal, but subject to such appeal the order would appear to be final The same rul, applies to orders made on applications under 1 91 As regards orders under sect 47 they are decrees, (5) and subject to appeal A separate suit can only lie in such cases as all outside the scope of sect 47

Appeal Revision—An appeal lies against an order on an application under this rule, O XLIII r 1 (g), setting aside or refusing to set aside a safe (b) No appeal lies from an order refusing au application to restore to the file an application which has been dismissed for default (7) No second appeal lies (8)

Durga Churan Mandal v Kafi Prosonno Sircar, 3 C W N 586 (1899), sc, 26 C 721, Basti Ram v Puttu S A 146 (1886)

⁽²⁾ Azun ud din v Buldeo, 3 A 554, 559 (1881)

⁽³⁾ Dumodar Blumshet v Vmayak Trim bak, -6 B 10 (1901) s c , 3 Bom L R 463

⁽⁴⁾ Azan ud din t Bulkeo, 3 A 5.4 (1881), Sukhai v Dunjal, 1 A 374 (1877), Bandi Bibi i Kalka, 9 A 602 (1887), Withurs Das i I suhalal, 13 B 216 (1834), and in Amrit Masor i Gurda Paryan 7 A II C. R 183 (1875)

⁽a) Muran Singh (1 ry (Singh 11 C 302 (1885)

^(!) In to the question whether the also certer approbable in that contemus the

sule, see Tota Run v Ahub Chand 7 A 253 (1884), Girdhari Singh t Hardio Narain Singh, 31 A 230, at p 233 (1870), or is to the point mentioned in Ganga Prasad t

Ju, Lai Rai, 11 A J33, at p 337 (1853) (7) Sopa u kim w Reazaddin, 27 C 411 (1854) Seo Jang Baladdur w Yahad « Persiad 8 C W N 160 (1903), Raja v Sangua, 11 M J1 (1889), Nusqipi r Gangau, 10 B 133 (1885)

^{(8) 9 104,} Aurajan r Reul Klan 3 Be 531 (183) I Tuchmijat r M Mandal Be 53 (183) I Tuchmijat r M Mandal Roya Galum Chun r D v, 184 (422(183) G j t K. r r i Gojt Lad - 1 (7 (183)) Mili ya Dasal r li limo Led in Mondal - 2 (802 (183)) Asmu li r Pranco Fr 17 (W N 814 (2011); 14 (L. L.) - 4

If, as he should be, the auction-purch is r is made a party to the proceedings he can appeal if the sile is set aside (1). Where a sile is sought to be set aside on some ground other than those meutioned in these rules, and the matter is dealt with under sect. 47 (as in the case of fraud (2)), the order under that section is a decree and appealable as such, and a second appeal his (3). An objection cannot be allowed for the first time in appeal (4). Where a Court wrongfully sets aside or refuses to set aside a sale its order may, if the circumstances fall within the terms of sect. 115, he the subject of revision (5).

93. Where a sale of immoveable property is set aside [s. Return of purchases under rule 72, the purchaser shall be entitled the money in certain cases to an order for repayment of his purchase-elaw innoney, with or without interest as the Court may direct, against any person to whom it has been paid.

"Where a sale."—The corresponding section in the last Code was "when a sale of mimo ealide property is set aside under sects 312 or 313, or men it is found that the judgment dehter had no saleable interest, etc, and the purchaser is for that reason deprived of it" (6) The auction purchaser under the last Code might have applied under sect 313 (now r 91), and the Court might have set aside the sale under the same section (see now r 92), adjudenting upon the question raised, viz, the absence of all saleable interest. The section was enabling and not prohibitive of an independent action (7) Such an application might not, however, he made, and it might yet become known and found (8) either by the Court of execution (9) or in another aut (10) that the property did not belong to the judgment debtor. In this case also the purchaser was upon the fact being found entitled to recover hack his purchase money. It was held that the words in sect 315 of the last Code "when it is found," etc., must be taken in connection

Gopal Singh , Dular Kuar, 2 A 352
 Kanthi Ram v Bankey Lal, 2 A 395
 (1879)

⁽²⁾ Provided an attempt is made to substantiate the allegation Umakanto Roy 1 Dino Nath Sanyal, 28 C 4 (1900), s c, 5

C W N 124
(3) Kokıl Sıngh r Edal Sıngh, 31 C 385
(1904), Rajanı Kant Bagehı v Hossanı
Uddın Ahmed 3 C W N celxxivu (1809)
In Sami Pillar v Kırıbhasını Chetit, 21 M
417 (1807), the case was held not to be within
s 115, as the question was not between
parties to the suit

⁽⁴⁾ Macnighten v Mahabir Pershad, 9 C 656 (1882)

⁽⁵⁾ See Birj Mohun Fhakur e Rai Uma Nath Choudhry, 20 C 8, 11 (1892), distinguished in Shew Prosad Bungshidhur i Ram Chunder Haribux, 41 C 323 (1913), Lakshmana v Najimuddin, 9 M 145 (1884).

Chakrapani Chettian v Dhanji Scttu, 24 M 311, 315 (1990), Ishvar Lakhmidat u Harpran Ramp, 21 B 531 (1990), Sookoo mar Singh v Kashee Singh, 13 W R 250 (1870) [cl 15, charter], Radhasyam Kar t

Dinobundhoo Biswas 18 C L J 535 (1913) (6) See as to purchaser being unable to obtain possession Surama v Rama, 8 M 99 (1884), and see Artyauund Roy t Juggut Chandra Guha C W A 105 (1902)

⁽⁷⁾ Surendra Nath Chose v Bem Madhab

Missa, 10 C W N 274 (1905)

⁽⁸⁾ See Manna Singh t Gajadhar Singh, A 576, 583, 586 (1883) [i e found in some previous proceeding or "when it has been ascertained or become known]

⁽⁹⁾ Sivarama v Rama, 8 M 99 (1854) (10) See Benode Bihary Nundi v Mohesh Chunder Ghose, 12 C L R 331 (1853) [found in suit to which decree holder was a party]

with a finding in a separate suit to mean "when it is found in some proceeding by which the judgment creditor is bound". For to compel the judgment creditor to refund merely because in some proceeding between other parties a Court had decided that the judgment debtor had no saleable interest would be contrary to principles of justice (1). The finding must have been in some proceedings to which a judgment creditor was a party or at any rate of which he had notice (2). It is to be observed that the present rule omits "where it is found," etc., as also the last paragraph of the former section. Nothing has been said as to the reason for the first omission, but as regards the second the Committee stated that they added words at the commencement of the rule, "in substitution of the last paragraph of the section which thus becomes unnecessary." Presumbly this observation refers to the italicized words "an order for repajment". Such an other being due for money may be enforced in execution under the rules providing for the execution of decrees and orders for money.

As regards absence of saleable interest in private sales there is under sect 55 (2) of the Transfer of Property Act, in the absence of a coutract to the contrary, an implied covenant for title by the vendor. In the case of execution sales there is no warranty of title either by the decree holder or by the Court. The purchaser huys the property with all risks and defects in the judgment debtor's title. In the absence of fraud his only remedy is to apply to set aside the sale und to recover back his purchase money when the judgment debtor had no sale tible interest at all. He cannot obtain a refund in proportion to the extent to which the judgment debtor had no interest (3). The right of the purchaser is absolute even though he himself caused the property to be put up for sale, provided that he was not guilty of fraud or misrepresentation or did not guarantee the validity of the sale (4). See notes to r. 91, and

"Is set aside "-See notes to preceding sections

"The purchaser shall be entitled"—When a sale is set aside the purchaser's right to recover the purchase money is not limited to an application under this rule to the Court executing the decree, but he may bring a suit for the purpose (5) He may sue to cancel the sale, (6) to establish his claim to the

Nilakanta : Imam Salub, 16 M 361, 363 (1892)

⁽²⁾ Vithoba v. Last. 18 B. 504 (1853) and S. C. S. 189 provides in the case of an application under a. 188 for notice to the judgment or ditor and the d circle holder.

⁽³⁾ Shanto (hundar Vulceria: Nan Sukh 23 \ Joo 3.06, 3.77 (1.001). Sundara at Vulkata Verada 17 \ V 2.8 (1851), in Irisato sales the buyer is recouped for any loss te may have oustain of Minina Singh (apillar Singh of 3.07, 500 (1883)). See Rust inpic Vinayal, 3.5 B - J (1.10) (he ray sure the judga intereditor for a very of possession of the property and that sale entitled if return of the jurclasse is cy in the footing of total failure of (1.1) at a 10.

⁽¹⁾ Brojendra Roy Chowdhrev Jugur \ath

Roy, 6 W R 147 (1866) (5) Nityanund Roy v Juggat Chandra Guha, 7 C W A 105 (1502), Hari Doyal Singh t Sheikh Samsuddin 5 C W \ 210 (1900) [in which it was also held that s -14 (now 11s) d d not apply], followed in Lam Kumar : Ram Gour, 13 C W \ 1050 (1303). Shanto Chandar Mukerp r Nam Sukh, 23 1 350 350 (1501) and cases there cite I and in following notes as to soit for interest Seo R shubar Dajal r Bank of Upper In ha 5 \ Joi (1883) A d qu and jurisdi tion of Small Cauco Court , 1 ra sanna hue ir hhair e Uma Charan Hazia I C W > 140 (1820), 1 , lavarpan c \arijana 11 31 ... 3 (155")

⁽⁶⁾ Litariam 1 Athi, 7 M . , (1884)

land where possession has not been obtained (1) and to recover the purchase money (2) I person was not a party precluded from sung because an order under sect 313 of the last Code was refused where, subsequent to such refusal it appeared that the judgment debtor had no saleable interest (3) If the judg ment debtor has any saleable interest in the property, the Court has no juris diction to order a refuud, and an order made can be set aside on revision (4) The former section was held to empower the auction purchaser to require repay ment of the purchase money but did not impose upon the decree holder the duty of tendering the money as soon as the sale was set aside. He was bound to pay the purchase money only if called upon to do so but not otherwise, and until be was so compelled to refund the purchase money he had no right to call upon the judgment debtor to pay his debt a second time (a) In a recent case under seet 315 of the last Code at was held that an auction purchaser seeking to recover the nurchase money on the ground that he has been deprived of the property owing to the failure of the dehtor's title bad no remedy outside the provisions of the Code and the remedy given is not a suit for money had and received under Art 62 of Schedule I of the I mutation Act of 1908 but is a suit within Art 120 of that Act (6)

"Interest "—Thus the Court may refuse interest (7) as when a person claims more than he is found entitled to (8) or if it is proved that the purchaser has contributed to the loss he has sustained (9). He should not however be charged with the expenses of the sale (10). Where a sale has been set aside the purchaser has been allowed the money laid out by him for the benefit of the property accounting for the rent and profits (11).

94 Where a sale of immoveable property has become to cartificate to purabolite the Court shall grant a certificate specifying the property sold and the name of the person who at the time of sale is declared to be the purchaser Such certificate shall bear date the day on which the sale became absolute

- Kunhi Moidin i Terayil Moidin 8 M
 (1884)
- (2) Jushun Lal e Muhammad Safdar Mi ISA 383 (1891) Gursh dawa t Gangaya 22 B 783 (1897) Yityanund Roy t Juggat Chandra Guha 7 C W N 105 (1902) Premraj v Javarmal 15 Bom L R 41 (1913)
- (3) Pachayappan v \arayana II M, 263 (1887)
- (4) Kunhamed v Chathu 9 1 437 (1886) (5) Venkata appa Row v Ayanna 1" M J 194 (1906)
- (6) S leshawar Prasad Naram Sin, h v Gosha n Mayanand 35 \ 419 (1913) follow ing Moh uddeen Ibrahim v Vahomed Mura

- Levas 23 M L J 487 (1912) and Munna Sungh v Tajadhar Singh 5 A 377 (1883)
- (7) See Moulv e Abdool Hye v Macrae 23 W R I 5 (18 4) [rate] Nafar Chandra v
- Gopal Chandra 19 C L J 358 (1914)
 (8) Kashun Lall v Muhammad Safdar Mi
- (8) Kishun Lall v Nuhammad Safdar Mi 13 A 383 386 (1891)
- (9) Aunhi Moidin v Terayil Mod n 8 M 101 103 (1884)
- (10) Hurdio Beebee v Surjoo Pershad 6 1 H C R 309 (1864) Hulso t Juchmun Das 1gra Visc 1
- (11) Morjan * Moulvio Abdool Hye 23 W R 393 (18") see Waharajah M tterject Sing r Heirs of Wido v of Juswunt Sing 3 M I A 4-(1841)

"Immoveable property"-See notes (1)

"Has become absolute"—See notes to sect 65 and 1 92 anie (2)

Sale certificate —See notes to seet 65, ante. It was held that when a sale had become absolute the Court would grant a certificate to the representative of a deceased purchaser (3). A Court should not make an expacte order amending a certificate, (4) and there is no appeal from an order amending a certificate on review maximuch as the decree having been already executed the matter is not one relating to execution under sect. 244 (now 47), anto (5)

Stamp Registration -Under sect 35 of the Indian Stamp Act (II of 1899) a sale certificate cannot be registered unless it has been duly stamped The sale certificate should not be granted until the anction purchaser has furnished the requisite stamp paper for its engrossment. Attention is directed to the circumstance, which is often overlooked, that the stamp duty is payable, not by the deposit of the sum required to purebase stamps, but hy the stamps them selves (6) Under the provisions contained in the second paragraph of sect 89 of the Registration Act (III of 1877), a copy of the certificate is to be sent hy the Court to the Registering Officer Although sects 17, 32 58, 61 and 89 of that Act except sale certificates from the ordinary procedure in Registration it was said in the Notes accompanying the first draft of the Bill that, "They leave it doubtful whether the action of the Court does or does not complete the registration of the certificate. The procedure laid down in the case of sale certificates would seem sufficiently to meet the requirements contemplated by registration" It was accordingly proposed in the first draft to declare by an addition to sect 89 of the Registration Act on the lines of sect 81 of that exact ment, that the "filing of such copy or copies shall have the same force and effect as registration" But this proposal bas not been adopted (7) The stump is required for the sale o reincate itself. The Court does not require an application for a certificate in writing and if in writing it need not be stamped (8)

"Property sold '-Property not attached and not advertised for sale cannot be sold (9) No property can be sold except that which belongs to the defendants in the suit (10) What interest of the defendant passes is a mixed

⁽¹⁾ Hart Govinds I amel andra 9 B II C R C4 (187.) and acc M M Maharma I itch Sangi v D sai Kallinrayaji 10 B II C R 251 (1873) (II: 1) Law as to min occables

⁽²⁾ Must Blawarre Matl na I rasa I 16

⁽ W N 1855 (P C 1512)
(3) Ymaydd Nariyan i Diffafriya

⁽³⁾ Vinavsk Narsyan e Duttatriya Kr lina at B 120 (18 J)

⁽⁴⁾ Rajsh Lu Lo Nu lim r Wilson 23 W. R. o(1 (15))

⁽a) Bortha Roy t Run K r vr I rala l 3 (W N 3 1 (18 i) () S o I t to I v r Kr Ina + B 4"

⁽¹⁸⁸⁴⁾ () It was from a part of I ult

whitler a salo certificato was compulsorily registral le ur ler sect 17 of the Registration Met So I rok sale Climder Dass: Fur Clan I Dres 9 C 82 (1882) Shirram Viriyan + Rayi Sald aram 7 B 201 20 (1882) Tak action now (vempts sale certificat s whill were have to be left with by the Cutture I re 1 & 15 of the R. Egietrion Vetting 1 and 1 a

⁽⁸⁾ Hira Amba Lise 1 kel at 1 Ariba Lis 13 B + O (1854)

⁽³⁾ Lang Or of 1 a Mr. M. mtorum

W R ___ (18) (10) Kul n Cl ii l r Air seat Matel 47 (18 3)

question of law and fact depending on the questions what could be sold and what was in fact sold. To ascertom this the decree and the whole execution proceedings must be looked at. The question what legally passed by a sale cannot depend oltogether upon the form of the sale certificate (1) See the notes to sect. 63, onle, where this matter is more fully considered, (2) os also the question whether any title to the thing sold is warronted Sect 316 of the last Code dealt with the date of the vesting of the title, a matter which is now governed by sect. 65, to which refer. This provision replaces that in the old Code, that the title should not from the date of the certificate.

95. Where the immoreable property sold is in the occu- is nelitery of property to occupancy of ludgment-debtor or of some person on his hebalf or of some person claim-debtor. In gunder a title created by the judgment-debtor suhsequently to the attachment of such property and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made hy putting such purchaser, or any person whom he may appoint to receive delivery on his hehalf in possession of the property, and, if need he, hy removing any person who refuses to vacate the same.

Delivery of possession.—This rule corresponds with sect 263 of Act VIII of 1859 The words "and a certificate in respect thereof has been granted under sect 316," and "on application by the purchaser," were added by sect 318 of Act X of 1877 The present Code altered "sect 316" to "rule 94" and made the additions noted in italies, the words "the application of the purchaser" being substituted for "application by the purchaser". As to trespass on land of which octual possessiou has been given to the purchaser under this rule, see case cited (3)

"Subsequently to the attachment."—A purchaser cannot get summary possession under this rule from the lessee pendente lite of the judgment debtor and must bring a suit for possession (descriptions).

"On the application of the purchaser."—A judgment debtor in spite of confirmation of sale may oppose an application for possession on the ground that the sale was illegal, his occupancy holding not heing transferable by

sect 316, where some cases on Hindu Law

⁽¹⁾ Assamathern Nessa : Lutchmeeput Singh, 4 C 142, at p 154 (1878). As to discrepancy between sale notification and sale certificate, see Unia Churin Sens. Golund Chunder Norumdar, 1 C L R 460 (1878), Gowree Kumal : Sarat Chunder Dass, 22 W R 408 (1874), and Raja Thakur Barmba Jiban Ram (P C), 19 C L J 161 (1913)

will be found collected. As the matter involves a discussion of the substantive law it is not dealt with (3) Kailash Ghose t Jugal Lohar, 1 C. L. J.

^{104 (1905)} (4) Santomoney Dossee r Kedar Nath. 3

C W N xu (1893)

⁽²⁾ And see O Kinesly, C P C, notes to

custom, (1) but he cannot oppose on the ground that the sale of a permanent tenure was confirmed without previous payment of the landlord's fee under sect 13 of the Bengal Tenancy Act (2)

"Order delivery."—A purebaser of an undivided share of a Hindu estate acquires only a right to sue for partition and for delivery of what may be allotted as that share Such proceedings cannot be taken under this rule, and the dismissal of such an application under this rule will not bar a purchaser's suit for partition (3) For form of order, see the First Sched App E No 24

Putting the purchaser in possession.—A purchaser can obtain that possession although in the first instance he obtained possession under r 96, (4) and a plaintiff obtaining symbolical possession can maintain a fresh suit for real possession, (5) so can the assigned of the purchaser whose possession has been resisted by the judgment debtor, (6) as also a purchaser whether legal delivery has been given or not, (7) hut he must have endeavoured to get posses sion under this rule first (8) By a later decision it was held a suit was maintain able even if he had not applied for possession under this rule, the remedies by suit and under this rule being concurrent (9) Possession being given fifteen years after the sale does not entitle the judgment-debtor to recover possession by suit unless he shows twelve years' possession before he was dispossessed (10)

Limitation.—An application for possession must be within three years of the grant of the sale certificate under Art 178 of Act XV of 1877 (Limitation Act),(11) even where the assignee of the purchaser applies, (12) the date being reckoned from when the certificate has been granted, that is, when it has been issued to him (13) The Madras High Court, however, held that in respect of a suit for possession the date from which time begins to run is that of the sale, and the Article applicable being 138 (14) This rule now expressly provides that in respect of an application for possession the three years run from the date of the certificate A purchaser may sue for possession within twelve years of symbolical possession being given him (15) Symbolical possession as ignist

⁽¹⁾ Durga Charan t Kali Prasanna, 26 C 727 (1899), Arman Sardar v Satkhira Joint (ompany, 18 C 1 J 564 (1913)

⁽²⁾ Mohim Chandra t Ram Lochan, 7 C

W N 591 (1903) (3) Yelumalar i Srinivasa, 2) M 231 (1906) For case where judgment-debtor resisted taking is assisten of a house jointly owned by him, see Sarvi Begam : Far Begam,

³⁶ A JSI (1914) (4) Hur Kisl re r. Sud is Chand r, 17 W

R 50 (157_) (5) Shankar c Nirsin riv. 22 B 157

⁽⁶⁾ Nagued Int. Les anna, 7 V. 74 (1881). Semi M. Fin e. Bhagalain, 9 C. 1002 (1552).

⁽⁷⁾ Sever Mattacami, 10 M 57 (1880) (b) Januar Lerdia Le, Jal Nurvin LCC 10 1 (last)

⁽⁹⁾ Kishori Mohun v Chunder Nath, 14 C 644 (1887), Krushna Satapasti v Sarasvatula 31 W 177 (1908)

⁽¹⁰⁾ Attotram : Balunkee Doss, 14 W R 357 (1870)

⁽¹¹⁾ Hanmantray v Suban, 8 B 257

⁽¹²⁾ Arumug t i Chockalingam, 15 M 331 (1812). Pullayya : Ramayya, 18 W 141

⁽¹⁸⁹¹⁾ (13) Kashmath e Duming Zuran, 17 B

^{-28 (1892),} see also Asu loollah r 1kbur W. 7 W R GO (1867) (14) Venkataling int a Veerssami, 17 M

^{59 (1533)}

⁽¹⁵⁾ Jegstun Bin + Parminant 16 (530 (lost), Harl V han t Bil wall al C 715 (1897); Nasaru I lin e Sayn bir Bal man. 1 + C L L _0 + (1013)

the grantors of a perpetual lease will not be effective against the lessee, so as to save limitation on a suit for possession (1). The Allahabad Court have however, held that a purchaser cannot bring /s suit for possession, even if his application for possession under this rule is barred, as the matter comes under sect 47 (2). In another case the same Court has held that the fact that an application under this rule has been rejected as being made beyond time is no har to a suit by the auction purchaser for the property purchased (3). And there are other decisions holding that sect. 47 is manufacible (1)

Appeal —An appeal was held to be from an order rejecting the application of the purchaser, who was the decree holder, the order being appealable as one under sect 241 (now 47) for possession (5) But the Allahabad and Calcutta High Courts have held otherwise, sect 244 of the last Code not being applicable, (6) but where the application for possession was resisted by the legal representative of the judgment debtor on the allegation that portions of the property belonged to him and not to the judgment debtor, the Calcutta High Court held the application to be one within that section and therefore appealable (7)

96 Where the property sold is in the occupancy of a tenant to necessary of tenant and a certificate in respect thereof has been granted under rule 94, the Court shall, on the application of the purchaser, order delivery to be made by affixing a copy of the certificate of sale in some conspicuous place on the property, and proclaiming to the occupant by beat of drum or other customary mode, at some convenient place, that the interest of the judgment debtor has been transferred to the purchaser

Delivery of possession—This rule corresponds with sect 261 of Act VIII of 1859, with the exception of the words "and a certificate in respect thereof has been granted under sect 316 'which were added by sect 319 of Act X of 1877, and the words in italies by the present Code which also altered 'sect 316 into "rule 94. This rule does not prevent the purchaser obtaining possession if he can, without the intervention of the Court (8).

"Certificate in respect thereof"-It was not incumbent on the Court

(2) Kalyan Singh v Thakur Das 3 A L J 234 (1906)

(3) Sheo Naram t Nur Muhammed 29 A 463 (1907), Bhagwati t Banwari Lal 31 \ 82 (b B) (1908)

(4) Bhimal v Ganesh koer, l C W N 658 (1897), Mahomed Mosraf v Habil Via (C J. J 749 (1904) Gliulam v Dwarka Prisa l, 18 A 36 (1895) 82 (F B) (1909)
(7) Malhusudan t Gobinds, 27 C 34
(1899)

(8) Obhoya Churn r Rajendro Coomar, 22 W R 406 (1874).

Gossain Dalmar t Bepin Behary, 18
 20 (1891), Nasiruddin v Sayudur Rahman, 19 C I J 200 (1913)

⁽⁵⁾ Mutta v Appasamı 13 M 504 (1890) (6) Bhanal v Ganesh Aber 1 C W N 6.98 (1897) [dasenting from Muttia v Appasamı 13 M 504 (1899)] Mahomed Mosraf v Hahali Min, 6 C L J. 749 (1904) and see Aastura Kunwar v Gaya Prasad, 29 A 297 (1906), Bhagwatı t Banwarı Lal, 31 A

under Act VIII of 1859 to put a purchaser into possession until he had his certificate of sale (1)

"Order delivery "-The Courts in this country do not give possession by removing the possession of one who is in possession under an apparent bon: fide title If the debtor can assert his title in possession by suit only the pur chaser can have no higher claim (2) Formal possession under O XXI r 36 given by a Court in execution operates as between the parties in point of law and fact, as a complete transfer of actual possession from one party to another, (3) and where land which had been given by a father to his son a minor was subsequently attached and sold in execution of a decree against the father, formal possession under this rule to the purchaser completely dispossessed the father, whether he held on his own account or that of his son . (4) but such possession will not take effect as actual possession as against persons who are not parties to the suit (5) nor against a purchaser, in execution of the rights of the judgment debtor, who had previously obtained actual possession (6) The delivery of possession to the purchaser under this rule does not cause dispossession of a person not the judgment debtor, found in possession by receipt of rent from tenants so as to entitle the latter to complain under O XXI r 99 (7) Symbolical possession as against the grantors of a perpetual lease without reservation to the granters and with no rights reserved and only a nominal rent, will not be effective against the lessee to save limitation against a plea of adverse possession (8) The rightful owner dispossessing the other is not a trespasser, and may rely for the support of his possession on the title vested in him (9) Au order under this rule can only be made by the presiding officer of the Court and is a judicial Act (10)

Limitation -The period of limitation for an application under this rule viz three years under Art 178 Sched I of the Lumitation Act, is reckoned from the date when the sale becomes absolute If formal possession be infruction suit against the judgment debtor for possession is good within twelve years of the sile under Art 138 of School I of the Limitation Act (11) It has been held that Art 138 of the Immitation Act only applies to suits in which the auction purchaser is the plaintiff and the judgment debtor, or a person claiming through him, the defendant (12) Where a purchaser is resisted in obtaining possession by a person claiming under a mortgage from the judgment debtor and sues f r possession the suit is governed by the same article even though he alleges the

343 (1897)

(7) Kisori Lalt Lalt Shib Lill, IC W Y

⁽I) Pukaram t Satvaji 5 B 206 (1881)

⁽_) Iarakant : Pud lomoi cy 10 Moo I 1 183 (1803)

⁽³⁾ La t sur , lur, un 7 C 419 (1881). lut see Maladeo e Janu 33 B 3"0 (1912)

¹⁴ Berr I R 115 (4) Dev 14 Ramamurti 18 W 40 4 (1594)

⁽a) Rujt Sigh e Binware, 10 C ri3 (155f) I buntt ie Rui (hinte 56.

⁽⁸⁾ Gossa i Dilmir v B pa Bliry 18 C 5_0 (18)1) (i) Banda v N. F. 15 B ... 38 (1830)

⁽¹⁰⁾ I rem hr | 1044 J ir 11 0 il 13 C W \

c 14 (1 109) (II) Krad na Lall t Riths Kr Ins 10 C

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mortgage to be collarive and fraudulent (1) and sues to set it uside (2). It has been held that if the purchaser be disposeesed by a third party sub equent to formal possession he has twelve years from disposeesion to bring a suit, (3) while, if the judgment debtor be in possession and formal possession be given un for this rule instead of inder 195, a suit for possession against him hes within twelve years of the date of formal possession (1) as formal possession under either r. 95 or this rule formal possession (1) as formal possession under either r. 95 or this rule formal possession be obtained or not (6). But a l'ull Bench of the Bombay High Court has recently held that a mere formal possession of immoveable property by a purchaser at a Court sale cannot prevent limitation running in favour of the judgment-debtor where the latter remains in actual possession, for symbolical possession is neither real possession nor equivalent to it under this Code except where the Code expressly or by implication so provides (7).

Appeal.—It was held that no appeal lay from an order for possession under the firm r section (8)

Resistance to delicery of possession to decree holder or purchaser

97. (1) Where the holder of a decree for the possession of immoveable property or the purchaser of any such property sold in execution of a decree is resisted or obstructed by any person in obtaining possession of the property, he may make an application to the Court complaining of such resistance or obstruction

(2) The Court shall fix a day for investigating the matter and shall summon the party against whom the application is

made to appear and answer the same

98 Where the Court is satisfied that the resistance or obstruction was occasioned without any just cause by the judgment-debtor cause by the judgment debtor or by some be put into possession of the property, and where the applicant is still resisted or obstructed in obtaining possession, the Court may

⁽¹⁾ Uma Shankar : Kalka Prasad 6 A 75 (1883)

⁽²⁾ Ikram Singh t Intizam 6 A 260 (1884)
(3) Juggobundhu t Ram Chunder 5 C

^{584 (1880),} Juggobundhu v Purnanund 16 C 530 (1889), Nasırudd n v Sayudur Rah man, 19 C L J 209 (1913)

⁽⁴⁾ Gopal v Krishnarao 25 B 275 (1900), Mahadeo v Parashram 25 B 359 (1900).

Harr Mohan v Baburali 24 C 715 (1897), the two former cases have recently been overruled in Mahadeo v Janu, 36 B 376 (1912), post

 ⁽⁵⁾ Mangli v Debi Din, 19 A 488 (1897)
 (6) Umbicka Churn v Madhub Chosal 4

C 876 (1879) 4 C L R 55 (7) Mabadeo v Janu 36 B 376 (F B) (1912) 14 Bom L R 115

⁽⁸⁾ Ghulam v Dwarka, 18 A 36 (1895)

also, at the instance of the applicant, order the judgment debtor, or any person acting at his instigation, to be detained in the civil prison for a term which may extend to thirty days

Obstruction of decree holder or purchaser -These and the following rules have been remodelled These two rules applied under the last Code to applications made by the decree holder (1) only, but now to applications both by decree holder and purchaser, thus embodying the provisions of sect 334 of the The preceding Code did not make it obligatory on a decree holder who was obstructed to pursue his remedies under these provisions. And it was accordingly held that the failure on the part of plaintiff to avail himself of this summary remedy did not har a suit (2) Morcover, it was held that there was nothing to prevent the decree holder or purchaser who had been obstructed from making a fresh application for delivery (3) The omission to have recourse to the provisions of the former Code did not it was held, preclude a person from instituting a suit to recover possession or making a fresh application for delivery An order under the former section passed against a person who had at the instigation of the judgment debtor obstructed a decree holder has been held not to bar a suit (4) A decree for partition is a decree for possession and the rulo is not rendered inapplicable by the fact that the person obstructing claims to be a mulgen tenant (5) Every obstruction must be caused either by the judgment debtor or claumants at his instigntion, hy persons who have no real interest in the property, or hy third parties claimants. The present rules deal with the first two cases and the next with the third (6) The effect of the remodel ling of the rules is as follows Sects 328-330 of the last Code applied to decree holders only, and seet 334 to obstruction of purchasers The provisions of these sections are incorporated in rr 97 and 98 which apply in farour both of the decree holder and purchaser and against the judgment debtor R 99 apples in favour of the same persons but against persons other than the judgment debtor This rule which incorporates the portion of sect 335 which dealt with the purchaser, modifies sect 331 The provisions as to trying the claim as a suit with the resultant appeal are omitted debtor have a right of suit under r 103 Lastly rr 100 101 and 103 which meorporate sects 332 and 335 deal with the dispossession of third parties Tl former section dealt with dispossession at the instance of the decree holder and the latter with dispossession by the purchaser Both are now dealt with together The Judge should fix a day, make an inquiry on taking evidence and if he directs that the property should be delivered in whole or in part should order that I (see

⁽¹⁾ In re Bibs Mahtab Koomara W R. 62 (1873)

⁽a) Balvant Santaram t Bal yi Naick S B 002 (1854) as a Jugm Lan Fewarco t Ball o Naick 3 Agra 16. Frintisk t Strayan S B 151 (1851)

⁽³⁾ Muthar Apparent 13 M AF A (1820) which also I also with the autject of appeal and which accords C win is Natire

hesava 3 W 81 81 (1880)

⁽⁴⁾ Bishen Dyal Singh v Sagar Snoh 2 C W \ 311 (15 it)

⁽⁵⁾ Gopalar Fernand 8 10 M 1.7 (18) h
(6) Govan France r R ann 3 M 81 8
(1890) approved in Rubba G I ad a blag
I unath 18 C I 1 138 (1913) Salama r

Marty and R B n 711 (1857) Tree ath Loy i Cl w Hry S W R 335 (18 7)

sion he given in one or other of the ways mentioned in the Code (1). It has belieful that this rule should be read with r 95 (2). These and the following section the former Code have been held not to apply to proceedings under the Mar latdar's Act (3).

"Is resisted ".—There is of course no indication as to the nature of the resistance or obstruction, but there must be some overtact of opposition to the Court's officers on the part of some one who is actually present (4)

"Possession"—I his term in this and the next rule has been held to incluse constructive and symbolical as well as actual physical possession Possession of immoveable property is not the less read or actual because it is only of throug tenants, servants, or members of one's family (5) The same was held as regarsect 335 of the last Code, (6) the provisions of which are incorporated in rr 97, 9 and 100

Limitation -The resistance or obstruction referred to is that mentione as forming the subject of the complaint, and huntation is not necessarily to l computed from the date of first obstruction (7) For the limitation is one which governs a cause of action arising out of a particular resistance or obstruction (Further, the period mentioned is important only is the limit prescribed with which the judgment creditors may by virtue of this rule bring what is in effect in action of electment against a stranger without the expense of a regular sur Other proceedings may be taken against a judgment debtor in execution with the period prescribed from the last application of the kind even though no instituted within thirty days after a wrongful obstruction (9) An application must be brought within thirty days of the obstruction but where according to the former procedure under sect 331, the application was converted into suit, the rights of the parties had to be decided as if an ordinary suit for possessio had been instituted by the decree holder against the defendant (10). Whe litigation under that section was pending the proceedings in execution wer suspended (11) When the litigation was unsuccessful, the period during which they had been pending could not be excluded in computing the period of limitatio for execution of the decree (12) An order rejecting an application as being barret

- Sco Brojo Mohun Sutputty v Shooda Monce, 8 W R 79 (1867), Shadhoo Saran v Bhuggoo Lall, 12 W R 98 (1869)
- (2) Kuppana t Kumara, 34 V. 450 (1910) (3) Kasam Sahib t Maruti, 13 B 552
- (1858) (4) Mancharam : Fakirchan I 25 B 478,
- (4) Mancharam t Fakirchan 1 25 B 178, 485, 486 (1901) See Mahabir Prasad v Parma, 14 1 417 (1892)
- (6) Mancharam t Falar Chand, 3 Bom L. R 53 (1900), per cur Whitworth, J., dasent, holding possession in the next rule is limited to actual physical possession, and does not extend to the possession of a landlord through his tenants
- (a) Brajabala Devi v Gurudas Mundle, 33C. 487 (1996)
- (7) Ramaschara Pillar : Dharmasaya, 5

- 3f 113 (1881), as to the meaning of terr 'month and exclusion of days of disposes son, see Dadu v Balganda, 5 Bom 11 C R
- 1 C J 39 (1568) (8) Aaram Das e Hazari Lall 18 A ...J.
- (1894)

 (9) Hunkur Singh t Madho Lall, -1 W L
- 147 (1574) (10) \amdo\ v Ramchandra 18 B 3*
- (1692) (11) Narayan z Sono, 24 B 345 (1899)
- (II) Narayan t Sono, 21 B 345 (1899) s. c. 1 Bom, L R 846,
- (12) Shivram r Sarasvatibai, 20 B 177 (1891) Is to adverse possession, see Krish mp r kashibai, 30 B 115 (1900), and dismissal for diffault, Sarat Chandra c Tarini Prasad Pal, 24 C 491 (1907), Kunj Behari
- c handh Prashad, 6 C. L. J 302 (1907)

did not, it was held, prevent the losing party from bringing a regular suit (1) As regards, however, the present unended procedure, see next rule A suit his under 1 103, post

"Detained in the civil prison "-It was thought that the previous ex pression, "commit the judgment debtor or such other person to jail," was nis leading as raising questions of dict money as in the case of civil imprisonment The language has, therefore been altered to render it clear that the provision iclates to conviction of an oftence in contempt of justice. The words "without prejudice to any proceedings," etc in the former sect 330, have been omitted, though presumably the law remains the same in this respect

Where the Court is satisfied that the resistance of 1] 99. obstruction was occasioned by any person Resistance or obstruc-(other than the judgment-debtor) claiming in tion by bona fide claimant good faith to be in possession of the property on his own account of on account of some person other than the judgment debtor, the Court shall make an order dismissing the upplication

Object of rule - The object of the corresponding and similar provisions in the last Code was, so far as possible, to prevent the originating of a succession of suits It was desired that a light should be determined finally in continuation of an original proceeding and not by fresh proceedings (2) This section, as the last, was limited to application by the decree holder, (3) but now includes orders made on the application of a purchaser against a person other than the judgment debtor (1) A person in whose favour an order under sect 330 had been made could not claim the benefit of the former section (5) As to the amendments, oide post

" Court "- 1 Superior Court might, it was held, for sufficient cause transfer a claim registered under the former section to a Subordinate Court for trul (6)

"In possession "-See next paragraph

"An order dismissing the application "—Under the list Code the claim was registered as a suit, and the Court investigated the claim as such It the ordered or stayed execution of the decree The order had the force of a decree and was appealable as such No question of title between the plantiff and his

⁽I) Ben Irasad t Lachman Irasad # 1 131 (1551)

⁽a) Stidaksimit lythinga 5 W of8 (1551) In Con ah Lerahad a Jakesaun 1 A H C I als, if a ction was lell marph call totl case of sperson put in posessor is Cland und rad cree

⁽³⁾ Bulal Sun Clouding & Biliars Lal. IB L. H. Jos (In a) Seu Mahal e Leranad r latter 14 % 417 (15%) in wh h the ուլ քն առնականագությունաբան

⁽¹⁾ Scens to this in 1 s 17, Jatl seedin s Kun ha 30 W 72 (1300) and as to the same NATASAL A

ic at a Jacol Kish rot Aml ke Del

Inc. W N 882 (1912)

^() Smath (losh i Ant la In all) 1 (11 / 102 (185)

^{() &}quot; Hakar i r Velh lina 5 M ob (1551)

0 21, r 9)

judgment d hter requiring the decree against them to be reopened could be adjudicated upon. The issues which projectly arose in an inquiry were whether the person obstructing was in possession on his own account or on account of some person other than the judgment dehtor (1). The word "possession" was not himited to actual physical possession, but included also constructive, such as hy a tenant (2). The issue which arose was one between the decree-holder as plaintiff and the claimant, that is, a person other than the judgment-dehtor.

Under the Code of 1577 the claim had to be investigated as if a suit had been instituted under sect 9 of the Specific Relief Act. The powers of the Court were thus strictly limited to an inquiry into the question of possession (3)

The Code was amended by sect 52 of Act All of 1879, the provisions of which were re-enacted in the Code of 1882, and the power of investigation was not himted to the fact of possession. Any question of title trising between the contending parties in connection with their right of possession might be finally determined in such investigation as in in ordinary action of ojectiment. The order, whether for executing or for staying execution, had the force of a decree determining the title and the right of possession. The plaintiff was not forced to a fresh suit or had a right to hiring a fresh suit of the decree was against him.(4). Where possession was shown to have been with the plaintiff the defeudants were not, without showing title in them selves, at liberty to impeach the plaintiff's title or to set up a just terti. The onus of proving a better title than the plaintiff's rested with them, and they might prove their title as a defence (5). A Court executing a decree was thus given a special jurisdiction which enabled it to try a claim of which the value of the subject matter fell below the pecumary limits of its ordinary jurisdiction (6).

It will be observed that considerable amendments have been made in the present rule to that been "numbered and registered as a suit between the decree holder as plaintiff and the claimant as defendant". Paragraph 2 under which the Court had power in interestingation of "the hike powers," as if a suit for the property had heen instituted by the decree holder against the claimant, is omitted, as also the third and fourth paragraphs under which the Court passed an order executing or staying execution which had the force of a decree, and was subject to the same conditions as to appeal. The words "with the like powers" were

⁽¹⁾ Mahomid Isab v Bahotappa 27 B 302 (1903), s c, 6 Bom L R 201, dist Moulakhan v Gori Khan, 14 B 627 (1890) which was a case between a decree holder and a person resisting execution classing under a title advices to the judgment debtor, where otherously the question of title as between those parties necessarily required decision in that case

⁽²⁾ Mancharam v Fakirchand 25 B 478, 5 c, 3 Bom L R 58 As to nature and terms of tenancy, see Talib Hossem v Gooroo Pershad 20 W R 57 (1873)

⁽³⁾ Moula Khan v Gori Khan, 14 B 627,

^{632 (1890)} Chinnasami Pillai v Krishna Pillai 3 V 104 (1851)

⁽⁴⁾ Vahip Rai v Dwarka Rai 27 A 453 (1903), Moula Khan v Gori Khan, supra Bapujurao v Fatesing Shahaji, 22 B 967 (1896), Mancharam v Fakirchand, 25 B 478 481 (1901)

⁽⁵⁾ Bapujirao v Fatchsing 22 B 967 (1896) See as to onus, Rakhal Chunder Mundul v Watson, 10 C 50 (1883), Man charam v Fahrchand, 25 B 478 (1901)

⁽⁶⁾ Sithalaksmi v Vythilinga, 8 M 548 (1884) See Kalima v Naman Lutti, 13 U 520, 522 (1890)

held to mean that the Court has the same powers for enforcing the attendance of parties and witnesses, etc, as it has in a suit (1) as regards appeal. A refusal to number and register the claim was held to amount to the rejection of a plant and was, therefore, appealable, (2) though those decisions have been dissented from (3). Where a claim was registered out of time no appeal lay, but the order could be objected to in an appeal from the final order which had the force of a decree (1). Proceedings taken after a decree for possession under sect 9 of the Specific Relief Let, were in the nature of a fresh suit, and therefore, an appeal lay (5). The Court to which an appeal lay depended on the value of the claim and not that of the original suit (6).

Now the Court, under the second clause of r 97, ante, is to investigate "the matter" If the obstruction is caused by the judgment debtor, the order under r 98 is that the applicant be put in possession. If the obstruction is due to the bona fide claim of a third party, the application is dismissed under this rule. It is not at tick what the scope of the inquiry in the latter case is to be. Presumably, however, it is to be of a summary character, even if it is not limited to the question of possession. For now a right of suit is given by r 103 to persons against whom orders are made under the present rule. Their position is therefore issimilated to that of parties against whom orders are made under in 95, 100, and 102 to whom a right of suit is given by r 103 of this Order

Dispossession by de- is dispossessed of immoreable property by the cree-holder or purchaser holder of a decree for the possession of such property or, where such property has been sold in execution of a decree, by the purchaser thereof, he may make an application to the Court complaining of such dispossession.

(2) The Court shall fix a day for encestigating the matter and shall summon the party against whom the application is made to

appear and ansuer the same.

101. Where the Court is satisfied that the applicant was in Bona find claimant to possession of the property on his own account the judgment debtor, it shall direct that the applicant be put into possession of the property.

Scope of rules —the preceding rules refer to a resistance offered in the course of delivery of possession in execution, whilst these rules refer to a sulf s

⁽¹⁾ Sathalaksim i Vythalmaa, S M 144 140 (1551)

⁽⁻⁾ I min fro Del Ra kuta Landdu, lish wari 11 (-234 (155)) Gopalar Fernand 2 10 M 1.7 (152-), Januar 10 Juto Factory 11 I a Laj Kumar, 13 (W N 7-4 (159) (3) Valna t Lamelar La Jeon L. Is-

⁽¹⁾ Lake Nariyan -1 B 302 (15 0) (0) Nasir Mr Fikir : Melec Mr -2 (800 (150)

⁽⁶⁾ Mulakhan r C ri Khan 14 B 6-7 (1890) Kalaa r Narian Katu, 13 M 5-0 (1890)

queut stage, viz to the event which may arise as to the result of the delivery of possession; (1) and give an applicant a right of contesting, without instituting a separate suit, the decree holder's or purchaser's right to dispossess him (2) As to dispossession by purchaser, the rule thus incorporates that portion of sect 335 of last Code It was beld that if in execution of decree a claim made by a third party in possession is rejected, he should either bring a regular suit or wait until he is dispossessed, and then apply under the former section or bring a separate suit, or he might do both (3) See as to regular suit, which is now dealt with by r 103, post, of this Order, cases cited (4) In a suit instituted under that rule the judgment and the decree in the original suit are not admissible in evidence (5) Where the judgment creditor obtained an order for possession prior to the death of the judgment dehtor, it was held that there was no necessity for bim to bring any other person on the record between the date of that order and the date on which the order was executed (6) Tho rule applies to possessory actions (7) Where in execution a person not a party to the suit is dispossessed, his dispossession does not give him a cause of action within the jurisdiction of the mamlatdar This rule applies (8) This rule does not apply where sect 47 does (9) It does not apply to a case where the execution of the deerec has been transferred to the Collector and he has acted under the powers conferred on him by the Local Government Board under sect 70 (10) A person is none the less a undement debtor because he may have acquired an interest subsequent to the date of the decree passed against him (11)

Procedure—The Court should first examine the applicant in order to determine whether proceedings under this rule will be or not, (12) and if it appears that the applicant was a party to the decree, (13) or that he is still in

⁽¹⁾ Buhen Dyal Singh t Sagar Sungh, 2 C W N 311, 314 (1896) See Ham Chandra Subrao v Ravit, 20 B 351 373 (1895), which deals with the subject of disposession, as also does Mancharum v Lakir Chand 3 Bom L R 58 (1990)

⁽²⁾ Mahomel Ansur t Probash Chun kr. Sha S W R 8 (1857) As to limitation, see Art 163, Sch. If, Let XV of 1877, and transfer where the Court is deprived of jurisdiction pending proceedings, Kales Dass Neogy t Huro Nath Roy Chowdhury, T W R 5 (1865), and withdrawal of application, Subbaranien t Ponunsawmny Chelty, 7 M II C R 293 (1870)

⁽³⁾ Pergusson r Nikomul Labirce 23 W R. 270 (1870). Kishen Sun lur r Fukeer ood leen, 1864 W R. 61 (1861). Gulabhai r Jinabhai, 13 B 213 (1888)

⁽⁴⁾ Ayyasami r Sarmiya, 8 M 52 (1884) [limitation], as proved in Mainda Sardar r Gorachand, 16 C. W. N 971 (1912), and Wanla Balah t Bhaha Sundan Dasia, 13

C L J 187 (1913), Ram Natam Dutt t Annoda Prosad Joshi, 14 C 631 (1887) [mis joinder] (5) Dhani Kaluar v Birj Bhukan Roy, 1

C W N clarat (1897)

 ⁽⁶⁾ Biyyakka i Fakira 12 M 211 (1889)
 (7) Brohmo Moyce Daba et Burkut Sirdar,

¹³ W R 261 (1870)
(8) Ram Chan Ira Subrao r Rayn an H

^{351 (1895)} (9) Instad the Jamii Lal, 17 t 478 481

^(18.15) (10) Ragho v Hanmati, 15 Bom 1. 1: 35.)

^{(1913), 37} B 458. (11) Shripati e Pirap, 9 Rom 1 R 1018

⁽¹⁹⁰⁷⁾ (12) Obhoy Churn Deyr Rajen iro Coomar

Ghose, 16 W. R. 285 (1871).
(13) Ram Gojal Chuckerbutty r. Pormo

Chunder Bannerjee 12 W R. 47.5 (1863). See Hune Kalore v Kaleo Kalore, S W B 111 (1867)

possession,(1) or in receipt of rent from the judgment debtor,(2) the application should be rejected, but not on the ground of possession if the parties are agreed that the applicant has been dispossessed,(3) nor on the ground that the applicant had not originally obtained possession in a strictly legal manner (4) It is sufficient if it should appear that the party, though not in personal occupation was in possession by receipt of rent, (5) or as mortgagee, or as mortgager through a mortgagee in possession.(6) and has been dispossessed under the decree or under colour of it A mortgagee from a tenant is in possession on his own account (7) A member of a joint Hindu family, however, cannot say that he is in possession of any particular portion of the joint family on his own account his possession being that of the family (8) A party dispossessed under colour of a decree to which he was no party is entitled to an investigation and to an order if his title is established (9) If the claimant was in possession, though without a good title, he cannot be dispossessed in execution of a decree against a third party to which ho was no party On the other hand, if the party against whom the decree was obtained was in possession though without a good tith no person not in actual possession or receipt of rent can resist execution (10) The onus is on the applicant (11) The order under r 101 decides the question of possession, and is made dependent on the result of the suit to establish the right It is therefore unnecessary to sue to have it cancelled (12) If there are several applications each application should be tried separately (13) It is incumbent on the applicant to prove whether or not the judgment debtor was in pes casion at the date of the sale, and the onus is not discharged by mere proof that he was in persession at some time autecedent to twelve years before the suit (11)

Kalee Naram Singh v Protap Chunder Buroosh, 12 W R 231 (1809), Ruttun Koocr t Fussu luck Hossem, 22 W R 103 (1874)

⁽²⁾ Brajal da a Gurudas, 33 C 487 (1906)
(3) Judoo Kapaleo a Issur Chander Roy,

¹⁷ W R 375 (1872)

⁽⁴⁾ Obhoya Churn Dey a Raj ndro Ceomar Chose, 22 W R 406 (1874)

⁽⁵⁾ Bhyrab Sircar: Sham Manne, 15 W

^{1 70 (1871)} Banco Wallinds Dutt a Ann l I all Ve joom far 22 W B 123 (1474)

⁽⁶⁾ Se ur Met asgur Ali, 20 W. R. 373 (1873) distinguised in Kedar Nath e Salay Clembra, 13 € 1 J. 13 (1313), post, Statin for e Jochan Singh, 2 A. 94 (1875), as to recently of pressent in lyer representation of the College of production of the college of production of the college of part for mes cutton, Tarakant for near the Pull form y Descent OM 1 A. 17, 485 (1823).

⁽⁷⁾ hi lar Nath i Salis Clanfra Di

⁽a) (* a a cit limb & 18 a a c 10 la 17 li (a) (* a a cit limb & 18 a a c 10 la 17 li

^{298 (1999)} The former case has been recently distinguished in Radia Gobind 1 Raji anth, 18 C I J 138 (1919), following Gounda Naur o Newaya, 3 M 81 (1880) and see Sheik Abdul v Jadunandan, 18 U J J 141 (in cannot ahenate a particular shreet)

⁽⁹⁾ Hassan Ah t Nub thine l, 11 W h 116 (1865) (10) Sharada Moyeo t Nobin Chinl t, 11 W R 255 (1865)

⁽¹¹⁾ Mahomed Ansure Probash Chand a Sha S W R 8 (1807), Woods franker Marane the high Abdool Gunes, 12 W R 16 (1864), Judoo Nath Smoth thate Perilad 14 W R 355 (1870), Brimtham Chand 16 Opt. Para Chan Hampere, Jo W R 114 (1873), as to objection that decree is barred see Mohesh Chander t Chandra Woods J W R 186 (1865)

⁽¹²⁾ Ayyasana a Sandya S M 52 S (1881)

⁽¹³⁾ Standa Myon (\chinder 11) W 1 220 (1550)

⁽¹¹⁾ Nasiru I lin + Nayu lur Rahi i an. (2) (2) f - 1 - 12 (1913) , M I lina (1 un 1 f f M Lesh (1 in lar P (, 1) + 473 (1997)

No question of title can be investigated in n proceeding under r 101 (1) It has been recently held that O IX r 13 is not applicable to a proceeding under these rules (2)

- 102. Nothing in rules 99 and 101 shall apply to resistance is Rules not applicable to or obstruction in execution of a decree for the transferre lite pendente possession of immocable property by a person to whom the judgment debtor has transferred the property after the institution of the suit in which the decree was passed or to the dispossession of any such person.
- 103. Any party not being a judgment debtor against whom some order is made under rule 98, rule 99 or just to regular sut rule 101 may institute a suit to establish the right which he claims to the present possession of the property, but, subject to the result of such suit, if any, the order shall be conclusive.

Object and scope of rules -Rule 103 is the second paragraph of sect 335 of the last Code The disposition of the rest of the section is as follows Obstruction of the purchaser is dealt with hy rr 97 and 99 and dispossession of a claimant other than the judgment debtor by r 100, ante 1 power is thus given where an attempt has been made to deliver possession (3) and there is obstruction or resistance.(4) to give after inquiry (5) a summary decision which shall protect the public peace, prevent obstruction and terminate the execution proceedings by determining what should be immediately done subject as regards claimants other than the judgment dehtor, to the result of a regular suit (6) The rules are designed for the protection and assistance of decree holders purchasers (7) and third parties dispossessed (8) ir 97 and 98 dealing with resistance by the judgment debtor (as to which, see r 97 onte) r 99 with resistance by third parties, and rr 100 and 101 with third parties dispossessed. I person it has been held is not bound to proceed under the former sect 335 He might if he chose at once bring a regular suit within the ordinary period of limitation But if he did choose to apply for a summary decision and it was against him he had to sue within one year from the time of the order (9) It was also held there

- (1) Kedar Nath v Saday Chandra, 19 C L J 13 (1913)
- C L J 13 (1913)
 (2) Hari Charan Ghose t Manmotha Nath
- Sen, 41 C 1 (1913)
 (3) Sharoda Proshad Mullick t Roy Dhun
- put Singh, 19 W R 219, 221 (1873)

 (4) Mt. Zahoorun e Syad Mahomed 18 W
- R 87 (1872), for if the purchaser has been put in possession peaceably the Court has nothing more to do in execution. Sevu r Muthusami, 10 M 53, 56 (1886), Smath Ghosh c Annola Prosad R n, I C W \ 192 (1896)
- () See Huro 1 rosa 1 Roy t Ramessur Missry Usha 24 W R 461 (1875) Mt Zahoorun v Sya l Mahomed supra
 - (6) Mt. Ashourun t Syad Mahomed 18 W
- R 57 (1872)
- (7) He ra Lall Bannerjee e Rajah Baroda Kaut, 13 W. R. 466 (1870)
- (8) See Govind Raisant r Lakshmau 18 B. 522 (1893) [application for restoration of
- possesson by joint mans, er]
 (9) Protap Chunder Chowdhry r Brojolall
 Shaha, H Li Ri F B G3s (1877), Sevii r
 Muttusam, 10 M 53 (1889) Malareo c

was nothing to prevent a decree-holder or purchaser who has been obstructed or resisted from making a fresh application for delivery without making any complaint under sects 328-330, 334 (1) That case was, however, subsequently distinguished on the ground that it was one in which the purchaser was resisted not by a third party but by the judgment debtor (2) The application must be made within thirty days of the resistance or obstruction (3) The Court was held not bound under sect 335 to pass any particular order, but only such order as may be proper in the circumstances of the case (4) A purchaser at a Court sale of the interest of one member of an undivided Hindu family ought not to be put in exclusive possession of the whole undivided land by virtue of a decree against one eo parcener only, (5) but only in joint possession with the others (6) It has been held that symbolical possession does not amount to dispossession within the meaning of the former section (7)

"May institute a suit "-See note, post, "Conclusive," and as to huits tion (8) for such a suit, which is one year, and Court fcc. (9) sec eases cited

"Conclusive"-The rule contemplates an order against one party of the other, and if an application is withdrawn, an order allowing the withdrawal is not an order under this rule (10) The order is one which becomes final and conclusive unless the party against whom it is passed institutes a suit within a year and obtains an adjudication in his favour Where the Court declined to

decice (12) Though an order under this section is not appealable, (13) it will be made the subject of revision (14)

Bulloo Konerec, 2 A H C R 450 (1870) Muttas v Appasami, 13 M 504, 506 (1890) Where the purchaser has merely obtained formal possession he may sur for possession within twelv years Jo-gobandhu Willer i Parianua I Cossami, 16 (530 (1889)

(1) Matt v a Appresion 13 M 504, 506 (15.0) [and see also sam eas where pur

claser is ilcree h lkr! (2) Kesti Naram v Abril II isan 26 A 305

(1901), Knox, I, di bitante (3) In utation Act, Art 107, Viniyakrao Amrit v Deorao Cevin I II B 471 (1897)

[min r] (4) Ad serina Mahom 1 Wagil 18 W R 57 (1872)

(a) Kallana i Venkattesh 2 H 476 (1875) (b) See Du. a) pa Shetti e Venkatramnaaa, 7 B 4 3 (1550) [explain d in Balaji Anant e (ancah Janar Lu 5 B 139 (1981)]. Latil Harr Pertil r. Hakam Chan l. 10 B. 363 (1551)

(7) Bral in Mullak r Rachjadu Rakshit,

30 C 710 (1903) Kison Lall Goswami # Lala Shib Lall 1 C W N 343 (1897)

- (8) Bhiku t Shujat Ali, 29 C 25 (1901) Mahadov v Bah, 26 B 730 (1902) [assigned from mmor], Bhimappa v Irappa, 26 B 146 (1901) s c , 1 Bom I. R 594 , Meeruda Sarb : Ratesa Bibi, 27 V 25 (1903) , Rango Vithal : Rikhiyadas II B H C R 174 (1874)
- (9) Priya Dasa Vilayat Khan 22 A 286
 - (10) Blukha i Sakarl d, 5 B 440 (1881)
 - (11) Mouradin Saib v Ratesa Bibi 27 W -
- (1 m3) (12) Achutas Mammavu, 10 M Jo7 (1880)
- (13) In Ram A tramschoor Ban it I enlad, 31 C 737 (1901), at p 741, the matter was hell to fall under s. 218 (now 47) and was therefore appeal this

(11) Sheoraj Singhe Banwari Das 6 (172 (1881), Sabhajit i Sri Gipal 17 1 ---

(1834) Mt. Zahborum i Syul Mal i el 15

W R 87 (1872) [del ty]

ORDER XXII.

Death, Marriage and Insolvency of Parties.

The death of a planning or defendant shall not cause the party's death, if right to aboute if the right to sue survives to the research.

Abatement -It has been pointed out (I) that the practice in respect of shatement under the Code is different from that which prevailed in the English Courts A suit, though perfect in its institution become defective by the death, marriage, or transmission of interest or liability of some of the parties In such case the suit was said to have ahated or become defective, and as a general rule no proceeding could be taken in it until an order to revive the suit or carry on the proceedings had been made. When the abatement was total-that is caused by the death, bankruptes, or insolvency of a single plaintiff or the marriage of a single female plaintiff—the case was completely suspended. and could not be proceeded with until it had been revived or the defect cured Where the abatement was partial merely as when it was caused by the death of the defendant, it prevented those proceedings only by which the interest of the deceased might be affected, for the death of a defendant made au abatement quoed himself alone. Thus ahatement though it suspended the proceedings in a case, did not nut an end to them But it had not the effect of heing a bar to a further suit upon the same cause of action one of the essentials of res audicate heing that the matter must have been determined, and when a suit ahated before judgment nothing had been determined in such suit. Under however, r 9 of this Order (formerly sect 371) when a suit ahates no fresh suit can be brought upon the same cause of action unless and until the order of abatement is set aside The provisions of this Order are substantially those of the last Code Rules 6 and 12 have been added and sub rule (2) has been added to r 10 (formerly sect 372) The last paragraph of sect 582 of the last Code has been made r 11 The provisions of this Order apply to appeals and the words "plaintiff,' "defendant and 'suit' include an appellant a respondent, and appeal respectively (2) They did not, however, under the last Code apply to proceedings in execution between the judgment-creditor and judgment debtor . (3) nor to proceedings in a Mamlatdar s Court (4) As regards execution proceedings, see now r 12, post

17 B 645 (1893)

⁽¹⁾ Benode Mohini Choudhrani v Sharat Chunder Dey Chowdhury, 8 C 837, at 1p 5,32 893 (1882)

⁽²⁾ R 11, post

⁽³⁾ Hira Chand v Kastur Chand, 18 B 224 (1834) (4) Ganpatram Jebharv Ranchod Haribhar,

Applicability -This rule is the same as sect 99 of Act VII of 150 an that the words right to suc was substituted for cause of action by sect w of Act XII of 1879 See also Rules of Supreme Court 1883 O 17 r I Th rule is the same as under the last Code. The illustrations have, however been omitted Illustrations (a) and (b) to sect 361 of the last Code have because itted is founded upon an intiquited decision (Anderson & Martindak 1 Ext 49) which is not very intelligible to practitioners in this country. Illustration (d) of the section was correct only under the Divablagi system and the wird

minor wis not of the e sence of the example. The Select Committee capit i also the other allustrations, considering them too obvious to serve any useful purpose This rule upplies to proceedings on uppeal (1) to ea es where und ran order of Court areference has been made to arbitration, (2) even after in award has been made but hefore decree, (3) and under the Delhan Agricultural Rehef Act to proceedings in respect of a conciliation a recement (4)

'Right to sue -Under the Code of 1509 Cinse of action corresponding ection was held to mean the right to hring in action (3) to suc" means the right to seek relief by means of legal procedures (6) It is a vested right (7) The cause of action in the original and revised suits mu t b the same (5)

"Survives '- All deminds whitsoever, and ill rights to present or defend my action or special proceeding in favour of or unint a person at the time of his decease, survive to and against his executors or administrat r swe certain can es of action mentioned below, (9) and pronues bind the refr sentatives of the pronulor in cie of the death of such promisor before per unle s the contrary intention appear from the contract (10) 1 and for milicious prosecution does not survive on the death of the plantiff (II) but after a decree for damag a for defamation at does survive on appeal after the death of the appellant to whose estate upury has eccurred for where a claus has hen perfected by a judgment, the nature of the rehef claim d on appeal stands on a diff rent footing and it does not follow that the right to allest is unstanderec partakes of the nature of the original decree (12) So al) en cound appeal (13) The position in such excess has hen enunciated as follows -

The only cases in which apart from qui strong of breach of contract exprision or implied a rem dy for a wrongful act can be pursue I against the e tate of a d ceased person who has done the act appear to us to he tho. in which it pert)

(1) R 11 post

DECT 1 (2) (14)

⁽a) I ru dis e l ru dis a" W IIa (1 403) (3) Den Dawerth y Vint

⁽C 11) U- V (I))

⁽⁴⁾ Naravan last K J 13 B 202 (15 H) (w) Ca a o an Datt r Bowa Har

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⁽⁵⁾ Slam Chandt ree Bhavaram la lar -- (- (1534)

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⁽II) hrish is Behary r. Cristation f (il tti, 31 (400 (1 x 1) Jos im e Sin 1

ly ar 31 M 1 (1 110) (I.) Copala Lan Chandra -0 B (I a) 4 lt L 1 3-0

⁽II) I ra n ti tiye ~ nisra haya et

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or the proceeds or value of property, belonging to another, have been appropriated by the deceased person and added to his estate or moneys. In such cases, whatever the original form of the action, it is in substance brought to recover property, or its proceeds or value, and by amendment could be made such in form as well as in substance in such cases the action, though arising out of a wrougful act, does not die with the person The property or the proceeds or value which, in the lifetime of the wrong doer, would have been recovered from him, can be traced after his death to his assets, and recaptured by the rightful owner there. But it is not every wrongful act by which a wrong doer indirectly benefits that falls under this head if the benefit does not consist in the acquisition of property or its proceeds in value. Where there is nothing among the assets of the deceased that in law or in equity belongs to the plaintiff, and the damages which have been done to him are unliquidated and uncertain the executors of a wrong doer cannot be sued merely because it was worth the wrong doer s while to commit the act which is complained of and an indirect henefit may have been reaped thereby (1) The right to sue will survive to an executor on an action on breach of contract or a tort if on the face of the proceedings it is shown an injury has accrued to the personal estate (2). It will survive when a Hindu widow sues to recover her husband a estate . (3) to the sons of a Hundu mother who sued to restrain encroachment on the share allotted to her on partition and agreed to sell her interest to the defendants at the value to be found on arbitration, and then died after the award but before the decree , (4) and for the purposes of appeal to the mother of a Mitakshara son who obtained a decree setting aside his father's ahenations , (5) to the representatives of a minor who, on attaining majority, sued to have his rights declared respecting property which by a consent decree and conveyance to which he was no party. his grandmother, father, and uncle conveyed to the defendants and who died pending suit (6) It also survived against the other defendants when a defendant's interest ceased before he died, without his representatives heing added (7) Where an agent suing on behalf of an undisclosed principal dies pending the suit, the suit should after the death of the igent he continued, if it can be continued at all, by the agent s representatives and not by the principal (8)

Not survivo — Causes of action in respect of defamation assault as defined by the Indian Penal Code, and other personal injuries not causing the death of the party, and cases where after the death of the party the relief sought could not be enjoyed or the granting of it would be nugatory e.g. (a) where a passenger was injured but not fatally in a railway collision and died without

Philips e Homfray, 24 C D 433, p. 454
 See also Harr las e Ramdas, 13 B 677, and Peck e Gurney, L. R 6 H. L. 377

⁽²⁾ Twycross v Grant, 4 C P D 40
(3) Parbutty v Rugin, 17 W R 475, 8

B. L. R. App., 33.
(4) Denomoyee Dassee r. Choomy, Money, Dassee, 4 C. W. N. 250 (1879)

⁽⁵⁾ Padarath Such v Raja Lam. 4 %

²³o, but see Vuhammad Hussam r Khuskalo, J A 131 (1886)

⁽⁶⁾ Dharamsi v Narotam, 5 Bom L. R 1011 (1 03)

⁽⁷⁾ Monag Khine r Barn, 6 W R, Lat 2 (1506)

⁽⁶⁾ Persantan Chettur e langachi laddy, 17 V. L. J. 110 (1 00)

bringing any action, and (b) divorce, do not survive , (1) ~ to set aside alienation by a Hindu widow (2)

to sue survives.

Procedure where one of several plaintiffs or defendants dies and right

Where there are more plantiffs or defer ants than one, and any of them dies, and where the right to sue survives to the surviving plantiff or plaintiffs alone, or against the surviving?

defendant or defendants alone, the Court shall & cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or plaintiffs, or against the surviving defendant or defendants.

Applicability -- This rule is the equivalent of sect 100 of Act VIII of 1809, save for certain formal amendments made by Act X of 1877, and the words "right to sue ' substituted for "cause of action" by Act XII of 1879 Except for three verbal alterations at is the same as that of the last Code applies to proceedings on appeal (3) Thus if one of the appellants dies and the application to rovive is dismissed as being time barred, the appeal should be ordered to abate so far as the deceased is concerned, and may proceed at the instance of the remaining appellants, (4) it cannot have the effect of causing the whole appeal to abate (5) Again, on the death of one of the respondents the proper course is to proceed under r 4, and either to declare that the appeal has abated as against him, and proceed against the other respondents, or to direct the legal representatives of the deceased respondent to be placed on the record (6) It has been held that a suit does not abate under this rule until the representative of the deceased plaintiff has failed to apply within the time allowed by law (7)

"Right to sue "-See notes to last rule. The rule is not limited in its applie ation to cases where the right to sue or appeal survives against the surviving defendants or respondents not as the legal representatives of the deceised but by reason of a right vested in them antecedent to the suit (8)

"To the surviving plaintiff alone "-On the death of one of two joint owners, suing for damages in respect of trespass, the cause of action survives to the other alone, (9) also where the interest of a defendant ceases in the subject matter of the suit before his death (10)

^{(1) 5 208,} Act \ of 1865

⁽²⁾ Sakyahani Ingle Rao t Bhavani Bozi, -7 M and (1301) seculso Ramjune Lachee. I Agra, 43 (1800), Chinna Veerayya t Laks minarasimum 2 M L J 375 (IJL)

⁽³⁾ R 13, put

⁽⁴⁾ Chandaran , r Klumabhai, _3 B 718 (15 5), a also Chutaman Nikant e

trat palest a 7 B and 5 Hom last 50 (1 + 3) (r) Larr Swake Lambert and . . . 1 .. 7 (1 - 3) (1 rite mout) a rrule hardapat

t Baldeo, 22 A 222 (1900)

⁽⁶⁾ Chandarsang t Khimabhat, 28 B 715 (15J5)

⁽⁷⁾ Goda Coopoorimiar : Soondaramall,

³³ N 167 (1509) (b) Chowdlay Shamanun I r hajnaram

Das, H C W A 186 (1300) ()) Chan framohan Ditt i Buwami lar, I

B L. K. O C J. 12 (1868)

⁽¹⁰⁾ V mg Klier Bun o W La, laf & (15G)

Errer Sens n DEATH, MARRIAGE AND INSOLVENCY OF PARTIES, 1049 0 22. 1. 3

(1) Where one of two or more plaintiffs dies and the right to sue does not survive to the surviving Procedure in case of plaintiff or plaintiffs along or a sole plaintiff or sole surviving plaintiff dies and the right

death of one of several or of sole plaintiffs plaintiff

to sue survives, the Court, on an ambication made in that behalf, shall cause the legal representative of the deceased plaintiff to be made a party and shall proceed with the "suit.

(2) Where within the time limited by law no application for is made under sub-rule (1), the suit shall abate so far as the deceased plaintiff is concerned, and, on the application of the defendant, the Court man award to him the costs which he may have incurred in defending the suit, to be recovered from the estate of the deceased plaintiff.

Applicability of clause (1).-This rule amalgamates sects 363 and 365 of the last Code and a portion of sect 366 Sect 363 dealt with the case of soveral plaintiffs, and sect 365 with that of a sole plaintiff. These are now dealt with together in the first clause of the rule. The second clause is the first paragraph of sect 366 of the last Code The second paragraph has been omitted, as also the Explanation to that section As to the definition of "legal representative." see now sect 2, clause (11) The section corresponding with sect. 363 of the last Code, as originally enacted by Act VIII of 1859, sect 101, required the legal representative to make the application to revive, but by Act VII of 1888, this provision and the latter portion of the former section from the words "the Court may cause" as it formerly stood, were substituted. Tho words "right to sue ' were substituted for "cause of action ' hy Act XII of 1879. The rule applies to proceedings on appeal,(1) and on revision,(2) but not under the last Code to proceedings in execution of a decree . (3) or to the case of a plaintiff dying after decree . (4) as to execution proceedings, see now r. 12. post Where there is only an application for leave to sue in forma pauperis, but no suit pending in Court, and the applicant dies before the leave is granted, the right to sue as a pauper, being a personal right, cannot survive in the legal representatives of the deceased applicant (5)

Sect 365 in the last Code corresponded with sect 102 of Act VIII of 1859, but underwent much modification Under sect 102 it was optional with the Court to make an order on the application of the legal representative, and it was not until Act VII. of 1888 that the mandatory form came into force. The words" where the cause of action survices" were inserted by Act X of 1877, the words "cause of action" being changed to "right to sue" by Act XII of 1879

⁽¹⁾ R. 11, post,

⁽²⁾ Anandamoyi Dasi v Rudra Mahanti, 18 C. L. J. 141 (1913); Deosaran : Syadunessa, 16 C L J, 521 (1912)

⁽³⁾ Gulabdas r Lakshman Narhar, 3 B 221 (1879) . Dulari r Mohan Singh, 3 A 7-9 (1551).

⁽⁴⁾ Ramanada v Minatchi Ammal, 3 M. 236 (1881) It refers to death before decree .

Bhugwan Das Khettry r Nil Kanta Ganguli, 9 C. W. N 171 (1904)

⁽⁵⁾ Lalit Mohan Mandil r. Satish Chandra Das, 33 U 1163 (1906)

The former section was held to have reference only to proceedings before decree , (1) and not to a surt in which a decree had been made , (2) not, under the last Code, to proceedings in execution of decree, (3) nor to an application to obtain permission to sue as a pauper (4) But as to execution proceedings, see nowr 12, post

"Dies "-This refers to death before decree (5)

"Survives "-See notes to 1 1, ante

"Legal representative "-The legal representative need not, since the passing of Act VII of 1889, if not under sect 50 (of the last Code), take out administration to continue a suit, but must do so hefore decree (6) An executor under Act V of 1881 is the legal representative of the deceased before probate has been obtained, but one of several executors cannot carry on a suit without proving the will (7) The rule presupposes the applicant is the legal repre If the representative character is denied, or where two or more claim it, the procedure under r 5 should be followed, (8) but where a decree has been made in favour of the legal representative of a deceased plaintiff, the Appellate Court should not go into the question of the representative's right to represent the deceased or dismiss the suit on finding that he or she had no right (9) The words "Legal representative" must, where there are more legal representatives than one, he read in the plural, thus where the appellant ded and only one of his three representatives was brought on the record the appeal nhated, (10) but in Bombay it has been held that an application by one of the heirs of the appellant is sufficient, and the respondent is cutitled to have the names of the others brought ou the record to have them bound by the decree (11) All the legal representatives must be brought upon the record, (12) as far as 18 possible, (13) if any refuse to be joined as appellants they should be midrespondents , (11) or my who cannot or are unwilling to be joined as applicants should be added as defendants (15) and in such a case the application should not be construed as no application by the legal represent itive so as to cause an appeal to abate (16) The sons of a deceased plaintiff, members of a joint 'hit ikshara family, may apply to revive without obtaining administration or a

(7) Moose t Losa 8 B =11 (1881), Januari

(J) Balabarr Ganesh, 27 B 162 (1302)

(1831), Musali Reddiv Ramayja, 23 11 1.

(189)), Haidar Hussin t Midul that 30

(10) Ghamandi v Amir Begam 16 A 211

t Dhanu, 14 M 454 (1831) (8) O da r Becpather, 17 M 203 (1833)

A 117 (1507)

⁽I) Bhugwan Das e Ail Kanta Gangutt, 9 C W N 171 (1904)

⁽²⁾ Cally Churn Mulick t Bhuggolutty Churn 5 C L R 108 (1879), decree directing turns of worship and their carrying out, Ram mada r Minatchi Aminal, 3 M 236 (1551)

⁽³⁾ Gulabdası Lakel man Nirhar, 3B +21 (1573) Dulari t Mohan Singh, 3 1 703 (1881), Med sonne as a Ameeroonnass, 2 C

^{1103 (100) 4} C 1 J = 34 (v) Buugnas Das e Sil harta Caraili

J (W N 171 (1 +04) () I recolmon thank () It II () and a recold ()

^{327 (1877)} (4) Lalit Mohan r Satult Chan les, J3 C

⁽¹¹⁾ Blikapt I urslotam 10B 5-0(100) (1-) Chamindi i Amir Begin, 10 \ all (1631)

⁽Id) Musala Red h r Ran 1994, ad M IaS (1633)

⁽II) Chamandi c Anir Begit i, sulvi

⁽¹⁰⁾ Se Musala Rellie Ran appara 100

⁽P) Ib

certificate under Act VII of 1883 (1) In a suit by a Hindu widow to recover property belonging to her deceyed bush and, the heirs of the hushand are tho legal representatives, (2) and not the widows personal heirs (3). But in the case of a llinda wife governed by the Vyavakara Mayukha, who obtained a decree for maintenance against her husband, her danghters as heirs of her "strillian improper ' are her legal representatives (1) Agam, on a plaintiff who oht med a decree against his father for partition dying pending appeal, his mother is his legal representative entitled to maintain appeal (5) Where an appellant gave the property in suit by deed of gift, the donce was allowed to carry on appeal as her hat not as done. (6) but this was before there was any section corresponding to sect 372 of the last Code, or r 1 of this, and the deed he set up was post dated to the deed from the appellant under which the respon dents claimed. An executor is the legal representative for the purposes of an appeal of a plaintiff who sned for possession of tarwad property, and to set aside an adoption made by the deceased Larnaran, and, obtaining a decree for possession only, appealed and died (7) An administrator, however, appointed under sect 10 of Reg VIII of 1827, without leave being granted him to sne, is not the legal repre sentative, nor is ho entitled to continue an appeal, (8) nor can the representative of a deceased pauper continue an application for leave to sue as a panper, such right heing only a personal one (9) Again, where the judgment debter in a but for malicious and wrongful conduct sold a share of his property liable to ho ittached in execution and died, the purchaser could not carry on the appeal as his representative as the purchase deed did not make him hable for the deceased s personal debts (10) I urther, a claim hased on personal trust cannot survive to a representative (11)

"The Court, on an application "-I his application is not necessarily confined to all the legal representatives, but one or more may apply and ask that those unwilling to join he added as defendants (12) This is only imperative where the person is admitted to be the legal representative or where no dispute is raised, (13) but the Court is bound to grant the application, even where an appeal has been heard and decided without the appellant's pleader or the Court being aware of the appellant's death and the representative applies to have his name placed on the record and the appeal reheard, the decree being a nullity (14) See now as to this, r 8, post

(1) Beejraj v Bhyropersaud, 23 C 912

- (1886)(2) Premmoji Choudhrani t Preonath
- Dhur. 23 C 636 (1896)
- (3) Tribhuwan v Sri Narain, 20 A 34t
- (4) Mandal Rewadat v Bar Rewa, 17 B
- 758 (1892) (5) Subbaraya Mudalı v Manika Mudalı
- 19 M 345 (1895)
- (6) Luteefoonissa t Rajacor Rahman, 8 W R 84 (1867)
- (7) Payyath v Thuuthipalli, 20 W 51 (18J6)

- (8) Malapa t Dov: 21 B 102 (1895)
- (9) Lalit Mohan v Satish Chandra, 33 C 1163 (1996) 4 C L J 234
- (10) Macleod v Kunhoje, 9 W R 271
- (1868)(11) Gangabai v Khashabai, 23 B 719
- (12) Musala Reddi v Ramavva, 23 M 125
- (1899) . Ghamandı v Amir Begam 16 A 211 (1894)
 - (13) Balabai v Ganesh, 27 B 162 (1902) (14) Janardhan Krishna v Ram Chandra,
- 26 B 317 (1901) see Anandamoyi Dasi v Rudra Mahanti, 18 C L J 141 (1913), (a.

"Proceed with the suit "-Objection to the applicant heing added as a legal representative should be raised at the earliest opportunity, and failure to object precludes the opposing party from raising it at a later stage (1) So where a decree has been made in favour of the legal representative of a deceased plaintiff, the Appellate Court should not go into the question of the representative s right to represent, or dismiss the suit on finding that he or she had no right (2)

Applicability of clause (2) -The section in the last Code (366) corresponded with the latter part of sect 102 of 1et VIII of 1859, with certain slight alterations made by Acts X of 1877, and XII of 1879, the explanation being added by the former Act and the words "within the time limited by law and 'shall on the application of the defendant' by the latter Act The second paragraph of sect 366 has been omitted. The Explanation appended to this section in the last Code bas been also omitted having regard to the definition of "legal representative" in sect 2 ante. This rule applies to proceedings on appeal (3) but it does not apply to a suit in which a decree has been made (4) nor under the last Code to proceedings in execution of decree , (5) as to this see nowr 12, post

"Within the time limited "-That is, six months (6) If no application is made by the legal representative of the deceased plaintiff and the suit is ordered to thate it may yet be revived under r 9 (7)

"No application "-Where two defendants appealed against a decree and one died, and no application was made to revive and the decree was reversed held the decree remained good as against the estate of the deceased defendant (8) If an application is made within time and is dismissed, the suit cannot be ordered to thate (9) If an application be made by one of the heirs of the decease! appellant the respondent is still entitled to have the other heirs put on the record (10) Where an application for revival has been made an order rejecting in application that a suit might be declared to abate and that the application for revival is invalid is not an order under this rule (11) The words 'any erson 'under the former section did not confine the application to an application by all the legal representatives, but for sufficient reasons any one or more might up; ly (12)

rule issue I at the instance of a person who is dead when the application is made is a nullity)

- (1) Meenatel r Anathan trayana 20 M
- -_1 (190_)
 - (_) Balabare (an sh _7 B 16_ (150_)
 - (3) R 11 just (4) Cally Churn t Bluggobutty 5C I R
- 103 (1573) (a) Medica issa r M roommissa - C
- 5-7 (15 0), 4 1 A to Dulan r Mohan, 3 1 "od (1551)
- () Art 1" Shell A CIA | 1185 الله لا مشرب P بأمارة با أمال ويتأملا بال

- (1913) 10 I \ 151, 17 C W N 829, 18
- GLJ9 (7) Bhoyrub Doss Johurry t Thakoor & C I R 374 5 C 139 (185))
- I ulvah v Cocil las J B .. 75 (1885) (8) Natera Sysar v Annasami Sysar -
- 31 1.6 (1.01)
 - (9) Subbayya i Sam midayyar 18 M 476
- (1535) (10) Blukapı 1 ursl otanı 10 B = 0 (1880)
- (11) Blagwan v Malaraja of Bhartjur 17 1 281 (151)
- (I-) Musal, Radie I was all low (15,70)

1:017 5 010 DEATH, MARRIAGE AND INSOLUTION OF PARTIES (1 22. t 4

"Shall abate -The section in the last Code ran," The Court of the man an erderth tile entil all atac . It was trepo ed to be smenled so as to ense effect to the rappen le that al atement results from the operation of law and does not describe the maker of an order. It was therefore, successed that the Court of sall march deels ottat the suit lad alated. The Short Committee. h wever, a'rock out the troops no that the Court mo, ht make an order declaring the al stement, is in its clim in it was unnecessary and was likely to give rise to h lealis Il near heate nama le by the legalier is sentative of the decreased about 1 and the soil rectal red to all the it may be they specificalized and the er let for reastal may be note immediately after the order for all atenuat (1)

"On the application of the defendant,"- '1), fendant here includes t last to I reese under t and d fendant respondent . (2) but a respondent in a special as real cann the pure the level representative of the diseased annellant to be substituted and the attend to proceed. He should file a cross appeal, (3) th such if e is al the hears of the deceased amellant has applied to revise, the resumment is entitled to have the names of the other heirs but on the record as to have them bound by the derec (1) The application must be within sie in mile of the death of the claiming (3)

Appeals -The Mahabad High Court held that no appeal has from an or ler passed unl r the first paragraph of the fermer sect 366 directing a suit to abate (6) such an order not being a decree, (7) but both the Bombay and Madras High Courts have held such an ord r to be a decree (8) No anneal hes from in ord r rejecting an application for a dictaration that a suit had abated by re son of the death of the plaintiff and the invalidity of an applica tion for result by the representatives of the deceased pluntiff (9) Where the stact if appellant dies and no representative applies to be substituted the respondent cannot require the appeal to proceed. He should file a cross appeal (10)

(1) Where one of two or more defendants dies and the is right to sue does not survive against the sur-Procedure in case of vising defendant or defendants alone or a sole death of one of several defendants or ot sole defendant or sole surviving defendant dues and defendant. the right to sue survives the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the sint

⁽¹⁾ Bhoyrub D ss Johurry v Doman Thakoor, 4 C L R 374 (1879) 5 C 139. Pulvahu v Goculdas 9 B 275 (1885), Ram Protan Chowdhury v Lal Chand, 9 C W N 369 (1901)

⁽²⁾ R 11

⁽³⁾ Jatta v Balu, 3 Bom H C 81 (1866)

⁽⁴⁾ Bhikan v Purshotam, 10 B 230 (1886)

⁽⁵⁾ Art 177, Schod L. Act IX, of 1908

⁽⁶⁾ Ihmad Ata Mata Badal Ial 3 A

^{844 (1881)} (7) Hamida i Ali Husen 17 1 172 (1893)

⁽⁸⁾ Bhikane Purshotam, 10 B 220 (1885) Subbayya v Saminadayyar 18 M 496 (1895) (9) Bharwan y Maharaja of Bhartpur, 17

A. 286 (1895)

⁽¹⁰⁾ Janta + Balu 3 Rom H C 81 (1860)

"Proceed with the suit "-Objection to the applicant being added as a legal representative should he raised at the earliest opportunity, and failure to object precludes the opposing party from raising it at a later stage (1) So where a decree has been made in favour of the legal representative of a deceased plaintiff, the Appellate Court should not go into the question of the representa tive's right to represent, or dismiss the suit on finding that he of she had no right (2)

Applicability of clause (2) -The section in the last Code (366) corresponded with the latter part of sect 102 of Act VIII of 1859, with certain slight alterations made by Acts X of 1877, and heing added by the former Act and the words "

and "shall on the application of the defendant" by the latter Act The second The Explanation appended to this paragraph of sect 366 has been omitted section in the last Code has been also omitted, having regard to the definition of "legal representative" in sect 2 ante. This rule applies to proceedings on appeal, (3) hut it does not apply to a suit in which a decree has been made, (1) nor under the last Code to proceedings in execution of decree , (5) as to this see now r 12, post

"Within the time limited "-That is, six months (6) If no application is made by the legal representative of the deceased plaintiff and the suit is ordered to thate, it may yet be revived under r 9 (7)

"No application "—Where two defendants appealed against a decree and one died and no application was made to revive and the decree was reversed

to thate (9) If an application he made hy one of the heirs of the decease appellant, the respondent is still entitled to have the other heirs put on the record (10) Where an application for revival has been made an order rejection in application that a suit might be declared to abate and that the application for revival is invalid is not an order under this rule (11) The words 'way person" under the former section did not confine the application to an application by ill the legal representatives, but for sufficient reasons any one or more mobile upply (12)

rule resuct at the instance of a person who is dead when the application is made is a nulhty)

- (1) M cnatchi i Anathanyrayana, 26 M _21 (130_)
 - (...) Balabare (an ali ...7 B 162 (190...) (3) R 11 1 at
- (1) Cally Churn v Bluggolutty, 5 C L R 104 (1573)
- (a) Medocamissa i Ar i roomassa 2 C 3.7 (1570), 4 1 A 66 Dulari e Mohai.
- 7 1 " a) (1851) () Art 1"5 She L I, Act IV al 1#5 Delif kare Hall behale P. C. Ja A. 331

- (1913), 10 I A 151, 17 C W N 829, 18
 - CLJJ (7) Bloyrub Doss Johurry t
 - Thakoor, 1 C 1 R 374. 5 C 139 (1553) Iulvahu t Gooil las UB ...75 (ISS.) (8) Natina lyyar t Annasami lyyar, -
 - 3(1.6 (1.01)
 - (9) Subbayya i Sam nadayyar 18 M 4 0
 - (1634) (10) Blakaji : 1 urshotam, 10 B -20 (1880)
 - (11) Blogmen v Maharaja of Bhartjur 17 1 -58 (15)
- (Ia) Misals Redlie I is son all Illin (1533)

FIRST SCHED DEATH, MARRIAGE AND INSOLVENCY OF PARTIFS 1053

"Shall ahate"—The section in the last Code ran, "The Court may pass an order that the suit shall abute" It was proposed to be amended so as to give effect to the principle that ahatement results from the operation of law and does not depend upon the making of an order—It was, therefore, suggested that the Court should merely declare that the suit had abated—The Select Committee, however, struck out the provisions that the Court night make an order declaring the shatement, as in its opinion it was unnecessary, and was likely to give rise to difficulty—If no application is made by the legal representative of the deceased plaintiff and the suit is ordered to ahate, it may yet be revived under r. 9, and the order for revival may be made immediately after the order for abatement (1)

"On the application of the defendant"—"Defendant" here includes plaintiff respondent and defendant respondent, (2) but a respondent in a special appeal cannot require the legal representative of the deceased appellant to be substituted and the appeal to proceed. He should file a cross appeal, (3) though it one of the heirs of the deceased appellant has applied to revive, the respondent is entitled to have the names of the other heirs put on the record so as to have them bound by the decree (4). The application must be within any months of the death of the plaintiff (5).

Appeals—The Allahahad High Court held that no appeal hes from an order passed under the first paragraph of the former sect 366 directing a suit to shate,(6) such an order not being a decree, (7) but both the Bomhay and Madras High Courts have held such an order to be a decree (8). No appeal hes from an order rejecting an application for a declaration that a suit had ahated by reason of the death of the pluntiff and the invalidity of an application for revival by the representatives of the deceased plaintiff (9). Where the special appellant dies and no representative applies to be substituted, the respondent cannot require the appeal to proceed. He should file a cross appeal (10).

4 (1) Where one of two or more defendants dies and the surplet to sue does not survive against the surdetendant or of sole defendants of defendants or of sole defendant or sole surviving defendant or sole defendant or sole surviving defendant dies and

the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit

⁽¹⁾ Bboyrub Doss Johurry v Doman Fhakoor, 4 C. L. R. 374 (1879), 5 C 139 Fulvahu v Goculdas, 9 B 275 (1885), Ram Protap Chowdhury v Lal Chand, 9 C. W. N. 369 (1904)

⁽²⁾ R 11

⁽³⁾ Janta v Balu, 3 Bom H C. 81 (1860)

⁽⁴⁾ Bhikaji r Pursbotam, 10 B 230 (1886)

⁽⁵⁾ Art 177, Schod. L, Act I \ of 1908

⁽⁶⁾ Abmad Ata " Mata Badal Inl 3 A

<sup>844 (1881)
(7)</sup> Hamida v Ali Husen, 17 1 172 (1833)
(8) Rhilau e Purshelmu 10 R 220 (1885)

 ⁽⁸⁾ Bhikaji c Purshetam, 10 B 220 (1885),
 Subbayya v Saminadaj yar, 18 M 496 (1895)
 (9) Bhagwan v Mal araja of Bhartpur, 17

A. 286 (1895)

⁽¹⁰⁾ Juta r Balu, 3 Rom H C 81 (1860)

- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
- (3) Where within the time limited by law no application is made under sub-rule (1), the sut shall above as against the deceased defendant.

Applicability .- This rule as originally enacted as seet 104 of Act VIII of 1859, was considerably modified and added to Act X of 1877, besides inaking certain verhal alterations, confined the scope to eases of the death of the defendant taking place before decree, and added a paragraph commencing "Provided that the person so made defendant" Act XII of 1879 added the next clause in the last Code from "When the plaintiff foils" to "the suit shall abate,' and substituted the words "right to sue "for "cause of action" Act All of 1882 added the further words from "unless he sotisfies" to "unthin such period," and the last paragraph was added by Act VII of 1888 New amend ments are italicized See post

The section is applicable to a suit for dissolution of partnership where two of the defendants died, and the plaintiff applied to revive (1) It also applies to proceedings on appeal (2) Hence on appeal by the plaintiff against a decree of dismissal the defendant died, on the death being notified to the Court it could not proceed to make a decree against the deceased < estate without revival (3) It further applies to second appeals (4) It, however, only applies to the east of a defendant dving before decree, and not to an application of the representatives of the defendant, who died after an ex parte decree, to be made parties for the purpose of setting aside the decree (5)

The section under the last Code did not apply to execution proceedings, (6) as to this see now r 12, post, nor to investigations in forma paupens under sect 107 (7) of the last Code corresponding with O XXXIII r 5 of this Code Under the provise to sect 232 of the last Code (O XXI r 16), the transfere of a decree could not obtain execution without notice to the judgment debter and where the judgment debtor was dead no such notice could be sent until his representatives were brought on record. There was nothing, it was held in that section to prohibit the transferee from applying under the former section corresponding with this rule (8)

meliides a respondent (9) Where it "Defendants"-The term here

⁽¹⁾ Junus Das t Soral pt, 10 B =7 (1531) (a) R H, Raj Chun I r c Ganga Das 31 C 457 (1.04), 8 C W N 422, 31 I A 71, f flowed in Ir am ud Din e Sadarath, J2 1 301 (1310)

⁽³⁾ Monre Lally Fazal Resem, 14 W R J37 (1570)

⁽⁴⁾ Notable aller Valuation of Held 1 - 31 I., J. 404, Madhulan Das e Nara n Dat . J \ 3. (1407), Upendra Kumar the artisty's Some Inf Marchhile C. L. J.

^{71 &}gt; (1307)

⁽⁶⁾ Samhasia i Vera Limmal, - 3 M atl (6) Stowell e Ajulha, 6 1 (1801). Krisl nayya v Unnissa, 15 M 339 (1831).

^[7] Janardan t Anant, 7 B 373 (1883) (5) Wahaling a Woo panar r Kuppanachi THE BOM "11 (1.007)" NO 17 11 ILJ 45

⁽⁹⁾ R H As to H Liw Ir r to est 552 of il last tool have ar nich er Butti shar r. Bo) shar, 7 A 728 (1882) Sod a Bloom a Grash Clin or H C all

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turned out that the defendant had died before the presentation of the plaint, the Court had no jurisdiction to substitute the representatives of the deceased as defendants and allow the suit to proceed as against them (1)

- "Right to sue does not survive "-In a suit for redemption against two defendants, the second being the sub mirtgagee of the first, on the death of the first, held on second appeal that no cause of action survived to the plaintiff against the second defendant, and the suit had abated, although the suit had been allowed to proceed against the second defendant (2)
- 'On an application "-On the death of a respondent, the right to have his representatives added vests jointly and not severally in the appellants (3)
- "Legal representative of the deceased defendant "-In an appeal by contributories against an order dismissing with costs an application against certain officers of a company under sect 214 of the Indian Companies Act 1882, on the death of one of the respondents his legal representatives cannot be brought on the record in his place in view of Explanation 2 to such section (4) A Hindu defendant died, herving a will of which no prohate was taken and his property came into the possession of his divided brothers who were brought on the record as representatives and a decree for the plaintiff made by consent. The mother of the deceased who apart from the will was the legal representative sued to set vside decree having previously obtained a declaration that she was entitled to the property as against the hrothers held she was not entitled to maintain the suit as the persons in possession were the proper representatives and the defendant could prove the will to show that she was not the representative (5) See also the notes to r 1 under Legal representative "
- "To be made a party"-Though the Court is hound to place on the record the person named by the plaintiff yet it was held that (acting under sect 32 of the last Code) it could also add the name of any person who had a Lood prima facie claim to be considered the legal representative of the deceased (6) This section as amended by Act VII of 1888 allowed the legal representative of the defendant to apply, and now the Court may proceed "ou an application by either side, so the question of the applicability of that or the corresponding section has now little practical value, vide post. In a recent case under the last Code it was pointed out that sect 368 (now represented by this rule) did not lay on the Court the duty of choosing the representative but that it was for the plaintiff to choose against whom he proposed to proceed, and that if some one else with an adverse claim to the nominee wished to be made the representative he should be added as a party (7)

^{(1885),} Lukshmibai t Balkrishna, 5 B 654 (1880) . Baldeo t Bumillah, 9 A 118 (1886) This last decision was overruled on another point by Debi Din v Chunna Lai 10 A 264 (1888)

⁽¹⁾ Veerappa Chettit Ponnan 17 M L J 5a1 (1907)

⁽²⁾ Prignyr Bap, 20 B 549 (189a)

⁽³⁾ Paru v Variangattil 28 W 359 (1904) (4) Wall : Howard, 18 A, 156 (1895)

⁽a) Janaka a Dhan a 14 M 454 (1891) (6) Athappa v Ayanna 8 M 300 (1884) but see Muhammad r Khushalo, 10 A, 223

⁽⁷⁾ Rameshwar v Janeshwari, 19 (I J

^{19 (1913)} p 26

"And shall proceed "-A person whom the plaintiff alleges is the legal representative of a deceased defendant being brought on the record, the decree will bind the estate of the defendant in the absence of fraud on the part of the plaintiff (1) Where the sole defendant died before decree, a decree passed against him on the supposition he was alive could not, it was held, be executed (2) So an appeal dismissed in ignorance of the death of the respondent who had lost in the first Court must be heard de novo after revival (3)

"The suit shall abate "-This applies to proceedings on appeal (4) So when two of the four appellants appeal through a guardian and the respondent dies and the appeal abates, no application for revival being made, the minors eaunot apply to revive through another guardian (5) Where one of four respon dents died and no application to revive was made within six months, the appeal boing one for the possession of land to which the four respondents claimed to be jointly entitled and in which the right to appeal did not survive against the surviving respondents alone, abated, (6) but where the habilities of the respondents are joint and several, the death of respondents without revival cannot exomrate the others from hability, and the appeal abates only so fir as the deceased respon dent is concerned (7) and where no application is made to revive, an appeal abates only against the respondents who have died (8) So on second appeal where two respondents died and no application was made to revive, the appeal did not abate (9) An appeal does not abate by reason of the failure of an appellant to bring on record the representatives of a deceased respondent if the appeal can proceed in the absence of such representative to a final and complete idjudica tion (10) On the contrary, where the decree could not he reversed without the representatives of the deceased being placed on the record, the appeal nas held to abate (II) Again, in a mortgage suit where the second defendant wa merely a surety personally, and on his death no application was made to revine held the plaintiff was not precluded from continuing the suit against the mort gagor and that the suit did not abate (12) An order for abatement was hell to be absolute (13) The former Code provided that the ant should that unh the plaintiff satisfied th

application within the s

of the grant of probate

defendant and applied beyond time to substitute the executor, held that wa

- (7) loy Gobind r Vonnotha Arth 13 (
 - (5) Bar I all v Adesang, 26 B 203 (1501) (9) Alla Balsh t Madho Ram, 23 1 -2
- (1J00)
 - (10) Benga Smire use e Gnanaprakasa J
- M 67 (Loot) (II) Dharanjit Nirinyin Singh (Chan
- d shward roand Small HC W \ 501(1.0) (1.) Mahdi Husain e Sashra Begam - 5 1 _04 (1.0..)
 - (13) Large Virgo and 21 M To)

⁽¹⁾ Kalir M hiden r Mutha Arishna Rameshwar t Janeshwart I) C I I I) (1913) (party not boun I by the electer when removed from the record on I laintiff sapph cation on the understanding that she would not be so bound)

⁽²⁾ Roop Naram t Rimayer, 3 C. I. R

^{1 :2 (1575)} (3) Shama Pullson Dino Nath, ... W. R.

^{103 (1570)} (4) Januardas e Stal ji, 16 B 27 (1811)

^() Laru e Variangattil, at 11 Roll

⁽C) Herr Kamuar r Araba Prava L -2 A

^{130 (1900)}

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sufficient cause for the delay under this section, and that the case came under sect 32 of the last Code (1). Some Courts were won't to take a strict view of what was "sufficient cause," excluding a plea of ignorance of the law. It was found by experience that a number of suits and appeals bad been held to abate somewhat unfairly through the ignorance of suitors and appellants as to the fact of the decease of a partly and as to the procedure necessary in such a case. It was proposed, therefore, to amend this rule so as to enable the Court in its discretion to allow the plaintiff in a suit to apply to add the name of the legal representative of a decease of defendant at any time before the passing of the decree. But this has not been done, is possibly it was considered that sect 5 of the Limitation let as any highly by the delay in the days of the latter.

Legal representative of a deceased defendant may apply—Before the amendment male by sect J2 of tet VII of 1883 it was held that the Court could not act save on the application of the plaintiff or appliant(J2) and the representative of a sole defendant could not apply to be made defendant,(3) unless the application came within sect 372 (now r 10) (4). The legal representative can apply under thirrulk (see sect 146). If there betwee claimants the Court should deade between them and not put both on the record (5). Where a party defended a suit on alternative defences has legal representative may rely on either (6).

Limitation — An application to have the legal representative of a defendant planntiff respondent or defendant respondent placed on the record must be made within six months from the death of the deceased (7). In a recent case it has been field that seet a of the Limitation Act does not apply to an application under this rule, and that where such an application is made after time the suit or appeal must be declared to have abated, and the remedy for the plaintiff or appellant is to proceed under r 9 of this Order (8).

 $Appeals = \ \ \, \hbox{ in order of abatement under the penultimate elause of the last Code was held to be an order and not a decree and appealable under sect 588 of that Code (9) See now O XLIII r 1$

5. Where a question arises as to whether any person is or is.

operation as to legal representative of a deceased question as to legal representative.

shall be determined by the Court

Applicability -This section in the last Code corresponded with sect 103

 ⁽I) Hossein Ali v Abdur Rahim, 7 C W
 N 529 (1905)

⁽²⁾ Sadhu Sarun Singh v Dwarka Singh 12 C L R 45 (1882), Iakshmibai v Bal krishna, 4 B 654 (1880)

⁽³⁾ Bai Javer v Hathi Singh 9 B 56 (1884) (4) Rajaram Bhagwat v Jibai 9 B 151 (1884)

⁽⁵⁾ Muhammad v Khushalo, IO A 223

⁽¹⁸⁵³⁾

⁽⁶⁾ Balmukund v Bhagvandas, 15 Bom L. R 209 (1912)

⁽⁷⁾ Art 177, Sched I, Act IV. of 1908 (8) Secretary of State v Jawahir I.al, 30

A. 235 (1914)
(9) Medhi Husain i Sughra Begum, 25 A
206 (1902)

³ v

0 22,10

of Act VIII of 1859, save for a mere verbal alteration by Act X of 1877 Under the former section the words were "the Court may either stay the suit until the fact has been determined in another suit, or decide at or before the hearing of the suit, who," etc. Now no alternative is given The Court must determine the question As to execution proceedings, see r 12, post

This rule applies to proceedings on appeal (1) and to a case of an agreement to refer a question of partition to arbitration; (2) hut not under the last Code to proceedings in execution of decree (3)

"A question."—Such as where the representative character is denied by the defendant (4) It need not be between persons claiming to represent the deceased plaintiff (3)

"Legal representative."-See notes to r 1, onto

"Such question shall be determined."-Under the last Code at was held that the adverse clamants to represent a deceased party must not be brought on the record, but the Court should follow one or other of the procedures laid down in the section (6) And that if the heirship was not established the Court cannot dismuss the suit but should stay it (7) The Court must now determine the question, side onte, "Applicability ' It is irregular to make two adverse claumants co plaintiffs, but the defect may be cured by the consent of the parties (8) Two rival claimants should not be placed on the record, and after the hearing, their claims decided in the final decree (9) The Court has not to decide who is the heir of the deceased plaintiff, but who shall be admitted to be such legal representative for the purpose of prosecuting the suit (10) The appoint ing of a legal representative for such purpose does not determine any issue proparly raised, such for instance as, in a partition suit, the vital issue whether the deceased plaintiff was joint or eparate from the rest of the family (11)

"The Court"-This must be the Court trying the suit A District Judge his no power to act under the section when the cause is before a Subordinate Judge although the latter may not be in Court on the day of the application (12)

Appeals -It was held that the order might be a tasak on an appeal from the decree even though no appeal has been preferred from the order, (13) but not if the party complaining was not a party to the decree (14)

If a well (re)

W 1 15 4, 121

⁽¹⁾ R 11

⁽²⁾ Permisalfa e Perimally, 27 M. 112 (1 (03)

⁽³⁾ Medienni sar Ameero amise, 41 A (a) , 2 (a27 (1570)

⁽¹⁾ Ouls r Requires 17 M 209 (1533) (") sullayear samma Layar, 18 M & to (Inc.), Hansant wich r ham (equal, so

^{1 745 (1,005).} () Har Sarame Mara, J V 467 (1897)

⁽⁷⁾ Indatai : (ar - 27 R. 1 2 (1 et). 4 1 - 12 In the wi 17 1/ 1- 175

⁽¹⁸⁷²⁾ SR L. B. App. 18

⁽¹⁾ Anla : 1 homa, 15 B 145 (18 G) (10) Ralabara Canesh, 27 B 1/2(14.). B m L R 980

⁽II) Parsotam e Janki Iso, 25 \ 103

^{(140), 1 1/1 \ (140) 200} (la) Byco Cimler lambalar 181,

^{1)} Har Narama Khara .. 9 & 447 (1857) . Blum, telt 145418.001. Italafate

^{*} R 1:2, 4 Ren L R 30(1 41) 1 + Mulhillar 20 1 20 (15 4)

TIRST SCHED DEATH, MARRIAGE AND INSOLVENCY OF PARTIES. 1059 O 22, rr 6-8

Notwithstanding anything contained in the foregoing rules, whether the cause of action survives or not, there abatement by shall be no abatement by reason of the death of reason of death after hearing either party between the conclusion of the hearing and the pronouncing of the judgment, but judgment may in such case be pronounced notwithstanding the death and shall have the same force and effect as if it had been pronounced before the death took place.

Death of party after hearing -This is new It was considered that the legal effect of proceedings taken in ignorance of the death of a party was uncertain, and it has therefore been enacted that the mere circumstance of a death among the parties did not invalidate judicial action The English practice has been followed as to the validity of a judgment where a party has died between the conclusion of the hearing and the delivery of the decision (1) The death of a plaintiff before hearing does not justify a dismissal of the sint for default of appearance under O 9, r 8 (2)

(1) The marriage of a female plaintiff or defendant is shall not cause the suit to abate, but the suit Suit not abated by marriage of female party. may notwithstanding be proceeded with to judgment, and, where the decree is against a female defendant, it may be executed against her alone.

(2) Where the husband is by law hable for the debts of his wife, the decree may, with the permission of the Court, be exeeuted against the husband also, and, in case of judgment for the wife, execution of the decree may, with such permission, be issued upon the application of the husband, where the husband 18 by law entitled to the subject-matter of the decice

Husband and wife -This section corresponded with sect 10 of Act VIII al 1859 sive for slight amendments made by Act A of 1977 some now as in the last Code but for one verbal amendment. It applies to proceedings on appeal (3). Where a person died pending suit and his wife was brought on the record and judgment given against ber which was affirmed on uppeal and between the original and final judgment she married again the decree it was held could not be executed against the second hash and (4)

(1) The insolvency of a plaintiff in any suit which the (s. assignee or receiver might maintain for the When plaintiff's insolvency bars suit. benefit of his creditors, shall not cause the

⁽¹⁾ Chetan Charan Das : Balbhadra Das, P C, 3. 1 331 (1913), 40 1 1 151, 17 C 11 1 629 21 A 314, Ramacharya e Ananta Charya,

²¹ B 314 . Surendra heshub r Doorgasoon ders, 19 C. 513

⁽²⁾ Lee case of d ath of party before

bearing, see D bi Baksh anghe Habib Shal,

⁽³⁾ R 11 (4) Bindabun Chund re Mackintosh 9 W l: 442 (1848)

suit to abate, unless such assignee or receiver declines to continue the suit or (unless for any special reason the Court otherwise directs) to give security for the costs thereof within such time as the Court may direct

(2) Where the assignee or receiver neglects or refuses to procedure where assignee tails to continue the suit and to give such security within the time so ordered, the defendant may apply for the dismissal of the suit on the ground of the plaintiff's insolvency, and the Court may make an order dismissing the suit and awarding to the defendant the costs which he has incurred in defending the same to be proved as a debt against the plaintiff's estate

Insolvency -- This rule corresponds with sect 106 of Act VIII of 1859 as modified by Act X of 1877, which (inter alia) extended the section to received appointed under sect 351 of the last Code, and substituted the last portion of the section as it now stands commencing from the words 'apply for the dismissal" The words "shall not cause the suit to abate have been substituted for "shall not bar the suit, ' and an option is given as to taking security rule applies to proceedings on appeal (1) It does not declare that the assign shall be made a party to the suit as the Act does in the east of persons represent ing a deceased party The practice in India was to add or substitute the assigner s name, and he might be called upon to deposit the costs of an appeal, (2) hut now the Official Assignce should give security before the order is made making him t party (3) The form of the order should be one giving the Official Assignce a time within which to elect and give security for costs If that is not done within the time specified the defendant may apply for dismissal (4) The defendant cannot plead abatement without giving the Official Assignce an opportunity of prosecuting the suit (5) This rule does not apply to a case where there has only been an application to declare the plaintiff an insolvent, and a vesting order has been made, but the proceedings are subsequently annulled and the plaintiff is not declared an insolvent (6) It only applies to the case of an insolvent plaintiff not to that of an insolvent defendant. The Assigned has no power to continu the defence of a suit pending at the time the vesting order was made or to get himself in ide a party to a suit with a view of moving for a new trial or for any other purpo c whatsoever He may apply to stay the sunt under sect 13 of th In han Insolvent Act (7)

11 9 (1) Where a suit abutes or is dismissed under this Order,
Effect of abatement or no fresh suit shall be brought on the same cause of action

⁽²⁾ Health of the read name 12 H H (18 0) of 4 C W \ 1 1 (2.7 (15 0)).

⁽⁴⁾ Load a) c San Lat La H 401 (15 a) 1 H H (and 207 (18 4)

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(2) The plaintiff or the person claiming to be the legal representative of a deceased plaintiff or the assignce or the receiver in the case of an insolvent plaintiff may apply for an order to set aside the abatement or dismissal; and if it is proved that he was prevented by any sufficient cause from continuing the suit, the Court shall set aside the abatement or dismissal upon such terms as to costs or otherwise as it thinks fit.

(3) The provisions of section 5 of the Indian Limitation [s. Act, 1877,(1) shall apply to applications under sub rule (2).

Effect of abatement or dismissal.—This rule corresponds with sect 371 of let X of 1877, save that the word "or" between "deceased" and "bankrupt" (subsequent) "insolient") was inserted by Act XII of 1879. The present amendments are verhel only. Sect 372A has, however, been introduced into the rule as sub rule (3)

This rule applies to proceedings on appeal (2). Before the amendment of sects 368 and 370 of the last Code it was thought the corresponding section referred only to orders passed under the last paragraph of sect 368 and the second paragraph of sect 370 of that Code (3). This opinion however, which was other, was no longer correct after the amendment, for sect 370 of the last Code as amended had no provision for abatement and under sect 368 as amended the abatement was under the penultimate clause, while the first clause of sect 366 also provided for abatement and to such orders of abatement this section was applicable (4). The former section was not applicable to an application by a plaintiff when the defendant is dead, and his representatives ought to have been brought in (3) nor to a case where a plaintiff who after obtaining an order for substitution of the representative of the deceased definition and issue of summons, took no steps, and the sut was dismissed (5)

Practice —A Court may make an order for abatement under r 3 (formerly sect 366), and then revive the suit under this rule, (?) and the order for a hatement may be coupled with an order under this rule (8). When appheations for ahatement and for revival were set down for hearing together, the proper order to pass was held to be to declare the suit to have ahated and then at once to pass an order under this section on sufficient cause being shown (9). The cause of action in the original and revived saits must be the same, no fresh cause of action can be imported into the revived suit (10).

Now repealed and replaced by Act IX of 1908

⁽²⁾ R 11

⁽³⁾ Bessessur Bhugut v Murk, 9 C 163 (1882)

⁽⁴⁾ Bhoyrub Doss v Doman, 5 C. 139 (1879), 4 C L R 374, Fulvahu v Goculdas, 9 B 279, Ram Protap v Lal Chand, 9 C W N 369 (1904)

⁽¹⁾ Benode Mohini t Sharat Chunder, 8 C 842 (1882)

⁽⁶⁾ Bessessur Bhugut v Murli, 9 C 163

⁽¹⁸⁸²⁾ (7) Bhoyruh Dass v Doman, 5 C 139

^{(1879), 4} C L R 374 (8) Fulvahu v Goculdas, 9 B 275 (1885)

⁽⁹⁾ Ram Protap v Lal Chand, 9 C W N 369 (1904), Goda Coopooramier v Soon daramall, 33 M 167 (1909)

⁽¹⁰⁾ Sham Chand Giri v Bhayaram Panday, 22 C 92 (1891)

sole appellant (1) No appeal, however, lay from an order allowing a defendant sobjections, neither was such an order a decree (2) See now O XLIII r 1 (1) An appeal lics under the Letters Patent from an order dismissing on its ments in application by the assignee of the plaintiff to be added or substituted (3) In appeal was also held to be from an order dismissing any application under the former section to be brought upon the record is representative of a deceased party in a case in which a decree under seet 86 of Act IV of 1883 had been passed, such order being one under seet 244 of the last Code, and therefore a decree within the meaning of seet 2 of that Code (4). And wherever a matter can be said to full within seet 47, ante, the order as a decree will be appealable. An application by a respondent, whose interest was at one time represented by a receiver, to replace upon the record of the appeal as a party respondent the name of such receiver, which had been stuck off owing to a misrepresentation of fuct, may be treated as an application for review of the order striking off the name of the receiver (5)

11. In the application of this Order to appeals, so far as Application of Order may be, the word "plaintift" shall be held to include an appellant, the word "defindant" a respondent, and the word "suit" an appeal

Appeals —This, with some alterations, is the second portion of sect 583 of the last Code, the first portion of which is the second clause of sect 107, and to the notes of which section reference should be made. Where in a personal action for an injunction a decree was given for the defendant with costs and the plaintiff appealed, but during the pendency of the appeal the defendant respondent died, it was held that the right to prosecute the appeal against his legal representative did not survive (6)

12 (1) Nothing in rules 3, 1, and 5 shall apply to proceedings

Application of order in execution of a decree or order.

to proceedings

Miscellaneous proceedings — As has been already observed in the notes to the preceding rules the opinion was cherally entertained under the last Code that the Chipter which this Order replaces did not apply to the execution of decrees. The original bill, therefore, proposed to except allevecution proceedings from the operation of this Chapter. On revision, however, it was considered that only the executions expressly mentioned should not apply to such proceedings, and that otherwise the provisions of the Order should be made equally applicable to suits and to proceedings other than suits (7).

1 411 2 1 342 (1 4/-)

⁽¹⁾ James Biller Jiau, 24 A 532 (1502) overruling Moti Lam e. Kundan Ial, 22 A

^{350 (1500)} (2) Cemi real Bank of India t Salja

Salet, 24 M. 222 (1990) (3) Latt. 31 Mn. r. Steller Charl. 4 C. M. S. 4 (2) (188) Fry Steller Chalch

⁽⁴⁾ In D. Water Caya Level, 13 A 142 (15 %)

⁽a) In the matter of Sarat Chan Ira Sir als. 18 1 257 (1833)

⁽¹⁾ J main v Sawi i Iyengar, Ji M 70 (1)10)

^{7 2 (1} on)

ORDER XXIII.

Withdraual and Adjustment of Suits.

- 1. (1) At any time after the institution of a suit the l Withdrawal of suit or plaintiff may, as against all or any of the abandonment of part of defendants, withdraw his suit or abandon part claim
 - (2) Where the Court is satisfied-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-

matter of a suit or part of a claim,

it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with aborty to institute a fresh suit in respect of the subject-

matter of such suit or such part of a claim

(3) Where the plaintift withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (4), he shall be hable for such costs as the Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim

(4) Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the

consent of the others.

Withdrawal of suit.—Sub rule (1) is new, save for the first line, which follows the wording used since sect 373 of Act X of 1877. Prior to that it was "at any time before final judgment," such being the terms of sect 97 of Act VIII of 1859. Sub rule (2) originated in sect 97 of Act VIII of 1859. Sect 373 of Act X of 1877 added the words, "that the suit must fail by reason of some formal defect," "or to abandon part of his slaim," or for the fait so abandon of "These last words were altered to "or in respect of the fait so abandon of "by Act XII of 1879. The present Code has substituted "allowing the funntity to institute" for "permitting him to bring," and made the other alterations noted in italies. It has omitted after the words "on such terms" the words "as to costs.

that the defence was such that the suit must fail (1) It has been held that while it is impossible to by down any exhaustive definition of "sufficient grounds ' within the meaning of this rule, it may be generally said that the Court should not allow withdrawal of suit after the parties are ready for trial if it would obviously piejudice the defendant (2)

"With liberty to institute a fresh suit "-This does not prevent the Court, when such fresh suit is brought, from entering into the question of res judicata, (3) but a suit is not barred by the principle of res judicata because in the former suit after evidence had been recorded but before judgment liberty to bring a fresh suit had been granted (4) Courts in India have not the power to make a decree of non suit. So where in a suit for enforcement of a hypothecation against immoveable property it was dismissed, in the form in which it was brought, on the ground that the plaintiff having purchased a part, could not sue for the whole of his claim against the rest of the property with permission to bring a fresh suit it was held that such permission ought not to have been granted (5) In a decree wholly dismissing a suit for possession on the ground that the plaintiff had only made out his claim to one third of the property claimed, the liberty given to bring a fresh suit for possession of the one third was a millity and the claim was res judicata in a suit brought in pursuance of the liberty (6). If the permis ion through madvertence be not recorded the omission may be rectified on review (7). The procedure provided in this Order is not the only manner in which a plaintiff can come to Court a second time for adjudication upon the merits of his rights (8) I imitation applies to the second suit as if it was the first (9)

grant"-The order should not be for the dismissil of the " May suit but in terms of this rule (10) The proper order is one which limits the time in which the payment should be made and which soes on to direct that on fulnto to pay within that time the original suit is dismis ed with costs (11) Apart from this rule the Courts in this country have no power to dismiss a suit and give a plantiff have to bring a fresh suit on the same matter (12). It has ben held that the dismis of of a suit in the form it was brought do a not amount to permission to such a um (13) Intitlus has been discrited from (14). If the defendant has upgered this order cannot be made ery inte (15) but must

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⁽I) Adar mass a blads for I f -3 (lest)

^() Mah patric Nathu 33 H 722 (1969) (i) Walson r Collector I Hajebabye L.

W R P (~17 (180)) 13 M o F V 160 2 B I R P C. 45

⁽¹⁾ M na B bear Dm vl Mi H W R 2"1

⁽¹⁵⁷¹⁾ () Banwari i M ha ma I Mashail J N

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⁽⁴⁾ M. a. a.a. a.a. vabani 1 4 5

⁽¹⁰cl)(t. Il C. ran ir nod? sirigraf (1) (10) Doucetta Wisc I W R 7 ... (15 4)

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he made on notice to hun (1) The effect of the order is to leave matters as if no suit had been instituted, and O II r 2 will not dehar the plaintiff from seeking rehef he did not include in his first suit (2). Where the order was made so as to enable the plaintiff in the first suit to include a portion of his elum omitted in the original suit and such fresh suit was brought, it was held that the additional portion was not barred by sect 7 of Act VIII of 1859 (3) Where an Appellate Court, instead of deciding upon an appeal, refers the appellant to a fresh suit, the order whether right or wrong if accepted by the parties, is hinding upon them (4) A Special Judge under the Dekkhan Agriculturists Relief Act, in the exercise of his revisional powers, cannot do so no such application having been made to the Lower Court (5)

Sub rule (3) -The original clause was introduced as the effect of the decision cited (6)

"On such terms "-The only case in which a Court may enforce a condition, eg that the payment of costs he a condition precedent to withdrawal. upon a plaintiff who seeks to withdraw is where the plaintiff asks not only to withdraw but also liberty to bring a fresh suit (7) The order that the plaintiff should pay the defendant s costs is almost if not quite, a matter of course, and an Appellate Court will not interfere with such an order (8) The plaintiff had to pay the costs mourred by the defendant where he caused the defendant's arrest before judgment and then applied for withdrawal under this rule (9) If the liberty be to bring a fresh suit ou payment of costs a subsequent suit is not void ab mitto if the costs are not paid before its institution and subsequent payment cures the irregularity (10) But if the order be that the costs be paid within a specified time and that is not done the withdrawal must be taken to be without permission , (11) though the Court has power to extend the time for payment when it is absolutely impossible for the party to pay such costs before the day fixed (12) In a recent case where permission to withdraw a suit on payment of costs with liberty to institute another had been granted, but the subsequent suit was brought before the costs had been paid it was behl that it was barred because the former suit was still pending but that on a liter payment of the costs the withdrawal became complete (13)

"Claim "- Claim means such a claim as if the allegations on which if

- (S) Decette Was 1 W R 322 (18c1) (J) Seed Alice Adub 15 11 160 (18 0) (10) Melul Azur : Firahim Wolls 11 (
- 165 (1904) (II) Harmathic Stelllassam 10 (W S S(190) 2C 1 1490 Fishere \1001194
- J3 V 248 (1309) (L.) Lena Mutherian r. Karaj panna 29 M
- 370 (1 401)
- (13) Shital Prosal r Caya Primal Li (I J -29 (1314) (Junkas (J, anl
- Woodroffe J) approving thelal triz e
- I bral m Wills, segra

⁽¹⁾ Misser Del co Pershail t Buldco Per slad, 5 V W P H C R 116 (1873). Karcem Bee t Bergam Bic 3 M II C 308 (1867) Kalan Singh v Lekhraj 6 \ 211

^{(2) 11} hart Lafe Baran Var 17 1 53 (1894) (3) Hahi Baksh t h tam Baksh I A 3.4 (1576) see also Landon Bombay and Weds terrane in Bank i Hurjorji 9 H 346 (1885)

⁽⁴⁾ Raph t \il Mone 20 W R 440 (1873) (5) Makiapi e Manapi 12 B 654 (1888) (6) Also Tal for Alsdo, I Nulses 20 W R

^{415 (1573)} (5) Haidar Shah r. Jamna Die 17 & 1 >

^{161 (189} a)

with the sauction of the Court upon a misappichension of material facts,(1) or where a compromise in which an infant was concerned was made without the sanction of the Court, (2) or on the ground that the compromise was obtained upon a misrepresentation of the facts, the compromise would be set aside,(3) and a decree embodying unlawful terms of a compromise, eg, the sale, as being against public policy, of an office attached to a temple involving services of a personal nature and entitling the holder to receive emoliments, is inoperative and will not be enforced.(4) so a decree made on a compromise entered into behind the back of a defendant and to which she is not a party is a nullity as against her (5) For grounds on which a compromise may be set aside, see case cited (6) In England it was held that the question whether a compromise was invalid ought to have been made the subject of a new action, but having been tried without objection as a motion the objection could not be raised on appeal (7) In India it may be set aside either by suit or by way of review, but preferably by review (8) It cannot be set aside on a motion on the ground of fraud, (9) nor can the question as to whether the compromise is valid be gone into on an appeal from the consent decree (10) The effect of setting aside a compromise is to remit both parties to their original rights (11) When a consent decree by A against B and C is set aside by a decree in a suit by B against A so far as it affected their rights, such decree does not reserve the consent decree so as to entitle A to have his suit restored and rebeard on its merits (12) If the compromise does not give the plaintiff any of the reliefs claimed in the suit but deals with the matters not the subject matter of the suit, no decree can be made (13) And a Court is not bound to enforce a compromise which goes beyond the suit It may refuse to do so but it cannot modify it (14) If the compromise goes beyond the scope of the suit the decree should be pised for so much as relates to rehef which the Court could give in the suit (15) Su where the compromise was an agreement to refer the matter in suit to arbitra tion, and the award made thereon dealt with additional matter, the award could only be recorded as fir as it related to the suit (16). But by consuit of the parties and the leave of the Court a suit may be amended so as to cover in increased claim, and there is nothing in the law which prevents the (I) Schmen a Abect Acce, 6 C est (J) lookesmary : Woodby (hind to -)

W 216 (1505)

⁽IbsIl). (2) Karmali a Bahambhay, 13 B 137

⁽³⁾ Calbert 1 Indian, 9 (D 27), p = (5

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⁽⁴⁾ lalahmansawami v. Ramaswami, 20 31 (150.) (5) Sankara e Kumarasanya S U 173

⁽c) Iwa Smu, in c Trigag Single & C

^{175 (1551)} (7) Clieft : I Jan 1 C D auf (1979)

[£]ا £ 10 بدر ادعم المتمل و ما مماملاً (د) (1854), Little Pitt bir elliter and design W. L. .. (ba) + ab Kart In the Health, 110 W 5 11-7 (199)

C 619 (15 is) (10) Burn McIam e Chasta Mem, 5 to W N 577 (1501)

⁽¹¹⁾ Klapscroomssa i Reuslan Jelian, 2

C 181 P C (1876) L6 W R 16, 14 A

⁽¹²⁾ Blumpt r. Inknalst, lu B " 5 (Id) Matta Nijava i Handinaraja, ad

⁽¹⁴⁾ Lapat h. Mr. a. Kar. ara H.n. 13 (- 170 (155/)

⁽I) Melica II saffetand (I)

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paties to a suit enlarging by consent or compromise the original claim and tting or allowing a decree for a greater amount of money or land than that originally a ked for (1) Where a compromise goes beyond the subject matter of the suit, and a decree is made on the basis of the compromise, although the decree in respect of the surplusage cannot be executed (2) the defendant is hound by its terms if he benefited therefrom The Madras High Court have, however, held that a decree passed in terms of a compromise entered into between parties and comprising therein reliefs not covered by the suit, is yet enforce able in execution, provided that there is nothing unlawful about the terms though the decree itself as drafted might have been objected to on an appeal therefrom (3) The decree passed on a compromise cannot be regarded as ultra tires simply because it goes beyond the subject matter of the suit and contains other conditions. If such other considerations are the considerations for the compromise they must be incorporated in the decree, if they are indepen lent they may be regarded as surplusage (1) But where the suit was for money, and the defendant agreed to his property being charged as a term of the compromise, it was held a decree could be made embodying the charge (5) If the compromise affected matters outside the suit, and it was agreed that if one party failed to carry that portion out the other could sue in respect thereof the section does not prevent the same being enforced by suit (6) The language of the section is wide and general and does not preclude parties from settling their disputes ou such lawful terms as they might agree to without heing restricted to such relief as one only of the parties had chosen to claim in the plaint. In a suit for money where the plaint asked for a simple money decree an agreement that the amount decreed should be a charge on certain properties was held to be both lawful and to relate to the suit (7) When by unregistered documents a compromise going beyond the scope of the suit was affected but only such portion as related to the suit recorded and decreed that portion required no registration and the finding thereon was res judicata and if the decree had referred to or narrated the other terms of compromise it would have been judicial evidence of that portion of the compromise (8) But an agreement outside the scope of the suit although incorporated in the decree does not operate as res judicata (9) When a consent decree was passed in terms of compromise with a reservation that only the property claimed in the suit could be obtained in execution a subsequent suit in respect of other property dealt with in the compromise based upon hoth title and the compromise was not barred by this rule or by O II

⁽¹⁾ Mohibullah r Imam: 9 A 229 (1897) (2) Jasimuddin Biswas : Bhuban Tehni,

³⁴ C 456 (1907) (3) Anantanarayana Aiyar & Abdul Ka run 17 M L J 200 (1907) \$ c. 30 M 421

⁽⁴⁾ Purna Chandra v Nil Madhub 5 C W N 485

⁽a) Joti Kuruvetappa i Sri Devandra 16 M L J 354 (1906)

⁽⁶⁾ Gupta Narain t Bejova Sin lari 2 C W N (63 (1897)

⁽⁷⁾ Joti Kuruvetappa v Izari Sirusappa 30 M 478 (1907) Natesa Ch tti i Vengu

Nachiar 33 M 102 (1909) (8) Pranal Annee r Lakshmi Annee 3 C W \ 485 P C (1899) a. c. 26 I A 101 Ramdhan r helan Lal 1° C W N 217 (1908)

⁽⁹⁾ Purna Chandra Burman r Panchkari Gnose 5 C L J Io (1906) and see Bir bhadra \ath v Kalpatara Panda, 1 C L. J 3\$8 (1905)

r 2(1) The object of judicial sanction to a compromise entered into by the parties to a suit where one of them is an infant is to safeguard the interests of the minor before the Court An objection that a minor son in a Mitakshara family was not made a party to a suit in which his father as Laria or manager of the family was a party, and that such minor was in consequence deprived of the protection which he would have enjoyed by reason of a judicial sanction of the compromise, is not by itself sufficient to make the compromise inoperative against him Unless it is shown that the minor has been prejudiced, he cannot successfully impugn the decree (2) The difference between a consent decree declaring the agreement of the parties and the agreement of parties themselves, when the one or the other is sought to be afterwards enforced, goes no further than this, that in the former case it would not be open to a party to question the accuracy of the decree, as expressing what at the time was the contract which had been made (3)

Appeal -An appeal lies against an order on a dispute as to whether a compromise had been arrived at, the alleged compromise being impeached as not being lawful (4) Where the decree recorded a compromise going beyond the scope of the suit an appeal hes, and on appeal the decree should be modified so as to include only such portion of the compromise as relates to relief which the Court could have given in the suit (5) See now O XLIII r 1 (m)

Nothing in this Order shall apply to any proceedings in execution of a decree or order. Proceedings in execution of decrees not affected.

"Proceedings in execution "-This rule was added to the Code by Act VI of 1892, but it then included "any subsequent to the decree," and had an L to the Appellate Court pending an appea decree appealed from within the meaning of this section" Prior to the pissing t Act M of 1892 it was held that where a decree was put into execution the proceedings taken therefor amounted to a separate litigation, which could be compromised under O XXIII r 3, read with sect 111 (6)

(5) Venkatappa + Thumma, 18 M 410

(1894), see also the Manag r of Sri Metnak

ahi Devestanam Madura t Abdul Kasim, ol

⁽¹⁾ Parsanni e Naraini, 2 A L J 680

⁽²⁾ Birbhadra Nath t Kalpatara Panda, 1 (L. J 358 (1505)

⁽³⁾ Krishna'al r Hari Covind, 31 B 15

⁽⁴⁾ Sridharan r. Piran athan, 23 M. 101

^{(15 11).}

M 421 (1907) (6) Muhammad Suluman t Jhul li Ial 11 A 228 (1588)

ORDER XXIV.

Payment unto Court.

- 1. The defendant m any suit to recover a debt or [s damages may, at any stage of the suit, Deposit by defendant of amount in satisfaction deposit in Court such sum of money as he of claim. considers a satisfaction in full of the claim.
- Notice of the deposit shall be given through the Court [s by the defendant to the plaintiff, and the Natice of deposit. amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his application.
- No interest shall be allowed to the plaintiff on any sum [s deposited by the defendant from the date Interest on deposit not allowed to plaintiff after of the receipt of such notice, whether the sum deposited is in full of the claim or falls notice. short thereof.
- (1) Where the plaintiff accepts such amount as satis- [s faction in part only of his claim, he may Procedure where plainprosecute his suit for the balance, and, if tiff accepts deposit as satisfaction in part. the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the sut meurred after the deposit and the costs incurred previous thereto, so far as they were caused by excess in the plaintiff's claim.

(2) Where the plaintiff accepts such amount as satisfaction in full of his claim, he shall present to the Procedure where he accepts it as satisfaction in full. Court a statement to that effect, and such statement shall be filed and the Court shall

pronounce judgment accordingly; and, in directing by whom the costs of each party are to be paid, the Court shall consider which

of the parties is most to blame for the litigation.

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- (1) Parsanni e Naraini, 2 A L J 680 (2) Birbhadra Nath v Kalpatara Panda, 1 (* L. J 358 (1905)
- (3) Krishnabar e Harr Covin I, 31 B 15
- VI 421 (1907)
- (1894), see also the Manng r of Sri Meenak shi Devastanam Madura t Abdul Kasim, 30 (6) Muhammad Suluman t Jhukki Jal, 11

(5) Venkataj pa : Thimma, 18 M. 410

- (i) Sridharan e Paramathan, 23 M 101 A 228 (1549)
- (15 m).

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- 2. Notice of the deposit shall be given through the Court is by the defendant to the plaintiff, and the amount of the deposit shall (unless the Court otherwise directs) be paid to the plaintiff on his appheation.
- 3. No interest shall he allowed to the plaintiff on any sum is deposited by the defendant from the date of the receipt of such notice, whether the sum deposited is in full of the claim or falls short thereof.
- 4. (1) Where the plaintiff accepts such amount as satis is faction in part only of his claim, he may prosecute his suit for the balance, and, if the Court decides that the deposit by the defendant was a full satisfaction of the plaintiff's claim, the plaintiff shall pay the costs of the suit meurred after the deposit and by excess in the plaintiff's claim.
- (2) Where the plaintiff accepts such amount as satisfaction receives it as satisfaction in full of his claim, he shall present to the inful.

 Court a statement to that effect, and such statement shall be filed and the Court shall pronounce ludgment accordingly. and, in directing by whom the costs of each party are to be paid, the Court shall consider which of the parties is most to blame for the higgstion.

ORDER XXV.

Security for Costs.

1. (1) Where, at any stage of a suit, it appears to the Court that a sole plaintiff is, or (when there When security for costs may be required from are more plaintiffs than one) that all the plainiiff. plaintiffs are, residing out of British India, and that such plaintiff does not, or that no one of such plaintiffs does, possess any sufficient immoveable property within British

India other than the property in suit, the Court may, either of its own motion or on the application of any defendant, order the plantiff or plaintiffs, within a time fixed by it, to give security for the payment of all costs menued and likely to be meured by any defendant.

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(2) Whoever leaves British India nuder such encumstances Residence out of British as to afford reasonable probability that he will ladta.

not be forthcoming whenever he may be called upon to pay costs shall be deemed to be residing out of Butish India within the meaning of sub rule (1)

- () On the application of any defendant in a suit for the payment of money, in which the plaintiff is a woman, the Court may it any stige of the suit make a like order if it is satisfied that such plaintiff does not possess any sufficient immoveable property within British India.
- 2. (1) In the event of such security not being furnished Effect of failure to within the time fixed, the Court shill make furnish security. an order dismissing the suit unless the pluntiff
 - or plantiffs are permitted to withdraw therefrom (2) Where I suit is dismissed under this rule, the plantiff may apply for an order to set the dismissal aside, and, if it is proved to the satisfaction of the Court that he was prevented by my sufficient curse from formshing the scenarty within the time allowed the Court shall set aside the dismissal upon such terms as to security, costs or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit

() The dismi- il shall not be set uside unless notice of such application he leen erved on the defending

"Residing," r. 1, sub rule (1) -As to the meaning of this word, see notes to sect. 23, arte. The meaning of the term depends upon the intention of the Legislature in framing the particular provision to which the word is used. The term here the and to idence under such circumstances as will afford a reasonable y robal plity that the plaintiff will be forthcoming when the suit is decided. Luch case trust therefore depend on its particular circumstances (1). A per on who leaves British India under the circumstances mentioned in r. 1, sub-rule (2). is deemed to be residing out of British India

"British India."- \s to the meaning of this term, see notes to sect 1, a to As the residence must be out of British India a plaintiff who resides in another Province or Presidency of British territory cannot be called on to give security (2) An inhabitant of foreign territory such as Hill Tippers, must ave security even though the defendant is all our esident in foreign territory (3) The British cantenment of Secunderabad was held to be out of,(1) and the cantenment of Wadhwan within (5) British India

"May."-The exercise of the power conferred on the Court is not imperitive but discretionary to be exercised according to the encumstances of each (as (6) and the Court will not order a plaintil to give security unless grounds are shown tending to show that the defence is true, (7) or that the suit is not a bena fide one,(8) and it appears that the exercise of the power is necessary for the trasonable protection of the defendant (9)

"Leaves British India," r. 1, sub rule (2) - When a plaintiff leaves British India before the case is decided the defendant should apply to the Court under sub rule (1) to take security for costs (10) and then unless there is a reasonable probability that he will be forthcoming whenever he may be called on to pay costs, or, that he has sufficient immoveable property in British India to meet them he must give security. If no security is furnished judgment will be passed against the plaintiff by default. But when a case has gone to judgment without such application the Appellate Court cannot pass any order as to the costs in the first Court (11) As to security in the case of appeals, see O XLI r. IO, post

- (2) Gahan t Owen Coryt 11 (1864), as to the Code of 1809, see as. 34 and 35 of same
- (3) Koroona Moyce v Ooma Churn, 12 W R 465 (1869)
- (4) Hossam Alı Mirza r Abed Alı Mirza, 21 C 177 (1893)
- (5) Triccaru Panachandu Bombay Baroda, etc. Rv. 9 B 244 (1885)
 - (6) Degumban Debre Aushootosh Bancrice. 17 C 610, 613 (1830), Shama Sundary &

- Rash Behary Dhur 3 (W N 7.3 (1893) . In the goods of Prem Chand Moonshee 21 (283 (1894). Bai Pirbu i Devji Meghji 23 B 100, 102 (1898)
- (7) Shama Sundary v Rash Behart Dhur. supra
 - (8) Namubas v Daji Gobind, 35 B 421
- (9) In the goods of Prem Chand Moonshee. supra, in which case, as the suit would have
- to proceed as an administration suit, the plaintiff could in no event have been hable for the defendant a costs
- (10) In re Calcutta and S E Ry Co 8 W. R 217 (1867)
 - (11) Ib.

(1910)

⁽¹⁾ Mahomed Shufili + Laldin Abdula 3 . B 227 (1878), where a residence of 4 months with a statement that it was intended to be permanent was considered insufficient, see Sri Goswamı v Shrı Govardan Laljı, 14 B 541, at 547 (1890)

"Suit for the payment of money," r. 1, sub rule (3).—The last puri graph in sect 380 of the former Code was inserted by sect 5, Act VI of 1888 A suit "for money 'is wider than a suit for debts. It is necessary to look at the substance of the suit A suit for money damages is within the section , (1) such as a suit for possession of ornaments and other things, or in the alternative, their value (2) The words formerly appearing, "independent of the property in suit," have been omitted because the naturo of the suit excludes the possibility of the property in suit being immoveable. If the suit is one in which the chief or principal relief asked is the recovery of money, or of moveable property for which the plaintiff is liable to pay money, the suit falls within this rule (3)

Security .- In terms no exception is made in this rule of the case of i minor, nor can such an exception be introduced into the rule. The order to give security is, however, a discretion try one, and unless in exceptional cases, neither an infant plaintiff nor his or her next friend ought to be required to one security for costs (1) Without deciding the question whether a continuing security is necessary, the Supreme Court held that if security has been farmshed, fresh security will not be demanded unless it is shown that the smeties are in no wise subject to, and have no property within, jurisdiction (5) For the proper mode of proceeding on a security hand see below (6) The words "or show good cause, 'etc , at the end of sect 381 of the last Code, and the last puagraph if that section, have been omitted. The Court has, however, under sect 118 power to calarge the time

taking of security in other cases, such as in staying execution (O ALI r (O XLV r 13) and where an appeal has been filed (O XLI 1 10) It would, however, appear that the Court can demand security in cases for which no express provision is made. So though the Court will not require security because the plaintiff is a purper or he find that he is not the real lit And the representatives of a

Calling for security in other cases -the Code itself provides for the

and charitable trusts created by hun, and in which they are not personally interested, should, it has been held, give security for costs (8)

⁽I) Desumbare Debt t deotooden? Bancrice, 17 C 610, 613 (1530) (2) 1b , followed in Anandamore Gold, 16

C 11 × 763 (1712)

⁽³⁾ Sonabar v Inbhawandas, 32 B 602 (1:05)

⁽⁴⁾ Ballister (Despt Menhit, ad H 100)

⁽¹¹⁻³⁵⁾ (5) Wars tant Ira, Fulton 151(1544).

Blanda bir : Malp 3 it 130 (1010)

^() Pater Bibec : Napos Khan, 5 C 437 (1-37) , M , I A t " a Barr bandra In e. 10 H e st (trot) . (11 Nath Ch will to . Her to Inil I . 31 Ca 162 (1.03). han min tajar e di ma hajari at M

^{637 (1901)}

⁽⁷⁾ Klajah Assenochlajoo e Schmon H 6 33 (1697) Juning dicture of P (1) Run Coomar Kunlos t Chunler Kanto Mockespee, 2 C 213, at pp. 200 201 (1870)] Harr Nath : Ram Kurair Bigelii DC L 3 od (1914), Germ I Das v Hamash y Je A dar, fult n 155 (1813) [if collusen at l imbout on by a third party is grove la curty

for e ata will be er level] (5) Brejon oliun Desser Hurrel II Desse b C L R 3, 60 (1880), and retracely e let to to end to jullio righter are Care M starll some Din tar l | 1 | 11 , 11

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Failure to furnish security.—ActVIII of 1859, sect. 55 (sect. 58) of the ferror Cole). The words after "sect. 373" of first paragraph, were inserted by sect. 53. ActVII of 1888, but have now been taken out; indeade, "Security." The time may be attended under sect. 188. Before dismissing a suit under this rule, the Court should see that notice of the order requiring security has been a tyed on the party or his pleader (I). A person whose suit has been dismissed under this rule, may, if defendant in a subsequent suit, rely on the same matter put forward in the previous suit. It was queried whether he could do so if he were plaintiff in the subsequent suit (2). It has, however, recently been held that a dismissal of a suit under this rule does not bar a fresh suit for the same cause of action (3). An order dismissing a suit under this rule is a decree and open to appeal (i).

- (1) Timmu v. Deva Rai, 5 C 265 (1882) (2) Rungray v. Selhi Mahomed, 6 R 482 (1882)
- (3) Hariram Mohapi i Laibai, 26 B 637
 (1902), s. c., i Boin, L. B 262.
 (4) Williams t, Brown, S.A. 108 (1886).

"Suit for the payment of money," r 1, sub rule (3)—The last para graph in sect 380 of the former Code was inserted by sect 5 Act VI of 1888 I suit " for money ' is wider than a suit for debts. It is necessary to look it the substance of the suit A suit for money damages is within the section, (1) such as a suit for possession of ornaments and other things or in the alternative, their value (2) The words formerly appearing, 'independent of the property in suit," have been omitted heeause the nature of the suit excludes the possibility of the property in suit heing immoveable If the suit is one in which the chief or principal relief asked is the recovery of money, or of moveable property for which the plaintiff is liable to pay money, the suit falls within this rule (3)

Security -In terms no exception is made in this rule of the case of a minor, nor can such an exception be introduced into the rule. The order to give security is, however, a discretionary one, and unless in exceptional cases neither au infant plaintiff nor his or her next friend ought to be required to one security for costs (4) Without deciding the question whether a continuing security is necessary, the Supreme Court held that if security has been furnished, firsh security will not be demanded unless it is shown that the smeties are in no wise subject to, and have no property within, jurisdiction (3) I or the proper mode of proceeding on a security bond see below (6) The words or how good cause, 'cte, at the end of seet 381 of the list Code, and the list pulp if that section, have been omitted. The Court has, however, under sect 118 power to cal are the time

Calling for security in other cases -The Code itself provides for the taking of security in other cases, such is in staying execution (O ALI r ! O LIV r 13) and where an appeal has been filed (O ALI 1 10) It would however, appear that the Court can demand scenity in cases for which no express provision is made So though the Court will not require security because the oluntiff

find that he

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and charactable trusts created by him, and in which they are not personally interested, should, it has been held, and security for costs (8)

Ausbootosh (I) Desambari Debi i Bancry c, 17 C 010, 013 (1830)

^{(2) 1}b followed in Anandamore Gol d, 16 C 11 1 763 (1312)

⁽J) Sonabar : Inflowantas J. B 602

⁽¹⁾ Bal Inbar t Despi Mealpl ad B 100

⁽a) to 1 one to his, tulion 150(1511) Black Lie Waln LeB add (1910)

⁽⁾ lovier Black Nopen Khan 5 t 117 (1537) Mr. 1 A t " e Louis ha i fra the Direction tops of the author · 164 141 1 31 4 10- (1-03) hea ma sayat e I mis hayar of 31

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⁽i) Kl gab Assentedliges a Storie 11 C '31 (1897) [calm, d'clum of 1 (1)

Ram Coomar Kunlor t Clund r harto Mack spec, 20 -33, 11 [11 -3] -11 (15")] Hart Noth t Ram Kurrer Log In to C L J od (IJIJ), & sind Das t Rainsal v I &

lar 1 ilton 155 (1813) [if collasses a 3 matigation I a that I party is prove to col ly

fore stavallines I to 1] (5) Brejomol un Desset Hart I II Ikas, 6 C I R 4, 60 [1550] at 1 at a 1 a 17 ristes t entr jubl rolls as tal Me arll saise De obar I In the H

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Failure to turnish security.—Act VIII of 1859, sect 35 (sect 381 of the fermer Code). The words after "rect, 373," of first paragraph, were macried by sect 33. Act VII of 1888, but have now been taken out: tideante, "Security." The time may be extended under sect 118. Before dismissing a suit under this rule, the Court should see that notice of the order requiring security has been rived on the party or fins pleader [1]. A person whose suit has been dismissed under this rule, may if defendant in a subsequent suit, rely on the same matter pat forward in the previous suit. It was queried whether he could do so if he wire plaintiff in the subsequent suit (2). It has, however, recently been held that a dismissal of a suit under this rule does not bar a fresh suit for the same cause of action (3). An order dismissing a suit under this rule is a decree and open to a notal (1).

- (1) Titamu v. Deva Rai, 5 C. 265 (1882)
 (2) Rungrav v. Sidhi Mahemed, 6 R. 482 (1882)
- (3) Harram Mohanji e Lalbar, 26 B 637
 (1992), s c, 4 Boin, L R 262.
 (4) Williams v. Brown, S A 408 (1886).

exempted from attending Court, as purdanashin women under seet 132, post,(1) or other persons of rank exempted under sect 133, or persons living without the jurisdiction who are not bound to attend under O XVI r 19, (m) civil ind inilitary officers who cannot, in the opinion of the Judge, attend Court without detriment to the public service (2) fr 4, clause (c)], and lastly, (iv) persons who ire from sickness or infirmity unable to attend Court (r 1)

An application for a commission should not be made except on notice to the opposite party (3) A commission should not issue for any cause not stated in these sections, the practice standing upon the statute (4) Assuming, however, that the cause alleged is one mentioned, the Court has a discretion (5) to grant or refuse a commission, the question being in each instance whether a sufficient case has been made out having regard to the disadvantage (6) which attends evidence taken on commission This discretion, however, must, like any other, be judicially and not arbitrarily exercised

I Court will not unless there be an absolute exemption or for strong reason, issue a commission to examine a party to the suit, nor a servant of the party applying (7) for such a witness may be brought by his master before the Court If the proposed witness be a stranger, the Court may consider the importance of the matter to which he will testify and may assume the possibility of his not being credible, and the importance of observation of demeanour, (8) the oppor tunity which has taken or may take place for his examination de bene esse, (9) and the like and will consider not merely what the plaintiff a case requires, but what justice to the defendant is well is to the plaintiff requires (10). In a large number of cases, where the witness is material the commission goes as a matter of course As regards delay in making the application if a party applies late, but thinks it worth his while to incur the expense of taking out a process such as summons of

- (1) Chamatkar Wohtney v Woh s Chunder, J C W N 500 (18 L) Melies Chunder e Manick Lall 3 C W N 751 (1853), 1 rovat humarce : Ofurlakissen 3 C W N 753 (1509) in whi hit was held that if a jurdana al in off inds a sin t the rules of her class that does not define ler of translit to be exarin d und r c mussion Native ladus rotex rited units 132 should be alles 1 to ren am in their palkis in Court while grom, cold no Ruka Baner Roberts, I B L. l. 5 N. V (18 5) Kristor ohun Makirper Alarmor y Dalke 2 Hyd 88 (15 1) Nusrat Banco r Malor d Say 21 15 W. L. and (1574). As to examinate materials the witters of rail me. Mr. Zel rut sollal. فاحطلنا العللة لدحك وتسلمتك W R LJ (1571)
 - (a) we Mais sall r (to 2 last & Hell 126 (152) fagglanth a for exact . . fam alriet I

1 15 1 14" (1 ma);

I Inc . . 31 . . .

- (4) See Gopal Chunder v Kurnodhar Moochee, 7 W R 313 (1867) [as lo [risoners see now I risoners Tealimony Act], Marsiali t Chicae, 2 Tayl C Bell 191 (1851), J
- Beenodecus 2 113d 152 (1861) 1mf int tender years]
- (a) Burney : Fyr. 1 Hyde 68 (15 2-43) Moup & Namehand 23 B 6-0, 6-1 (153) Nusrut Banso v Malomed Sayem 18 W 1 -30 (1572)
- (t) Mmost mvarmbly of the of posite at to rith Nather Diving it Such 20 W II 202 (15-31) بني
- (7) Aurth Nath : Dlingut Snoh 20 11 B -J (167J)
- (6) Mowje t N t hand, -3 B t- (-) (to J) citi , lkrlin e Greenwood 20 C
- D 1 1 16
- 10) Jert tin 1 J fi berlin i freen and well Dong (187) Challens c . Lad once

a commission on the chance of deriving benefit from it, the Court should ordinarily not prevent his doing so, though it should take care to see that the party does not use the late issue of process as an excuse for delaying the final hearing of the case, (1) and a commission has been allowed where the cause was on the peremptory heard of the day, where the issuing of it was not calculated to prejudice the defendant or subject him to loss or inconvenience (2). As to expenses and costs of issuing commission, see r. 15, post

6. Every Court receiving a commussion for the examination of any person shall examine him or cause him less pursuant to commission to be examined pursuant thereto

Examination of witness—The parties should appear before the Composition in person, or by agent or pleader (r 18). It is the duty of the party obtaining a commission for the examination of witnesses to take all such steps as are necessary to seem their attendance before the Commissioner (3). As to the latter's powers in this and other respects, see r 17 post. If one party obtains a commission and the other joins in it the latter is entitled to examine his own witnesses, but he may cross examine his opponent's witnesses without joining (4). In Calcutta the examination and cross examination is by counsel and not by attended the examination of witness es under a commission being of the same nature as an examination in open Court (5). The examination may either be viva voce or by interrogatories (6).

7. Where a commission has been duly executed, it shall to be returned, together with the evidence taken under it, to the Court from which it uas issued, unless the order for issuing the commission has otherwise directed, in which case the commission shall he returned in terms of such order, and the commission and the return thereto and the evidence taken under it shall (subject to the provisions of the next following rule) form part of the record of the suit

Return -The commission may be open (7) but generally it is directed to be executed on or before a certain date called the returnable date of the

⁽¹⁾ Hurce Dass v Meer Woazzum, 15 W R 447 (1871)

⁽²⁾ Janssen v Dundas, 1 lfyd. 269 (1864)
(3) Lekraj v Palec Ram 2 A H. C R 210 (1870)

⁽⁴⁾ Gregory t Dooley Chand, 14 W R, O J 17(1868), a comm asson returned before a witness is fully cross examined is mad missible Bosogomoff t habsput I ste Co 5 (W Y cexx (1901)

⁽⁵⁾ Hoffman r Frampee, Coryton, 7

^(1804.5) Pran Krishna t Biswaniath 8 3 I R App. 101 (1872)

⁽⁶⁾ See Mown r Nemchand 23 B t.b., 627 (1899) Tarucknath Mookerjee v Gource Churn, 3 W R 147 1.0 (1805)

⁽⁷⁾ In Mackellar r Wallace Fulton to (1842) no specific time was fixed, but aix months was held not too lot , a time for a commession for the examination of witnesses in 1 s, land to be outstanding

commission, though the time within which a commission must be excuted may be callarged on application from time to time. The evidence must he taken within the time allowed. Where a Commissioner took evidence after the last return day had expired it was held that the depositions were inadmissible (1). The return should show on the face of it that the Commissioner had administered the oath to himself and the interpreter, if any (2). Documents attached to the return of a commission and identified with the documents referred to in the evidence may be read at the hearing of the suit in which the commission issued, unless they have been objected to on being tendered in evidence hefore the Commissioner. Objection to the madmissibility of such documents should be taken before the Commissioner (3)

- 8. Evidence taken under a commission shall not be read when depositions may as evidence in the suit without the consent of the party against whom the same is offered, unless—
 - (a) the person who gave the evidence is beyond the jurisdiction of the Court, or dead or unable from sickness of infilmity to attend to be personally examined, or exempted from personal appearance in Court, or is a civil or military officer of the Government who cannot, in the opinion of the Court, attend without detriment to the public service, or
 - (b) the Court in its discretion dispenses with the proof of any of the eigenmentances mentioned in clause (o), and authorizes the evidence of any person being read as evidence in the suit, notwithstanding proof that the cause for taking such evidence by commission has ceased at the time of reading the same.

Reading of commission —The list rule provides that the commulata shall form part of the record. On this ground it has been considered that before it is tendered in evidence by the party at whose met mee the commission is add the other party is centified to refer to it without putting it in evidence (1). This is the precise of the Courts in the Modissil (5). But according to the Tractice prevailing on the Original State of the Calenta High Court, the party obtaining the commission is in tendered in evidence. If he does not the opposite 1 mty may do the Unities is not then on commission is tendered and has been admitted executing the communities.

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^{(1) (} r h r) c Dodey Charl H W L O J 17 (18 a) (c) I ran hand are Bassanati, 5 B LeR

^{(4) 114} Min ar Bashar, 30 left V₁₂ 131 (1872) 1 2 2 2 V 2 1 2 1 C Le R 102 (12 2 1 1 1 1 1 1 1 1 1 1

⁽⁴⁾ Neturna Danico e Niclo Lall 3 C.W. N. Carrina (Body) foll Dourna Arb C.C. Carrina (Body) foll Dourna Arb C.C. Carrina Dayle, S.R. L.R. Upp. 10c. (15°c). (a) Dhaniram e Muth Lall 13 C.W. Nov., 36 C. 7 (1509). Man C.L. L. S. Nov., 36 C. 7 (1509). Man C.L. L. S. Nov., 15 C. 37 (1509).

in the suit, nother puty has the right to make use of it (1). Semble, that the increfret that a deposition was not read and signed in the usual course would not by its! If prevent the reception of the evidence (2). Where a commission was returned after the witness had been in part, but before he had been fully, cross examined it was held to be invibrable (3). Unless there is consent the Court may refuse to hear evidence taken by commission, inless the circumstances mentioned in clause (a) are shown to exist at the time of trial (4). But the Court may dispense with proof under clause (b). And where it appears from the deposition its. If that the person was examined outside the jurisdiction, that is sufficient (5). Clause (a) supplies with reference to r. 4 an omission in the former

Commussions for local intestigations

9. In any suit in which the Court deems a local investigational to make took to be requisite or proper for the purpose local inedigations of cluendating any matter in dispute, or of any mesne profits or damages or annual net profits, the Court may issue a commission to such person as it thinks fit directing limit to make such investigation and to report thereon to the Court:

Provided that, where the Local Government has made rules as to the persons to whom such commission shall be assued, the Court shall be bound by such rules

"Requisite or proper"—The Judge should not delegate to a Commissioner functions which he can and should discharge himself. He cannot depute a Commissioner to inquire into that which can with equal convenience be proved in Court (6). He caunot direct him to take evidence which the Court can take, or deede points which the Court can and should deede, such as the trial of the most important issues of fact in a case, (7) deputing, in effect, the decision of the case to the Ameen, (8) as where an Ameen was deputed in a case of disputer boundary, the issue turning chiefly on possession before the date of suit (9)

Kusum Kumarı r Satya Ranjan, 30 C
 1003 (1903), Hemanta Kumarı v
 Banku Beharı Sıkdar 9 C W X 794 (1905)

Banku Behari Sikdar 9 C W N 794 (1905) (2) Boisogomoff i Nahapiet Jute Co, a C W N coxxx (1901)

⁽³⁾ Ib see generally Authors Evidence

Act, notes to s. 33
(4) Rajah Prithee v Hara Dhun, 22 W R

<sup>331 (1874)
(5)</sup> Girdhar Nagjishet v Ganpat Moroba,

¹¹ B H C R 129, 131 132 (1874)

⁽⁶⁾ Shushee Ram v Vobo Kant, 14 W R 190 (1870), Ram Dhun t Ram Vonce, 21

W R 280 (1874)

⁽⁷⁾ Buroda Churn v Ajoodhya Ram, 23 W R 286 (1875), Shitawa v Bhimappa, 24 B 43, 45 (1899). In Kristo Chinder: Broja Mohun, 22 W R 183 (1874), an objection that the Court itself should have decided the question was overruled.

⁽⁸⁾ Iswar Chandra v Jugat Lishor, 4 B L. R App 33 (1870), Sangih v Wookan,

¹⁶ M 350, 351 (1892)
(9) Kalee Doss v Khettro Pal, 17 W R 472 (1872)

It is of the utmost importance that witnesses should be examined in open Court, and by the Court itself Ameens or other Commissioners must not be made the real Judges of important questions of law and fact, which it is the duty of the Court itself to determine Local investigations ought to he restricted to points which really require some local inspection for their elucidation Witnesses therefore cannot be examined out of Court, except with reference to points for the determination of which local inspection is required (1) An Ameen should be appointed to hold a local investigation only when it is necessary to inspect the land, to make maps, to obtain information with regard to physical features, to identify land in maps with parcels which are the subject of suit, to identify maps with one another with the aid of objects to be found on the land For these and similar purposes an Ameen may examine witnesses when the evidence which they have to give is of such a nature that it ought to be taken by him on the spot Where, however, any fact can be proved by evidence taken otherwise than on the spot it should be taken in Court (2) In short, the local investigation referred to in this rule presupposes the existence on the record of independent evidence which requires to he clucidated, and that rule does not authorize a Court to delegate to a Commissioner the trial of any material issue which it is bound to try (3) The last Code after the words " nett profits," ran "and the same cannot be commently conducted by the Judge in person" These words, it was held, showed that when a Judge could conveniently conduct a local investigation in person he should do so The information so derived by him was a matter which, of course, he could take into his consideration in deciding the case (4) But it was considered desirable that he should put the result on record so that the parties might see what he considered established (0) Though a Judge might view a spot he could not, in a case where the issue was whether two persons were man and wife, go himself to the village where the parties lived in order that he might make inquiries amongst their neighbours He should in such case, summon witnesses and examine them in Court (6) These werds have now been omitted. And it has been recently held that the omission of these words indicates that a Indge should only make a local investigation where it is meces any for the purpose of understanding the evidence, and should not do so for the purpo c of githering information to be used for his pidement, for if addition of information is required his proper course is to appoint a Commis ioner who e report can be used in evidence and who can be examined as a witness (7)

"May Issue"—The Judge has a discretion which must be judicially exercised to grant or refuse a local investigation. A local investigation is not importative in every case, and a Judge is not bound to issue a commission of his

⁽¹⁾ Shalloo Smoh r Hananoc, raha 9 W P 83 (1868), Build in Chind r v N In Chind r, 17 W R 282 (1872)

⁽c) He lalar C mil er i Nobin Chunl e, per fiwar Chunla i Jugat Kober, d. H. L. R. App 23 (1870), d. Feal hirest gat of lawer e descript refer to postum for testian Ipano a reffection bill or chies argine Mana. J. M. 230 352 18 a)

^{(3) 11, 4} c 31 1 1 M 149 (15 a)

Ram Natain v Olinirs Nath, 17 C W N 3-7, 374 (1911), 15 C L J 17 -3 (4) Dwarks Nath i Province K mar 1

C.W. N. (52 (1857) | 1 y (or are Binlle-Lall, J.C. 3.53 (1882) (5) Joy (or are Binlles Lall engla-

⁽c) Il ill so Saless r. Micarinat Limbi

⁽⁷⁾ In kell of the Land In C. L. J.

^{134 (1310)}

own motion (1) Though the propriety of the order may, under sect 105, he questioned in regular appeal, it cannot be made the subject of direct or special appeal (2) When a Judge has ordered a fresh local investigation, his successor should not interfere with the order, but carry it ont before disposing of the case, (3) nor where one inquiry has been carried on, should a second issue for the same purpose without setting aside the first (4) If the Court considers it necessary to order an inquiry, such an inquiry cannot be left to be made after decree (5)

"Such person"—Subject to the Provise, any person whom the Court thinks fit may be appointed A Munsif may be appointed Commissioner (6). The section itself, however, does not now require that an officer of Government should be appointed (7). But a Jindge should not order a Subordinate Judge, whose judgment is before him on appeal, to go and inspect the locality and make a report. A Judge from whose decision an appeal is pending, is the most unsuitable person to make such investigation (8).

"To make such investigation"—A Commissioner is bound not to go be sond the points referred to him for inquiry (9) Where a Commissioner was only appointed to draw a map and no power was given to him to take evidence, statements of persons recorded hy him were held not to he evidence, and ought not to have been looked at by the Judge (10) Notice should be given to the parties of the time when the local investigation will be held (11)

10. (1) The Commissioner, after such local inspection as 6.

Procedure of Commissioner. he decems necessary and after reducing to stoner.

writing the evidence taken by him, shall return such evidence, together with his report in writing signed by him, to the Court

(2) The report of the Commissioner and the evidence taken Report and depositions to be evidence in suit.

report) shall be evidence in the suit and shall form part of the record, but the Court or, with the permission of the Court, any of the parties to the suit, may examine the Commissioner may be referred to him or mentioned in his report, or as to the manner in

which he has made the investigation

⁽¹⁾ McDonald : Munar Roy, 3 W R let \, 153 (1865)

⁽²⁾ Graham v Lopez 1 W R 141 (1864) Bykunt Nath t Pearco Monee ib 196 (1864) Poorno Persadt Chun lernath, ib ,249 (1864).

Rash Behareer Salub Rov, 12 W R 76 (1869)
(3) Shurrsoollah t Bawl Mun Lil I W R

<sup>102 (1564)
(4)</sup> Novah Syul r Surussutty Debia, 23
W. R 93 (1574)

⁽⁵⁾ Jugodumba Del ia e Rehince Debia, 23 W. R. 422 (1875)

⁽C) Churamun Singh i Anos p Singh 11

⁽ L R 533 537 (1882) (7) Doorga Dasse (Norso Churn 6 W R,

tet \ bl (1866)
(b) Roy Sultan r Musumat Laloo, 17

W R 300 (1872) (9) Ram Dhun e Ram Monce, 21 W R.

⁽⁹⁾ Ram Dhun e Ram Monce, 21 W R. 250 (1574)

⁽¹⁰⁾ Stawar Bhimagra, 24 B 43 (1859)
(11) hristo Monce v 1 Jinton, 12 W. R.

⁽¹¹⁾ Kristo Monce r. 1 Junton, 12 W. R. 130 (1960). Jhathou Nation r. Massarist Junda, 17 W. R. 250 (1972).

(i) Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit

Procedure —A day should be fixed for the return of the report, and then for hearing objections to it (1) The report and evidence are filed, and become part of the record (vide post, "Shall be evidence") The evidence without the report is not evidence in the suit. It may be, however, that oral testimony may not be necessary, as where a Commissioner is simply deputed to make a measurement, and it is not necessary that the report must have depositions attached to it to make it legal evidence (2) though, if there he depositions, they cannot go in without the report. The latter cannot be rejected because the Ameen's remuneration has not been paid (3). The Court considers the report and evidence taken, subject, of course, to any objections that may be taken to them by either party along with the other evidence on the record,(4) and may examine the Commissioner and take further evidence, as to which see post. While the report may be looked to to explain a map, (3) the Court should not question the correctness of a map attached to a report which is not impagned by other party (6).

"Shall be evidence "—The report and evidence if the investigation is completed, (7) is evidence upon whatever materials it is based though, of cours it will have more or less weight according as the basis of it is more or less reason able and valid (8) and although the Court may have exercised its direction unwisely and wrongly in ordering an inquiry or in giving the Commissioner too extensive powers (9) hut not if the proceeding is without jurisdiction (10). The Court is not hound by the report, but may inquire further into the matter if there is may necessity for so doing. The report is for the assistance of the Court and is part only of the evidence, and other evidence may be received to explain it or show that it was wrong (11). The Court is at liberty to adopt a portion of the report is done in the report is derived in the Court and explicit in such evidence to suffer a decree if it is believed by the Court and considered sufficient without further

⁽¹⁾ Jan't Narum : (a bir thun Lall, al W R, 2 (1873) (2) Chunf r Mon e r Nduml ar Mustef :.

^{(2) (}hunfr Mon er Nduml ar Mustefr, 7 W R 13 (1507)

⁽³⁾ Janat Kult r r Dina Nath, 17 C asl

⁽Ler1) dl (4)

Mahom I Anwar e R v Cl in F 17
 I 21 (1572)

⁾ Br, rath () all rain 15H Meal 16 H P wil (15 0).

⁽⁷⁾ halle Hans r lab Nara n 13 W II.

Chowdhrun a Coll ctor of Mymers ab 8 W R 257 (1807) Dele Gebind a Chat 8 Sing 10 W R 312 (1803) Khajah Abba 10

Bhuttoo Sle Lh - 2 W It 350 (1974)

(9) Umbi a Churn e Gluck (1u d r s

W B - 30 (1965) | 1 ajnath 1 anlah r

Nor - 1-40 12 W It 126 (1985) | 6 8 4 h

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W R =10 (157-), as to further explaned

⁽In) I real month. Makerper v. Mart v. I

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exil rectorerrob rate it (1). The report is exidence in the suit in which it is male, but in that suit only (2)

Examination of Commissioner - The Commissioner may be examined in person. This provision, it has been and was probably considered necessary because an Ameen is something like an arbitrator, and it may have been thought that he could not be examined as to his proceedings (3) In a recent case it was said that the object of this provision was to protect the Commissioner (who is a quasi judicial officer) on grounds of public policy from vexatious examination by either party and it was held that a Court cannot arbitrarily withhold permission to examine a Commusioner for accounts asked by a parts (1) Charges against the Commissioner ought to be fully inquired into (5) This and the last rule do not contemplate the tender of further evidence after the report, except the examination of the Commissioner himself, but they do not forbid it. They are consistent with either course, and the point must be decided on ceneral principles according to the facts of each case (6). Sub-rule (3) as to farther inquiry is new

Appellate Court.-The report must be taken into consideration by the and llate Court, even though it may be of opinion that local investigation should not have been made (7) If the Court finds the report deficient in any point it can send for the Commissioner and examine him (8) In Appellate Court ought not to interfere with the result of a local inquiry except upon clearly defined and sufficient grounds, which must be expressed in its judgment (9) On the other hand, the report should not be made the basis of a judgment to the total disregard of the other evidence on the record (10)

Commissions to examine accounts

11. In any suit in which an examination or adjustment of is commission to examine accounts is necessary, the Court may issue a commission to such person as it thinks fit or adjust accounts directing him to make such examination or adjustment

⁽¹⁾ Sectaram Mookenee v Ramparam Mookerjee, 6 W R 51 (1866) A Munsil'a report of a local investigation when not shown to be substantially erroneous in its data or reasoning should convey the greatest weight as evidence of the facts it sets forth Wise w Amecroonnissa Chatoon, 3 W R 219 (1865)

⁽²⁾ Denobandhu Ghose v Nistarini Dasi, 12 C L R 50 (1882)

⁽³⁾ Azım Sarung v Alimooddeen 17 W R 270 (1872) sed qu as to Amin's position. (4) Sitaram v Ram Prosad Ram. 19 C L J 87 (1913)

⁽⁵⁾ Ab lool kurreem v Campbell 8 W R

^{172 (1867)} (6) Grish Chunder : Soshi Shil hartshwar, 27 C 951, 966 (1900) s c, 4 C W \ C31

⁽⁷⁾ Rajnath Pandah t Doorga Lall, 12 W R 136 (1869)

⁽⁸⁾ Shee Dyal : Hodgkinson 24 W R 342 (187.)

⁽⁹⁾ Rance Sarut : Baboo Prosunno 15 W

R (P C) 15 (1870), s c 13 Moo 1 A 607 of Protab Chunder v Rance Surnomoyee, 19 W R 361 (P C) (1873) \langedbub :

Rsj Lishore 18 C L. J 220 (1913) (10) Bustee Sahoo & Jeo Asrain "4 W P

^{338 (1875)}

() Where the Court is for any reason dissatisfied with the proceedings of the Commissioner, it may direct such further inquiry to be made as it shall think fit.

Procedure -A day should be fixed for the return of the report, and then for hearing objections to it (1) The report and evidence are filed, and become part of the record (tide post, "Shall be evidence") The evidence without the report is not evidence in the suit. It may he, however, that oral testimony may not he necessary, as where a Commissioner is simply deputed to make a measurement, and it is not necessary that the report must have depositions attached to it to make it legal evidence, (2) though, if there he depositions, these cannot go in without the report. The litter cannot be rejected because the Ameen's remuneration has not been paid (3) The Court considers the report and evidence taken, subject, of course, to any objections that may be taken to them by either party along with the other evidence on the record (4) and may examine the Commissioner and take further evidence, as to which, see post While the report may be looked to to explain a map, (5) the Court should not question the correctness of a map attached to a report which is not impugned by either party (6)

"Shall be evidence"-The report, and evidence if the investigation is comploted (7) is evidence upon whatever materials it is based though, of course it will have more or less weight according as the hasis of it is more or less reason able and valid, (8) and although the Court may have exercised its discretion unwisely and wrongly in ordering an inquiry or in giving the Commissioner too extensive powers, (9) hut not if the proceeding is without jurisdiction (10) The Court is not bound by the report, but may inquire further into the matter if there is any necessity for so doing The report is for the assistance of the Court and is part only of the evidence, and other evidence may he received to explain it or show that it was wrong (11) The Court is at liherty to adopt a portion of the report and reject the rest (12) The report is sufficient evidence to support a decree if it is believed by the Court and considered sufficient without further

⁽¹⁾ Ram Narun v Goburdhun Lall, 21 W R 2 (1873) (2) Chunder Monec v Nılumbur Mustofee

⁷ W R 43 (1867) (3) Jagat Kishore v Dina Nath 17 C 281

⁽¹⁸⁸⁹⁾ (4) Ib

⁽⁵⁾ Mahomed Anwar v Roy Chunder 17 W R 521 (1872) (f) Brijonath Chowdhry : Lall Weal 14

W R 391 (1870) (7) halee Dass v Deb \uran 13 W R

⁽⁸⁾ Chunder Coomar v J v Chunder, 19 W R 213 (1873) se Sl 1 \ run t Boo lh Singh II W R () 1) Fam Ice

^{112 (1870)}

⁽¹²⁾ Loreshmauth Mookerjee v Martin 1

Chowdhrain v Collector of Mymensingh 8 W R 287 (1867), Dole Gobind v Chamoo Sing 10 W R 312 (1868) Khajah Abdool t Bhuttoo Sheikh 22 W R 350 (1874)

⁽⁹⁾ Umbica Churn v Goluck Chinder 9 W R 596 (1868) Rajnath Pandah F Doorga Lall, 12 W R 136 (1869) of Shah Nuthoo : Ghunessam Singh 8 W R 267

⁽¹⁸⁶⁷⁾ (10) Adhoo Sircar & Phillippe, 10 W R 153 (1868)

⁽¹¹⁾ Azım Sarung v Alımooddeen 17 W R 270 (1872), as to further evidence,

W R 93 (18(4)

cyldence to corroborate it (1) The report is evidence in the suit in which it is made, but in that suit only (2)

Examination of Commissioner -The Commissioner may be examined in person. This provision, it has been said, was probably considered necessary because an Ameen is something like an arbitrator, and it may have been thought that be could not be examined as to his proceedings (3) In a recent case it was said that the object of this provision was to protect the Commissioner (who is a quasi judicial officer) on grounds of public policy from vexatious examination by either party, and it was held that a Court cannot arbitrarily withhold permission to examine a Commissioner for accounts asked by a party (4) Charges against the Commissioner ought to be fully inquired into (5) Thus and the last rule do not contemplate the tender of further evidence after the report, except the examination of the Commissioner himself, but they do not forbid it They are consistent with either course, and the point must be decided on general principles, according to the facts of each case (6) Sub rule (3) as to further inquiry is new

Appellate Court -The report must be taken into consideration by the Appellate Court, even though it may be of opinion that local investigation should not have been made (7) If the Court finds the report deficient in any point it can send for the Commissioner and examine him (8) An Appellate Court ought not to interfere with the result of a local inquiry except upon clearly defined and sufficient grounds which must be expressed in its judgment (9) On the other hand, the report should not be made the basis of a judgment to the total disregard of the other evidence on the record (10)

Commissions to examine accounts

In any suit in which an examination or adjustment of is accounts is necessary, the Court may issue a Commission to examine commission to such person as it thinks fit or adjust accounts directing him to make such examination or adjustment

Mookerjee v Ramnaram (1) Scetaram Mookerjee, 6 W R 51 (1866) 1 Munsif's report of a local investigation when not shown to be substantially erroneous in its data or reasoning should convey the greatest weight as evidence of the facts it sets forth Wise v Ameeroonnissa Chatoon, 3 W R 219 (1864) (2) Denobandhu Ghoso v Astarmi Dasi,

¹² C L R 50 (1852) (3) Azını Sarung v Alımooddeen 17 W R

_70 (1872), sed qs as to Amin's position. (4) Sitaram e Ram Prosad Ram 19 C L 1 87 (1313)

⁽a) Abial hurren e tampbil 5 W R

^{173 (1567)}

⁽⁶⁾ Grish Chunder : Soshi Shikharishwar. 27 C 951, 968 (1900) a c, 4 C W \ 631

⁽⁷⁾ Rajnath Pandah r Doorga Lall, 12 W R 136 (1869)

⁽⁸⁾ Shoo Dyal r Hodgkinson 24 W R.

^{342 (1570)} (J) Rance Sarqt r Baboo Prosunno 15 W

R. (P C) 15 (1570), s. c. 13 Moo 1 1 607 of Protab Chun ler r Rance Sutnomoyee, 13 W R 3(1 (P C) (1873) Nilmadhab i Raj Lishore 15 C L. J 220 (1913)

⁽¹⁰⁾ Bustee Salso r J o Narsin _4 W P 335 (1575).

Court to give Commissioner necessary Instructions.

12. (1) The Court shall furnish the Commissioner with such part of the proceedings and such instructions as appear necessary, and the instructions shall distinctly specify whether the Com missioner is merely to transmit the proceedings which he may

hold on the inquity, or also to report his own opinion on the point referred for his examination (2) The proceedings and report (if any) of the Commissioner

Proceedings and report to be evidence Court may direct further inquiry.

shall be evidence in the suit, but where the Court has reason to be dissatisfied with them, it may direct such further inquiry as it shall think fit.

Accounts -These and the next rule correspond with sects 180 and 181 of the Code of 1859, which in their essentials are the same as the present law (1) A Court may issue a commission under r 11 without the consent of parties (2) but where the reference had been made by consent, it was, under the circum stances of the case last cited, regarded as made on an agreement that the Com missioner should decide the questions of fact referred to him reserving questions of law to be disposed of by the Court (3) As to the proceedings on the commission, vile post Presidency High Courts on their Original Sido have a procedure and officers of their own in and for the taking of accounts, and it has in consequence been held that the provisions of the Code relating to the adding of parties should be adapted cy pres to the requirements of the Court in its ordinary civil juris diction (4) A reference to the Registrar of the High Court has, however, heen treated as having been made under the former section (5) The rule does not require that the Commissioner should be sworn or affirmed (6) A direction to a Commissioner to take accounts under these rules is not a preliminary decree (i)

"Necessary "-It was held where the plaintiff filed his books in Court and they were not impugned, that a commission should not have issued, but the plaintiff should have made up the account himself (8) Where there 18 objection and the items of objection are few in number, they may be dispo ed of in open Court If, however, they are numerous and in order to dispose of

⁽¹⁾ Chetty v Wahomed Essa 5 C W N

⁶⁹² at p 706 (1901) (2) Watson : Aga Mchedee 1 I A 346 at

p 362 (1874) (3) Ib

⁽⁴⁾ Vakatchand v Advocate General 8 B H C R 96 100 (1871) where it was held that when a decree had been passed referring the matter to the Commissioners office to have accounts taken and property sold the Court hal still power to ald a party to the suit

of the certificate made by the Commissioner in the Bombay High Court see Rustomiji Kessowji, 3 B 161 (1879), and as to exten sion of time for making of motion to vary report, see Hurmusji v Bomonji 9 B 250 (1685)

⁽⁶⁾ Rai Naisingh v Rai Narun 3 A

H C R 217, 232 (1871)

⁽⁷⁾ Narayan Balkrishna v Gopal Jiv Ghadi

⁽⁵⁾ Chetty v Mahomed Essa, 5 C W A 14 (18,3) 192 at pp (39 "05 (1901) is to the nat ire

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pursue is to appoint a Commissioner. This course may properly be pursued in the first instance if the account required is not of such a nature as to render it probable that there will be no difficulty in dealing with the disputed items in Court (1).

Examination .-- The Court furnishes the Commissioner with such proceedings and instructions as are nece vary (r 12). The Commissioner may examine the parties and any witnes es (2) which may be produced, and call for and examine documents relevant to the inquiry (r 16).

Proceedings—This includes both the evidence taken (3) and the Commissioner's report or opinion (4) Adistinction is drawn in the second paragraph between the proceedings which may or may not be accompanied by a report of the Commissioner's opinion and the report. The section is now more clearly worded

"Shall be evidence "-The Commissioner's proceedings are an inquiry for the information of the Court not a trial. His position is different from that of a Judgo trying a cause. The proceedings which include his report when he is required to report, are under this section to be treated as merely evilence in the cause. If therefore he finds a fact his finding is only evidence of that first but not a decision upon it. The report cannot be regarded as a judgment of a Court for standing by itself it is inoperative. It requires affirmance by an order of a Court to make it operative (5) It is only ovidence if the Court is not dissatisfied with it The section does not restrict the grounds of dissatisfaction (6) The Court must be satisfied with the proceedings before it adopts them The Court will no doubt in all cases give due weight to the opinion of the Commissioner and the duty cast upon it of satisfying itself as to the proceedings is in practice modified to this extent that it is usual to confine the examination to those parts of them to which exception has been taken by the parties but the duty to that extent at all events remains and can only be dis charged by such an examination as is sufficient for the purpose of satisfying the Court that the investigation has been conducted by the Commissioner fairly and in accordance with lim (7)

Powers and duty of Appeal Court—The fact that the judgment of the Court of first instance is an affirmance of the report of a Commissioner, does not affect the powers of a Court of Appeal though when the case comes before the latter the situation is of course somewhat different What has

⁽¹⁾ Degambar Mozumdar t haltynath Roy 7 C 6.4 6.7 (1881) Annoda Persadr Dwarkanath Gangopadhya 6 C 754 (1881) in which cases the procedure in taking accounts is lad down

⁽²⁾ Chand Ram v Brojo Gobind 19 W R 14 (18 3) on this point is not law

⁽³⁾ As regards the case of Chand Ram r Brojo Gobind 19 W R 14 (18 3) see last rule In Rai \uss u_oh : Rai \aran 3 A H C R 217 at p. 233 t is pointed out

that the depos t ons are to le returned with

the report

(4) Ib Chetty v Mahomed Essa 5

C W N CO? at p "07 (1901)

(5) Chetty v Mahomed Essa 5 C W N
692 at pp 01 "05 ,07 (1501).

⁽⁶⁾ Ahmed \anabhain Khasaji Karimbhai, B H. C R A C J 149 L-0 (156.4)

⁶ B H. C R. A C J 149 150 (1863) (4) Chetty r Mahomed Essa 5 C. W 's 692 at pp "00" "07 (1901)

⁶⁹² at pp "0" "07 (1:01)

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Court to give Commissioner necessary instructions.

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⁽¹⁾ Chetty v Mahomed Essa 5 C W N 692 at p 706 (1901)

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p 362 (1874)

⁽³⁾ Ib

⁽⁴⁾ Vakatchand v Advocate General 8 B H C R 96 100 (1871) where it was held that when a decree had been passed referring tle matter to the Commissioners office to have accounts taken and property sold the Court hal still power to add a party to the strit

⁽⁵⁾ Chetty v Mahomed Essa, 5 C W N 699 at pp 699 705 (1901) As to the nature

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⁽¹⁸⁸⁵⁾ (6) Rai Narsingh v Rai Narun 3 A

H C R 217, 232 (1871)

⁽⁷⁾ Narayan Balkrishna v Gopal Ji, Ghadi 38 B 392 (1914) and see Kal mam Pirel and p Gangaram Sakharam 38 B 331 (1913)

⁽⁸⁾ Cl and Ram v Brojo Gol ind 19 W P 14 (1873)

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⁽³⁾ As regards the case of Chand Ram r Brojo Gobind, 19 W R 14 (1873), see last rule In Rai Nursingh v Rai Varain, 3 A H C R 217, at p 233, it is pointed out

that the depositions are to be returned with

the report (4) Ib , Chetty v Mahomed Essa, 5

C W N C92, at p 707 (1901) (5) Chetty v Mahomed Essa, 5 C W N

^{692,} at pp 701, 705, 707 (1901)

⁽⁶⁾ Ahmed Yanabhare Khasaji Karimbhar, 6 B H C R. A C J 149, 150 (1869)

⁽⁷⁾ Chetty v Mahomed Essa, 5 C. W N

^{692,} at pp 706, 707 (1901)

then to be dealt with is the decree of the Court below, and when this ever effect to the findings of the Commissioner, there is the added weight of the Judge's decision. But the duty of the Appellite Court is commensurate with that of the Court of first instance, and if it is dissatisfied with the proceedings in whole or in part, it is meanibent on it to do that which the Lower Court ought to have done, namely, to set them aside either wholly or partially, and send the matter back for such further inquiry is may be necessary (1). It is open to the Court of Appeal to deal with the report on matters of fact, and its powers are not limited any more than are those of the first Court to questions of principle when examining such report (2). In the first of the cases list cited, Maclean C.I was of opinion that if there had been a fur investigation of the matter by the Registrar or Commissioner, and his finding had been confirmed, the Appeal Court ought not to interfere except on the strong ground of manifest error or mainfest thuse (3)

Commissions to male partitions

13. Where a preliminary decree for partition has been passed, commission to make the Court may, in any case not provided for by section \$\mathcal{J}\$, issue a commission to such person as it thinks fit to make the partition or separation according to the rights as declared in such decree

14 (1) The Commissioner shall, after such inquiry as may be necessary, divide the property into as many shares as may be directed by the order under which the commission was issued, and shall allot such shares to the parties, and may, if authorized thereto by the said order, award sums to be paid for the purpose of equalizing the value of the shares

(2) The Commissioner shall then prepare and sign a reput of the Commissioners (where the commission was assued to more than one person and they cannot agree) shall prepare and sign separate reports appointing the share of each party and distinguishing each share (if so directed by the said order) by metes and bounds. Such report or reports shall be annexed to the

⁽¹⁾ Chetty v Mahomed Essa 5 C W N 692 at pp 701 706 707 (1901)

⁽²⁾ Chetty v Mahomed Ess¹, 5 C W N 62, at pp 701 707 707 (1901) Ahmed Annabhar k harsaji Ka imbhai 6 B H C R 149 A C J (1899), kankatala v Polesbetti, 6 M H C R 36 (1870) (liss from Sarapa v Mala: 1 M H. C R 1 (1862), Venkata z Venkataramarya, id 418 (1803)] In the second and third cases it was held that the hypellate Court would examine the accounts wen if no acception were taken to them is

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ground of appeal in India
(3) Chetty v Mahomed Essa 5 C W V
(92 (1901)

commission and transmitted to the Court, and the Court, after hearing any objections which the parties may make to the report or reports, shall confirm, vary or set aside the same.

(5) Where the Court confirms or caries the report or reports it shall pass a decree in accordance with the same as confirmed or varied; but where the Court sets aside the report or reports it shall either issue a new commission or make such other order as it shall

Revenue paying land —The juri diction of the Civil Court in matters of partition of revenue paying land is restricted only on questions affecting the right of Government to assess and collect in its own way the public revenue (1) See notes to see 151

"Gommissioner."—In the last Code the pluril was used. It was held by Pontifer, J., that the Court was not bound to appoint more than one Commissioner, but Tield, J., doubted whether having regard to the language of the third clause of the former section, this was so (2). And a Full Bench of the Ulrhabad High Court held that the Court could not legally issue a commission to one Commissioner oil (3). The Court may now issue a Commission to one or more persons. Commissioners have been looked on as officers of Court acting by a majority (4) though it is no longer so as regards Commissioners appointed to make a partition. Commissioners have no hen on the return for their fees, and cannot refuse to give it up until they are paid (5). When a Commissioner is unablo to execute the commission the plaintiff may apply for tho issue of a fresh commission and the Court should grant such an application (6).

Report —A party on the original side of the High Court desiring to move to vary a report made by the Commissioner must not only file his exceptions to such report but must also make his motion to vary it, within twenty days after the filing of the report or if the Judge or the Court have allowed him further time for such application then within the further time so allowed (7)

"Metes and bounds"—These are merely the measurements and the limits of the shares which may be mentioned in the Commissioner's report "Bounds" there do not mean a wall to be built. A Court has no power under this section to order its Ameen to cause a wall to be built separating portions of property of which partition has been decreed (8)

think fit

- (6) Masum un Lissa : Litifan 32 4 319 (1910)
 - (7) Narrottam v Harr Chand 13 B 369 1889)
- (8) Sohan Lal : Hardeo Sahai 19 A. 191 (18 %)

⁽¹⁾ Jo_odi.hury D ba.a: Kaalash Chundra 24 C 725 (1897) Ruttun Monec : Bropo Mohun, 22 W R 11 (1874) Apoodha Lall v Guman Lall 2 C L. R 134 (1878) Chundenash Aundi v Hur Narain, 7 C 153 (1881), Zahrun v Goun Sunkar, 15 C 198

^{(1881),} Zahrun v Gouri Sunlar, 15 C 198 (1887), Debi Singh t Sheo Lall 16 C 203 (1889) Hemanta humari v Jagadindra Nath 18 C L J 526 (1913)

⁽²⁾ Gyan Chunder : Durga Churn 7 C 318 (1881)

⁽³⁾ Mulchand t Muhammad Mi Khan

^{29 1 235 (1906)}

⁽t) Rajendra Matilal t Ramnarayan Vatilal 3 B L R App 3 (1869) (5) Rajinoheeny v Muddosoodun Bourle

^{24 (1865)}

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(1) Chetty v Mahomed Essa, 5 C W N

692, at pp 701 706, 707 (1901)

(2) Chetty v Mahomed Essa, 5 C W N 6,2; at pp 701, 706, 707 (1901) Ahmed Akmahan k hasaji Ka mibhai, 6 B If C R 149 A C J (1869), Kanlastala v Poleahetti, 6 U H C R 36 (1870) [diss from Sarapr v Malai, 1 M H C R 1 (1862), Venkatia v Venkataramanya, ib 418 (1863)] In the Appellate Court would examine the accounts even if no secretion were taken to them in

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(3) Chetty t Mahomed Essa 5 C W N

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(1) Jogoth hury Debe as hasta Hundra, 24 C 725 (1837) Ruttun Mo & Broyo Wohun, 22 W R 11 (1874) Algodha Isli V Gurann Lati 2 C L K 134 (8.8), Chunden anth Nundi t Hur Anzun, 7 C 153 (1881) Zahrun e Goun Sunkar, 15 C 198 (1887) Debi Singhr v Sheo Latt, 16 C 203 (1887) Hemany Kuman v Jagadindra Nath 18 C L J 526 (1913)

(2) Gyan Chunder t Durga Churn 7 C

(3) Mulchand & Muhammad Mr Khan

29 4. 235 (1900)

(1) Rajendra Matilal r Rammarayan Vatilal 3 B L R App 3 (1869) (5) Rajmoheenv r Muddosoodun, Bourke

(a) Rajmoneenv r Muddosoodun, Bourke 24 (1865) (b) Masum un Lissa r Latifan 32 A. 319

(1910) (7) \arrottam r Hari Chand, 13 B 368

(1889) (1889)

(8) Sohan Lal v Hardeo Sahai, 19 1, 194 (18 6)

Decree -In suits for partition of immoveable property not paying revenue to Government, the Court, if it has the information before it necessary to enable it to make a decree not only declarme the rights of the parties but actually fixing the particular meas, or rooms, or parts of the houses, as the case may be, of which possession is to be given to the parties respectively in partition, may make such a decree without employing the procedure of these rules, and the decree so made would be enforceable in execution, and possession of the re pective areas, 100ms, etc., could be given to the parties in execution of the decree (1) But where, as most generally happens, a Court has not the information necessary to the making of such a decree, it must make a preliminary or interlocutory decree of a declaratory nature, and then adopt the procedure of these rules by appointing . Commissioner, or Commissioners, whose duty will be, not to give possession, for at that period there would be no decree expable of execution by possession but who should allot such shares to the parties, award the sums to be paid in case sums are to be paid, and then prepare and sign a report appointing the shares and distinguishing such shares by metes and bounds, if ordered to to do (2) The Commissioner, or Commissioners, must then submit that report to the Court, and the Court, after giving the parties an opportunity of object ing (3) to the report, might under the last Code quash the report and proceedings of the Commissioner or Commissioners, and issue a new commission, or (where the Commissioners agreed) pass a deciee in accordance with the report. The decree in accordance with such report would be a decree allotting the specific shares, areas, rooms, etc., distinguishing them where po sible, by metes and bounds or other adequate description, and decreeing to the respective parties possession of those portions of the property allotted to them In the latter case that would be the final decree It is true that the interlocutory decree would be appealable, (4) but for all that it is not the final decree or the decree which is capable of execution, except possibly for such costs as it might award to be paid It is merely of the character of an interlocutory and declaratory dccree (5) It is only after a decree has been made by the Court expressing its approval of the partition scheme that there is any decree capable of execution as a partition decree (6) In a case which falls under the second of the above mentioned categories, the appointment of a Commissioner, whether he be the Amin of the Court or some one else, is not the issuing of a process in execution of a decree, nor are any proceedings of such Commissioner the carrying out of any process in execution The time has not yet arrived for execution of the decree (7) Proceedings under this rule for the purpose of effecting partition are proceedings in the suit itself and not proceed is in execution of a decree (8)

⁽¹⁾ Krishnamachariar t Kuppummal, 31

M 540 (1908)

⁽²⁾ Shah Muhammad v. Hanwint Singh 20 A 311, 312-314 (1898)

⁽³⁾ Shah Muhammad : Hanwant Singh, supra see as to requescence barring objection Gyan Chunder v Durga Churn 7 C 318 (1881)

⁽⁴⁾ Shah Muhammad v Hanwant Smah, surra sco Bhola Nath v Son moni Disi 1. C 273 (1885), Bej n Behari i Ial

Mohuu, 2 209 (1885) Dulhin Golab t

Ra lha Dey v

^{-- (5)} Snan xanı ammı e

⁽⁶⁾ Abdus Sunad t Abdur Razzaq 21 A 409 111 (1899)

⁽⁷⁾ Shah Muhammad . Hanwart Sugl 20 311 312 314 (1898)

⁽⁸⁾ D vark math Misser v Barind's Nath Masser, 22 C 420 (1830), foll in last case

The amendments in clause (2) and the addition of clause (3) replace the following words in the former section "either quash the same and issue a new commission or (where the Commissioners gares in their report) mass a decree in accordance therewith" The provisions are the same with this difference, that the Court has not now to pass a decree where the Commissioners agree, but has in every case nower to confirm, vary, or set aside (1) The action of an Amin appointed under this rule in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of article 164 of the second schedule to the Indian Limitation Act. 1877 (2) An order passed in a suit for partition, subsequently to the prehimmary decree appointing a commission to make the partition, is not an order in execution, and therefore is not appealable under sect 47. It is an interlocutory order pending the suit which has not been finally decided, and the appellant may take objection to it in an appeal against the final decree (3) Where in suits for partition, possession is sought of a definite share of a property consistmg of a number of houses, the principle in such cases is, that if a property can be partitioned without destroying the intrinsic value of the whole property or of the shares, such partition ought to be made, but where partition cannot be made without destroying the intrinsic value of the property, then a money compensa tion should be given (4) The decree must be stamped (5)

Appeal.— In application for the appointment of a Commissioner was held not to be a matter coming within the scope of sect 244 (new 47), and therefore no appeal lay from an order made on such application (6)

General provisions

15. Before issuing any commission under this Order, the is Expenses of commission to be paid into Court may order such sum (if any) as it stone to be paid into Court thinks reasonable for the expenses of the commission to be, within a time to be fixed, paid into Court by the party at whose instance or for whose benefit the commission is issued.

Costs —Costs of a commission to take evidence was generally made costs in the cause, (7) and this has been done where a commission issued to examine a purdanashin at her own request (8). A Commissioner has no lien on a return of partition for his fees, and cannot refuse to give it up till they are paid (9).

⁽¹⁾ Of Janks Presad v Gaurs Sahas, 23 A 75 (1905), where it was held that the Court might accept or reject the report but could not modify it

⁽²⁾ Shah Muhammad : Hanwant Singh, 20 1, 311 (1898)

⁽³⁾ Jogodishury Debes v Kailash Chundra Lahiry, 24 C. 7-4 (1897)

⁽¹⁾ Ashanullah e Kali Kinkur Kur, 10 C. 075 (1884)

⁽⁵⁾ Balaram v Ramkrishna 29 B 366

⁽⁶⁾ Jatla Mallayya v Madepalli, 17 M L. J. 144 (1996)

⁽⁷⁾ Cahan r Owen Coryt II (1504-65) (8) Monendrobboosan Busas r Soshee

bhoosun Bunas, 5 C 500 (1550)

⁽⁹⁾ Lajmoheeny Dabee r Muddoosoodin Dey, Bourke, 24 (1-55)

While it is competent to a Court to require that a sum should be deposited, the omission to exercise this power does not debar a Commissioner from recovering his remineration from the party at whose instance he was engaged (1). It has been held by the Madras High Court (2) that the Code does not authorize the dismissal of a suit on refusal or failure of a party to deposit the amount ordered under this section. When after the issue of a commission it is found that the work is in excess of the amount paid in for the costs of the comonison, and that the party at whose instance the commission was issued is not willing to pay, the only way in which the additional costs can be realized is by making the amount costs of the suit, and entering the same in the decree. An order for depositing additional costs when not entered in the decree crimet he enforced (3)

16. Any Commissioner appointed under this Order may, Powers of Commissioners. unless otherwise directed by the order of appointment,—

(a) examine the parties themselves and any witness whom they or any of them may produce, and any other person whom the Commissioner thinks proper to call upon to give evidence in the matter referred to him,

(b) call for and examine documents and other things relevant

to the subject of inquiry;

(c) at any reasonable time enter upon or into any land or building mentioned in the order

Powers —A Commissioner has wide powers and discretion to inquite as he may into the matters referred to him for investigation (4). He is entitled to take evideoce in the matter referred to him (5). Where instructions are given in the presence of both parties, and no objection is made by either then and there, they have no ground of complaint after the Commissioner has carried out his instructions, if the Court acts upon his report (6). He cannot, however go beyond the terms of the order appointing him (7).

Attendance and examination of with code relating to the sum monmy, attendance and examination of with mosses, and to the remuneration of, and penalties to be imposed upon, witnesses, shall

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⁽¹⁾ Gopalaratnamayyar v Bupala Aarasumma, 4 M 399 (1882), as to nature of remuneration, see Ragava Chariar t Vedanta Chariar, 3 M 259 (1881)

⁽²⁾ Ra_oava Chariar τ Vedanta Chariar, 3 M 259 (1881)

⁽³⁾ Tadhin Proshad Singh w Sardar Coomar Narayan Singh, 10 C W N 234 (1905) (4) Mohin Lall t Uunopoorna Dossec, 9 W R. 566, 568 (1868), as to calling for wills, see Unnopoonal Dabec w Rance Aolochomong, 1 ulton 83 (1833)

⁽⁵⁾ Tincouri Debi v Suttya Doyal Bannerib 6 C L J 105 (1889) [duty of Commissioner when examining accounts]

⁽⁶⁾ Bissessur Roy v Aanchun Roy 11 W R 155 (1869)

⁽⁷⁾ Ram Dhun v Ram Monce, 21 W R 280 (1874) Shibo Soonduree v Ram Chuder, 17 W R 469 (1872), Bustee Sahoo t Jeo Narain 24 W R 338 (1875), Bigo Gobiod t Kulee Prosumo 16 W R 294 (1871), Doogar Chun t Neum Chuni 24 W R 203 (1875)

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apply to persons required to give evidence of to produce documents under this *Order* whether the commission in execution of which they are so required has been issued by a Court situate within or by a Court situate beyond the limits of British India, and for the purposes of this rule the Commissioner shall be deemed to be a Civil Court.

(2) A Commissioner may apply to any Court (not being a High Court) within the local limits of uhose jurisdiction a witness resides for the issue of any process which he may find it necessary to issue to or against such uitness, and such Court may, in its discretion, issue such process as it considers reasonable and proper

Powers of Commissioner—A Commissioner was under the last Code vested with the powers of a Cril Court to summon winnesses and enforce their attendance under the provisions of the Code—But a private Commissioner, without the machinery of a Court, might find prietical difficulty in enforcing the order. In a case in which a private Commissioner experienced difficulty in enforcing the attendance of witnesses before him, the Colutta High Court directed the return of the commission and sent it under sect 386 (now r. 4) to the Cril Court, within whose jurisdiction the witnesses resided (1). It has, therefore, been critical that, as is already the prictice in many places, a private commissioner may cause his processes to be executed through the Court having local jurisdiction where the witnesses reside. It has been held in Bombay, on the Original Side, that an attachment will issue to compet a party to obey an order made by a Commissioner upon the certificate of the Commissioner that such order has been made and disobeyed without in the first instance, making such order a rule of Court (2)

18. (1) Where a commission is issued under this Order, Parties to appear before the Court shall direct that the parties to the commissioner in person or by their agents or pleaders.

(2) Where all or any of the parties do not so appear the

Commissioner may proceed in their absence

Appearance of parties before Commissioner —Act VIII of 1859 sect 181 A party, refusing to appear before an Ameen at the time he holds his local micestigation, is not at liberty afterwards to take any objection to his report (3) In the case of Eshan Chunder v Soorjo Lall,(4) it was held that where a plaintiff fails to appear before a Commissioner, and the defendant appears, the plaintiff is lable to have his suit dissuitsed with costs. Before proceeding under clause (2) due notice of the time and place fixed for proceeding should be given

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⁽¹⁾ Mahomed Alı v Wazıd Alı, 23 C 404 (3) Bamun Doss t Brojo Kishore, 6 W R (1890) 130 (1866)

⁽²⁾ Dhurandhardas v Bhau Govind, 10 (4) Marsh 139 (1864)

ORDER XXVII.

Suits by or against the Government or Public Officers in their official capacity.

1. In any suit by or against the Secretary of State for India suits by or against in Council, the plaint or written statement shall be signed by such person as the Government may, by general or special order, appoint in this behalf, and shall be verified by any person whom the Government may so appoint and who is acquainted with the facts of the case.

Suits against Government or Public Officers -See notes to sects 79-82, ante

- 2. Persons being ex officio or otherwise authorized to act proceeding shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of the Government
- 3. In suits by or against the Sceretary of State for India.

 Plaints in suits by or against Government
- words "The Secretary of State for India in Council"
- 4. The Government pleader in any Court, or such other Agent for Government to person as the Local Government may for any receive process Court appoint in this behalf, shall be the agent of the Government for the purpose of receiving processes against the Secretary of State for India in Council issued by such Court.

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5. The Court, in fixing the day for the Secretary of State

Fixing of day for appearance on behalf of Government

for India in Council to answer to the plant, shall allow a reasonable time for the necessary communication with the Government through

the proper channel, and for the issue of instructions to the Government pleader to appear and answer on behalf of the said Scientary of State for India in Council or the Government, and may extend the time at its discretion.

6. The Court may also, in any case in which the is distribution of person able to answer questions relating to answer questions as the said scalars to answer also

The defendant is a public officer and, on is Estension of the three defendant is a public officer and, on is examine public officer and on is recovering the simunous, considers it proper to make reference to Gerernment. In the major apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper

channel.
(2) Upon such application the Court shall extend the time for so long as appears to it to be necessary

8. (1) Where the Government undertakes the defence of a is suits against a public officer, the Government against public officer pleader, upon being furnished with authority to appear and answer the plaint, shall cappel to the Court, and upon such application the Court shall cause a note of his authority to be entered in the register of civil suits

(2) Where no application under sub-rule (1) is made by the is Government pleader on or before the day fixed in the notice for the defendant to appear and answer, the case shall proceed as in

a suit between private parties

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Provided that the defendant shall not be hable to arrest, nor his property to attachment, otherwise than in execution of a decree.

Government undertaking defence —This does not change the nature of the sut, which will continue as before The suit is against the officer, and against him the decree, if any, must be passed (1)

⁽¹⁾ O kinealy s C P C, note to a, 426

ORDER XXVIII.

Suits by or against Military Men.

1. (1) Where any officer or soldier actually serving the Government in a military capacity is a party Officers or soldiers who to a suit, and cannot obtain leave of absence cannot obtain leave may authorize any person to sue or defend for them. for the purpose of prosecuting or defending the suit in person, he may authorize any

person to sue or defend in his stead.

(2) The authority shall be in writing and shall be signed by the officer or soldier in the presence of (a) his commanding officer, or the next subordinate officer, if the party is himself the commanding officer, or (b) where the officer or soldier is serving in military staff employment, the head or other superior officer of the office in which he is employed. Such commanding or other officer shall countersign the authority, which shall be filed in Court.

(3) When so filed the countersignature shall be sufficient proof that the authority was duly executed, and that the officer or soldier by whom it was granted could not obtain leave of absence for the purpose of prosecuting or defending the suit in

person

Explanation -In this Order the expression "commanding officer " means the officer in actual command for the time being of any regiment, corps, detachment or depôt to which the officer

or soldier belongs

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Any person authorized by an officer or a soldier to prosecute or defend a suit in his stead may Person so authorized may act personally or appoint pleader prosecute or defend it in person in the same manner as the officer or soldier could do if present, or he may appoint a pleader to prosecute or defend the suit on behalf of such officer or soldier

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> Processes served upon any person authorized by an officer or a soldier under rule 1 or upon any pleader appointed as aforesaid by such person

Service on person so authorized, or on his pleader. to be rood shall be as effectual as if they had been served SOTT ICE. on the party in person.

Military men -Generally, as regards suits against soldiers, see Army Act 1881, and case cited (1) If a person sucs for a soldier without authority the suit must be dismissed. (2) and an objection to the plaintiff's right to bring the suit, though not taken in the Court of first instance, was allowed on second appeal (3) The provisions of sect 168 of the last Code have been embodied in O V rr 28-29, which deal with service on mulitary men

B H C R A C J 20 (1869). (1) Mahomed Saib r Nass, 10 M 319 (1887) (3) Ib.

⁽²⁾ Shivram Vithal t Bhazarthebar 6

ORDER XXIX.

Suits by or against Corporations.

- 1. In suits by or against a corporation, any pleading subscription and veri may be signed and verified on behalf of the fleation of pleading corporation by the secretary or by any director of other principal officer of the corporation who is able to depose to the facts of the case.
 - 2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

- (b) by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registeral office then at the place where the corporation carries on business.
- 3. The Court may, at any stage of the suit, require the Power to require per sonal attendance of officer of the corporation. The properties of the secretary of of any director, or other principal officer of the corporation who may be able to answer material questions relating to the suit.

"Corporation."—The corporation contemplated by the former Code was, it was held, a corporation as known in English law, that is, a corporation created with the express consent of the Sovereign, or of such actiquity that the consent of the Sovereign may be presumed (1) Thus, the Akhara Panehatit, ac association formed by the followers of Guru Nanak, who flourished to the fifteenth century, and having no royal sanction, though it be a corporation under the Civil law, was held not to be a corporation under English law (2) A company which has been duly registered under the Indian Coopanaes Act of 1882 is a

Committee v Burjorji Bamanji, 14 B 256, 289

(2) Panchaiti Akhari v Giun Kuar, 20 A. 167 (1897)

⁽¹⁾ Panchaiti Akhara v Gaura Kuar, 20 A 107, 169 (1897), as to corporations by pie scription, sen Yusuf Beg i Board of Lorizon Missions, 16 A 120, 422 (1894), and as to the attributes of a corporation, see Cantonment

corporation (1) There is nothing in r 1 to exclude from its operation a foreign corporation or a foreign company, and there is nothing in the Code, or in the Indian Companies Act, requiring such corporation or company to be registered under the Indian Companies Let before it can claim the benefit of this rule (2) The former section referred also to companies authorized to sue and be sued in the name of an officer or trustee Authority to sue or be sued in the name of an officer or trustee can only be conferred by Act of Purliquient, or by an Act of the Indian Lebilature, and there are some Acts in the Indian Statute Book by which certain companies are authorized to suo or be sued in the name of an officer (3) Where the actuary of in assurance company established in London by Act of Parliament, which gave him the privilege of sming there on behalf of the company, sued in India, it was held, though the Act did not extend to this country, that he night suc, in smuch as the insured must be assumed to have notice of the Act under which he could suc and be sued, and the contract might be considered as in effect made by him only (4) The rule now omits reference to Most companies are registered, and a registered company Companies authorized to sue and be sued in the name of an 13 1 corneration officer or trustee must, it was said, he very few, if, indeed any exist and it has been thought that they do not appear to call for special treatment

Suits by or against corporations—These rules do not deal with the question who may suc or be sued and in what manner but merely deal with two medents of procedure in such suits, we the subscription and verification of the plaint and service our adefendant corporation. The general rule however, is that a corporation (and a registered company is such) must sue and be sued in its corporation name (5) and cannot sue (6) or be sued (7) through an agent. A company "authorized to sue and be sued," etc., will of course sue and be sued in the name of the officer or trustee. It has been held that in the case of a suit by (8) or against (9) an unregistered and ununcorporated company or association not authorized to sue or be sued in the name of an officer, the names of the

W R 534 (1871)

- (1) Campbell v Jackson, 12C 41 44(158s)
- (2) Singer Manufacturing Co v Bajunath 30 (D3 (1902), dist hund Beg v Board of Missions 10 A 420 (1834) in which it was not shown that the party claiming the benefit of a 435 of the last Code was a corporation and see Jones v Tagore Fulton 338 (1845)
- (3) Camphell v Jackson 12 C 41 44
- (4) Jones t Tagore Eniton 388 (181a)
 (a) Ram Doss v Stephenson 10 W R 366 (1868) and according to Private International Law a corporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States Singer Vanisfacturing Co t Baijnath 30 C 103, 10a (1902), as to suits by an official liquidator, see Vulhammand busuf v Ilmalaya Bank, 18 4 136 (1890)

- (6) See Campbell v Jackson 12 C 41
- (1885)
 (7) Nubecn Chunder : Stephenson 15
- (8) Vahommedan Association of Veerut t Balshi Ram 6 A 284 (1884), Panchanti Akhara v Gauri Khar 20 A 167 (1897), Campbell v Jackson 12 C 41 (1885) as to minors see Pitum Dass t Ram Dhone, 1 Taylor 273 (1819 50)
- (9) Aoylash Chunder t Ellis S W R 4, (1867) Gancaha Singh ν Mindi Forest Co₁, 21 A 346 (1899) The latter case however, dissented from the former in that it held that a plaintiff could not escape the obligation of making each individual member of the defendant company a defendant by stating in the plaint that he had been mable to discover who the individual members of the company were.

ORDER XXIX,

Suits by or ayainst Corporations.

- 1. In suits by or against a corporation, any pleading subscription and veri may be signed and verified on behalf of the cation of pleading corporation by the secretary or by any director or other principal officer of the corporation who is able to depose to the facts of the case.
- 2. Subject to any statutory provision regulating service of process, where the suit is against a corporation, the summons may be served—

(a) on the secretary, or on any director, or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corpolation at the registered office, or if there is no registered office then at the place where the corporation carries on business.

The Court may, at any stage of the surt, require the personal appearance of the secretary of of any director or other principal officer of the corporation who may be able to answer

material questions relating to the suit.

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"Corporation"—The corporation contemplated by the former Code wis, it was held, a corporation as known in English law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed (1) Thus, the Akhara Panchatti, an association formed by the followers of Guru Nanak, who flourished in the fifteenth century, and having no royal sanction, though it be a corporation under the Civil law, was held not to be a corporation under Linglish law (2) A company which has been duly registered under the Indian Companies Act of 1882 is a

⁽¹⁾ Panchatt Akhara v Gauri Kuar, 20 A 107, 163 (1897), as to corporations by pre scription, see Yusuf Beg : Board of Longa Missions, 16 A 429, 422 (1854), and as to the attributes of a corporation, see Cantonment

Committee v Burjorji Bamanji 14 B 286 28J

⁽²⁾ Panchutti Akhara v Gurn Kuar, 20 A-167 (1837)

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cornection (I) I' construct upon a 1 to exclude from us operation a foreign corn tale not a foreign columnation and there is nothing in the Cole or in the Indian Command a Act regiment with corner rate more command to be resistered under the Indian this ones let before it can claim the beacht of this rule (2) T. c f 11 (1 ex 1) n referred also to companies authorized to sue and be sued in the name of any discrete trustee. Authority to sue or be sued in the name of an o heer or tradic can only be conferred by Act of Parliament, or by an Act of the In han Leavisture, and there are some Acts in the Indian Statute Book his which certain certaines are authorized to see of be sued in the name of an officer (3) Where the actuary of an assurance company established in London by Act of Palament, which are him the privilege of sums there on behalf of the con many, seed in India, it was held, though the Act did not extend to this country, that I c mucht see marmuch as the maured must be assumed to have matice of the Act under which he could sue and be sued, and the contract might be considered as in effect made by him only (1) The rule non omits reference to such communies. Most communies are registered, and a resistered community is a composition. Companies authorized to sue and be sued in the name of an officer or trustee must, it was said, be very few, if indeed any exist and it has been thought that they do not appear to call for special treatment

Suita by or against corporations.—These rules do not deal with the quistion who may see or be sued and in what manner, but increly deal with two mendents of procedure in such suits, vir the subscription and verification of the plant and service on a defendant corporation. The general rule, however, is that a corporation (and a registered company is such) must sue and be sued in its corporate name, (5) and cannot sue (6) or be sued (7) through an agent. A company "nuthorized to sue and be sued," etc., will of course sue and be sued in the name of the officer or trustee. It has been held that in the case of a suit by (8) or against (9) an unregistered and unincorporated company or association not authorized to sue or be sued in the name of an officer, the names of the

- (1) Campbelle Jackson, 12C 41.44(1885)
- (2) Sanger Manufacturing Co e Baynath, 30 C 103 (1922), disk, Yusuf Beg r Board of Missions, 16 A 420 (1934), in which it was not shown that the party claiming the benefit of a 432 of the last Code was a corporation, and see Jones e Tagere, Fulton, 388 (1845).
- (3) (ampbell v Jackson, 12 C. 41, 44 (1885)
- (4) Jones t Iaport, Iutton, 388 (1845)
- (§) Riam beas v Stephenson, 10 W R 346 (1868), and according to Pravate Interinational Law a curporation duly created according to the law of one State may sue and be sued in its corporate name in the Courts of other States. Singer Manufacturing Co r Baijunkh, 30 C 103, 105 (1902), as to saits by an official liquidator, see Muhammad Vonnt e Himshaya Bank 18 A 19s (1890)

- (6) See Campbell : Jackson 12 C 41 (1885)
- (7) Nubecn (hunder i Stephenson, 15 W R 534 (1871)
- (8) Vahommedan Association of Vecrut a Bakshi Ram, 6 A 254 (1884), Panchati Akhara t Gaura Kuar, 20 A 167 (1887), Campbell v Jackson, 12 C 41 (1885), as to nanore, see Patum Dass v Ram Dhone, 1 Taxlor, 279 (1849-50)
- (9) Aoylanh Chunder t Ellas, S. W. R. 15 (1867), Ganesha Singh ν Mundi Forest Co. 21 A 346 (1899). The latter case, however, dissented from the former in that it held that a plaintiff could not escape the obligation of making each individual member of the defendant company a defendant by stating in the plaint that he had been unable to discover who the individual members of the company.

members of the company or association must be disclosed, and they must be made parties as in the case of a firm, (1) and a suit cannot be brought by or again t a secretary or other person representing such association, though advantage may be taken of the provisions of O I r 8, ante As to suits by or against firms see O XXX

Subscription and verification of plaint —The Code enables a principal officer of a corporation to verify a plaint, and it is therefore not necessary that permission for that purpose should be obtained, but it should be shown in cases to which I applies, that the person purporting to verify a plaint is a principal officer and is able to depose to the facts of the case. If the plaint contains a statement to that effect, verification in the usual form would probably be suffi cient (2) But the Code does not require that the officer should verify from actual personal knowledge He may do so upon information and belief (3) An acting manager of a bank is a principal officer of the bank corporation and may sign a plaint for it (1)

Written statements and petition in insolvency —The provisions of the former section (now r 1) have by virtue of the provisions of sect 115 (now 0 VI rr 14 15) and sect 316 of the last Code respectively been held to be applicable to written statements (5) and petitions in insolvency under the Code (6) Sect 346 has now been removed from the Code medvency being dealt with by a separate Act (III of 1907) In conformity with the provisions of the Indian Companies Act so vice is allowed by post on corporations having a registered office

Service - In executive culineer of a rillway company is not an officer within the meaning of r 2 clause (a) on whom service may be made (7)

- (1) Yeknath v Gulabehand 1 B H C R
- A C J 85 (1863)
- (2) Srcenath Bancrice t East Indian Rail way 22 C 268 (1894) which dealt with an ins ifficient written statement and allowe ! evidence to be supplied by affidavit and witl waiver of objection to sufficiency of verifica
- (3) The Port Canning etc Co v Dhara nidhar Sardar 9 C W N 608 (1905)
 - (4) Delhi Bank 1 Oldham 21 C 60 (1894)

- _O I A 139
- (5) Sreenath Bancrice v Last Indian Railway 22 C 268 269 (1894)
- ceded s 435 of the last Code use the word
- herembefore
- (7) Hanlon v India Branch Railway 1 Hyde 197 (1862 63)

ORDER XXX.

Suits by or against Firms and Persons earrying on business in names other than their own

1 (1) Any two or more persons claiming or being hable as Sung of partners in partners and carrying on business in British name of firm.

India may sue or be sued in the name of the firm (if any) of which such persons were partners at the time of the accruing of the cause of action, and any party to a suit may in such case apply to the Court for a statement of the names and addresses of the persons who were, at the time of the accruing of the cause of action, partners in such firm, to be furnished and verified in such manner as the Court may direct

(?) Where persons sue or are sucd as partners in the name of their firm under sub rule (1), it shall, in the case of any pleading or other document required by or under this Code to be signed, verified or certified by the plaintiff or the defendant, suffice if such pleading or other document is signed, verified or certified by any one of such persons

2 (1) Where a suit is instituted by partners in the name of their firm, the plaintiffs or their pleader shall, on demand in writing by or on behalf of any defendant, forthwith declare in uriting the names and places of residence of all the persons constituting the firm on whose behalf the suit is instituted

(2) Where the plaintiffs or their pleader ful to comply with any demand made under sub rule (1), all proceedings in the suit may, upon an application for that purpose, be stayed upon such terms as the Court may direct

(3) Where the names of the partners are declared in the manner referred to in sub rule (1), the suit shall proceed in the same manner, and the same consequences in all respects shall follow, as if they had been named as plaintiffs in the plaint

Provided that all the proceedings shall nevertheless continue in

the name of the firm

3 Where persons are sued as partners in the name of their served. firm, the summons shall be served either—

(a) upon any one or more of the pathers, or
(b) at the principal place at which the pathership business is
earried on within British India upon any person having,
at the time of service, the control or management of the
pathership business there,

as the Court may direct, and such service shall be deemed good service upon the firm so sued, whether all or any of the partners are

within or without British India:

Provided that, in the case of a partnership which has been dissolved to the knowledge of the plaintiff before the institution of the suit, the summons shall be seried upon every person within British India whom it is sought to make liable.

Suits by or against firms.—"Firm" is simply a compendions expression to the several persons who are members of it, and the general law knows nothing of the firm as a body or artificial person distinct from the members composing it. The Judicature enabled partners to sue or be sued in the names of their firms, but this rule did not introduce anything that amounts to the recognition of the firm as an artificial person as distinct from its members (1). This Order dealing with this subject is entirely new. It is, with the exception of r 4, taken from 0.48a of the English Rules. The following notes are also taken from each portions of the notes in the Annual Practice on those rules as are of appleability in this country.

The following are the cross references with respect to this note -

Disclosure of partner's name, r 2, service of writ on partners is dealt with in this rule and r 5 Appearance, r 6 No appearance except by partner, r 7 Appearance den

O XXI r 50

as a firm r 10 ment against a firm see O XXI 1 50 Actions between co partners, r 9, infra

Actions between partners—Prior to r 10 of the English rules, corresponding with r 9, post, it was not quite clear that actions between a firm and tone of its members, or between two firms with a common member, were main tamable in the firm's name, (2) but this doubt is now removed by that rule which applies the rules to such actions, provided the firm or firms carry on business within the jurisdiction, and with the further provise that "no execution shall be issued in such suits exc pt by leave of the Court"

"Any two or more persons"—If one of the partners is an infant, the minority of one partner cannot be utilized by the other, or others, as a means of deferring payment of the firm's dehts (3) But the judgment should be either

⁽¹⁾ Lukhmidas Khimji t Purshotam Hvridas, 6 B 700 702 (1882)

⁽²⁾ See Pollock, pp 20 and 109

⁽J) Harris: Beauchamp Bros (1893) 2Q B

⁵³⁴ See also O NI r 50, note, Inlant partner See also in fra note 'May sue or be sued

against the ability attains by non, or against the firm fother than A. B. an infant for his ruch a cased anking by proceedings will, in Fingland, he against the firm other than the infant partner (I). A foreign corporation is different from a time, and may be such as an individual (2).

"As partners,'—The hability of partners for debts is joint (3) As a contralrule as in thy or against an ordinary partnership would have been defective. for want of partners were before the Court, (1) but now the firm may be said will out partners were before the Court, (3) but now the firm may be said will out partners were before the Court, (4) but now the firm as before action, and the action is brought against the firm alone, in the firms a name, the dece used a attner is not a partner to the action at all so far as partner dies between service of the writand judgment, the estate of the deceased partners into bound. Unless his personal representative is a defendant, judgment is against the surviving partners, and can only be enforced against them and the partner along the service of the control of such of partner, if The detate of a deceased partner is not liable for goods ordered before, but not delivered till after, his detail (2) acts (2).

"Carrying on business in British India."-If the firm carry on business within the jurisdiction within the meaning of the cases cited below, they may sue or he sucd in the firm name. It happens that in all the cases cited in this and the note on " Foreign kirms, the points raised turned upon the question whether the defend into were rightly sued. But the principle laid down in those cases applies equally to a plaintiff firm as to a defendant firm, the right to " sue or be sued" being given by the same sentence of this rule. It is, therefore, the practice of the Central Office in Lingland to refuse to issue a writ wherein a foreign firm is either plaintiff or defendant, unless the individual names of the partners are given The words carrying on husiness ' do not include an agency, even though the name of the firm b painted on the door of the office of the agency (8) Semble, "carrying on business 'means the possession within the jurisdiction of a place of business held in the name of the firm where business is carried on on behalf of the firm by a partner or by a person or persons in the pay of the firm (9) If the firm has no place of business in this country held in the name of the firm they do not earry on business within the jurisdiction even though the partners come to this country regularly in order to purchase goods to be sent to the firm

⁽¹⁾ Lovell v Beauchamp A C 607 (1894) For a case in which a cost book mining company was sued in its partnership name, see Escott v Graj, 39 L T (N S) 121

⁽²⁾ See Ann Pr O 9, r 8 note, loreign

Corporation."

⁽³⁾ Pollock, l'art, p. 26, Kendall v Hamilton, 4 App Cas 504, Pilley v Robin son, 20 Q B D 153, and cf. The Partnership Act, 1630 as 9 10, 12 and Weall v James, 68 L F 515

⁽⁴⁾ Lindley, (516)

⁽⁵⁾ Pollock Part, p 109

⁽⁶⁾ Ellav Wadeson, 1 Q B 714 (1899)

⁽⁷⁾ Bagel v Valler, 2 h. B 212 (1903)

⁽⁸⁾ Grant v Anderson 1 Q B 108 (1892)
(9) See Worcester City Banking Co v

Firbank & Co, 1 Q B 784 (1894), and com pare Baillie v Goodwin, 33 C. D 604, Grant a Anderson, supra, and Heinemann & Co v

S B Nale & Co , 2 Q B 83 (1891)

abroad (1) The English rule has been held not to apply to proprietors of a newspaper sued under the name of the newspaper (2)

The effect of the addition to the English rule of the words "carrying on husiness within the jurisdiction," is to establish, out of all the cases cited in the note on "Foreign Firms," the decision of Chitty, J ,(3) that where a firm carried on husiness in England and a partner was a resident in England, service it the principal place of business upon the person in control of the husiness, was good service on the firm, including any foreign partner resident abroad (4) Moreover, the rule as now framed appears to go even one step further, seeing that under its terms a foreign firm consisting of two or more persons (5) can be sued as a firm, provided it carries on business within the jurisdiction, whether a partner resides in this country or not For though Wright, J, held otherwise, (6) the C A refused to indorse his ruling on this point (S C). And in the case cited (7) it was held that partners usually resident abroad and having a London office in the firm name were rightly sued as a firm. If the foreign firm does carry on business within the jurisdiction the partners are persons sued as partners in the name of their firm under r. 1, and service on the person in control of the business 18 good service on the firm, including all the partners out of the jurisdiction so far as, but no further than (see O XXI r 50), any property of the partnership within the jurisdiction is concerned. It makes no difference whether the partners abroad are foreign subjects or British subjects It is not allegiance to the Crown which is in question, but whether the firm and its partners are subject to the juris diction of the Court If they carry on business within the jurisdiction in the firm name, then the rule, which must be read with O XXI r 50, applies (8) If the firm does not carry on business within the jurisdiction it cannot be sued in the

"May sue or be sued "-A firm consisting of "two or more persons' may sue or he sued even though one of them is under a disability (11) A person trading by himself as a firm or in an assumed or trading name, must sue in his own name, though he may be sued in his trading name (12) If one of several partners dies before action brought, and the plaintiff seeks, in suing the firm, to make the deceased partner's private estate hable, he must add as a defendant

firm name, (9) though a counterclaim may be pleaded against a foreign firm

suing in an English Court (10)

⁽¹⁾ Singleton v Roberts & Co, 70 L Γ

⁽²⁾ De Bernales v New York Herald, 2 Q

B 97 (N) (1893)

⁽³⁾ In Shepherd v Hirsch, Pritchard & Co,

⁴⁵ C D 231 (4) See also Lysa, ht v Clark & Co, 1 Q

B 552 (1891)

⁽⁵⁾ See note, "Any two or more persons,"

⁽⁶⁾ In Grant v Anderson, s ipra (7) Worcester Banking Co r Firbank L

Co. 1 Q B 784 (1694) (8) Ib

⁽³⁾ Western National Bank of New York

Perez Friana & Co , 1 Q B 304 (1891) Indego Co a Ogdvy 2 Ch 3I (1891), Hememann & Co v S B Halo & Co, 2 Q B

^{83 (1891),} Baillie v Goodwin 33 C D 604 (10) Graendtovecav Hamlyn & Co 8 Times Rep 238, sec O XXI r 50, note, Shall not render liable," etc. See also following

note (11) See Harris v Beauch imp Bros , cited

⁸ ipra, 1 (12)

scer It, , ..., owners of errgo in an Admiralty action sa res sum, as such in her of triding name, sco The Assunta (1302), P 150

the personal representative of such deceased partner, (1) and $\sec r$ 1. The right to sue partners in the name of the firm is not limited to the ease of partners in the firm at the date of the writ. And the hability of partners who have left the firm prior to or since the action commenced is a question of fact which may be rused under 0 NNI r 50 (2). A judgment against the firm has the same effect as a judgment against all the partners had formerly (3). If final judgment has been obtained against a firm upon a writ issued against the firm, execution cannot issue against a member of the firm without leave of the Court, unless such member comes within the provisions of 0 NNI r 50 (a), (b), (c), and Under the English rules, if a firm has recovered judgment, and one member afterwards dies, the survivor may issue execution (1). A firm cannot appear as a firm, but if a partner, together with the firm, are made co defendants, he may put in separate defences, one for himself, and one for the firm (5).

"At the time of the accruing of the cause of action "—These words enable the co partners in a firm dissolved before action to sue or be sued as a firm provided the co partnership existed at the time the cause of action accrued And hy the operation of r 10, infra, it enables an individual trading in a name other than his own name at the time the cause of action accrued to he sued in his trading name, although he has ceased to so trade at the time the action was brought

Foreign firms—The ruling in the following cases applies to a plaintiff foreign firm suing as well as to a defendant foreign firm being suid foreign firm suing as well as to a defendant foreign firm being suid foreign firm all the partners in which reside abroad cannot be served as a firm. The partners should be sued and served individually (6). The same rule applies to a colonial firm (7). A foreign firm baving a resident partner in England who transacts business for the firm hut not having an office occupied in the firm is name cannot be sued as a firm, and a writ so issued and served upon such resident partner, together with the service thereof was set aside (8). A single individual residing abroad and being a foreign subject and earrying on business in this country in the name of a firm, must be sued individually in his own name (9). If a single individual who is a foreigner is sued in his own name and served with the writ while temporarily

business in England was held good service on

the person sued.

⁽¹⁾ See Ellis v Wadeson 1 Q B 714 and Phillips v Homfray 24 C D 428 Re Shep hard, 43 C D 136

⁽²⁾ Davis v Morris 10 Q B D 426

⁽³⁾ Pollock, Pattnership, p 109, and see Clark t Cullen 9 Q B D 355

⁽⁴⁾ See O 17, r 1, and Davis t Andrews, W N 84, 94 See also O XXI r 50, ante

⁽⁵⁾ Taylor v Collier, 30 W R (Eng) 701

⁽⁶⁾ Western Astional Bank of New York: Perez Trans & Co. 1, Q. B. 304 (1831), over ruling Pollesfen v Shbson, 16 Q. B. D. 792 (in which case a foreign firm was swed in the firm name and service on a partner happening to be temporarily in Figlan I was held good service on the firm).

⁽⁷⁾ Indigo Co t Ogilvy 2 Ch 31 and of Judgment of Esher M R (1891) in Worcester City Banking Co t Firbank & Co, 1 Q B 784 (1894), Agart haufman Bros 39 Sal Jo 181

⁽⁸⁾ Heinemann & Co. t S B Hale & Co., 2 Q B S3 (1891), cf note, supra, 'Carrying

on business within the jurisdiction."

(9) Nee St. Golain r Hopermann & Agency,
2 Q B 96 (1893) and Russell v Cambefort,
22 Q B D 526, overruling O Neiler Classon
2 Co 40 L. J. Q B 191, where a foreigner
trading in England was sued in his trading
name, and service on the manager of the

in this country, the service, it appears, would be good (1) Service on the agent of a firm has been held to be no service on the firm (2) As to service out of the jurisdiction on a partner in a firm carrying on business in England, see note (3) It has been held in England that a defendant firm may contract itself out of the rules and rulings as to foreign firms If its principal place of husiness is out of the jurisdiction, and it has agreed to receive service at some place within the jurisdiction, a writ served in the manner agreed is well served (4) But an agree ment that the Court shall have power to order service on the foreign firm even though the case is not within O II of the English rules, is of no effect. The jurisdiction of the Court as to the ordering service out of the jurisdiction cannot he extended by agreement (5) A foreign firm sung in the English Court is liable to have a counterclaim pleaded against it, even though the nature of the counterclaim is such as to preclude the possibility of bringing an action upon it under O 11 of the English rules, which provide for service out of the juris diction (6)

"For a statement of the names "- In order to disclose the names of partners hereunder is not an order for discovery within O 31, r 21 of the English rules, corresponding with O XI r 21 of this Code (7) Where an affidavit has heon filed stating the names of the partners in the plaintiff firm there is no power to direct a cross examination on such affidavit, or the trial of an issue as to who were the partners in the firm at the time of the accruing of the cause of action (8)

Disclosure of partners' names -By sub rule (1) r 1 supra in an action by or against a firm, any party to the action may apply by summons to a Judge for the names and addresses of the persons who were partners at the time the cause of action accrued (9)

"Provided that all the proceedings "-Sec post notes tor 6

"Where persons are sued as partners"-These words authorize service in accordance with the provisions of this rule on any person sued who is carrying on business within the jurisdiction in a name or style other than his own name, (10) and also upon any two or more persons sued who are liable as co partners and carry on business within the jurisdiction A foreign firm not carrying on business within the jurisdiction cannot sue or be sued as a firm (11) Semble at provides a mode of service within the jurisdiction within the meaning of the English rule on firms trading within the jurisdiction whether the partners reside within or without the jurisdiction (12)

⁽¹⁾ See Carrick v Hancock, 12 Times Rep

⁽²⁾ Baillie v Goodwin 33 Ch D 604 see also Grant v Anderson 1 Q B 108 (1892) (3) See O AM r 50 note Unless ser

vice has been made on such partner (4) Montgomery v Liebenthal & Co 1 Q

B 487 (1898) (5) British Wagon Co v Cray, 1 Q B 35

⁽¹⁸⁹³⁾

⁽⁶⁾ Griendtoveen v Hamlyn & Co 8 Times

Rep 231

⁽⁷⁾ Pike v Leone, 24 W R (Eng.) 322

⁽⁸⁾ Abrahams & Co v Dunlop Pneumatic Туте Со 91 L Т 11 (С А)

⁽⁹⁾ Seer 1 supra note | For a states est of the names

⁽¹⁰⁾ Supra r 10 infra

⁽II) See at pra

⁽¹²⁾ Ann Pr notes to O 48A r 3

"Shall be served. —The rule of service presented by this rule applies is left to a ray count in the part heter. If a partier is served service must be pairs at an large to effect another embyer to the rule as to service out of the pair in the count to the design some report of the rule as to service out of the pair in the count to the design some ray the effected at the puncipal place of the rule within the parableton and timest include service of the notice presented by the operator. If no such notice is served the person is deemed to be served as a partier (1). Where a firm is only served and no appearance is counted as a partier (3). Where a firm is only served and no appearance is counted at 1 page and in default is ugod, sill equals service of the writton a pattern and pattern at page and when the such patter to apply nodes to serve the page and goals of a pattern not originally served as to apply under the VII in 30, for any degrang leave to resue execution against the person to the trained by trained by the page leave to resue execution against the person.

"At the principal place at which" "Souble this means a place where the lone so of the him is attaclored by an above to partner or sone person whose in the pass of the him in land in roly or again (4)

"Control of management" Service on the agent of a firm way held to be no service on the time (i) Service on a receiver and manager appointed by the Coart way held to be had on the ground that the words of this rule mean that the person having the control or mining ment of the participality business must be the servant of the partices whereas a receiver sethe servant of the Court so held on the same words in 7 200 of the English Banksuptey Rules, 1880 (6) Where there was no one in control substituted service was ordered (7).

"Deemed good service upon the firm."—Service on the firm by scrving the person in control larender, is not service upon each member of the firm so as to make such member "a person who has been served as a partner," (to within O XXI r 50 (8) though if partners appear individually under r 6, they will each be personally hible (9)

"Whether all or any of the partners are within or without British India "—These words must be red in conjunction with the words bearing on the same point in O XXI is 50. Semble they mean under the wording of the English rule that the service shall be good cryice on the firm

⁽¹⁾ See supra

⁽²⁾ Cf notes, cafes, 'At the principal place,' cic, and The control or management

⁽³⁾ R 5, infra

⁽⁴⁾ See Worcester City Banking Co v Firlank & Co, 70 L T 102 (1894), 1 Q B 784, Grant v Anderson, 1 Q B, 103 (1892), and of Heinemann & Co v S B Halo & Co, 2 Q B 83 (1891) It does not mean agency, see Bailie v Goodwin, 33 Ch D 604, and of De Berndes v New York Herald, 2 Q B 97 (a) (1893) See notes,

supra, turning on bisiness," etc. and Foreign firms, and as to a foreign firm contracting out of the cases by agreeing to service within the jurisdiction, see note,

[&]quot;Foreign firms," supra (5) Builto : Goodwin, 33 Ch D 604

⁽⁶⁾ Re Flowers & Co. 65 L J Q B 679

 ⁽⁷⁾ See Shillate v Child, W N 83 (208)
 (8) Re Ide, 17 Q B D 755

⁽⁹⁾ See r 6, note, Practice, and O AXI r 50, and of Alden v Bickley, 25 Q B D. 543

5) far 45 () 4 (rus 45g [r] erry () the trim within the Jurisia (a.e., (1) bit int Santagraf - real all arrally a laws-left of laypumer out d the just are a second run fact of second was also a maken a make best made والمستعدد المستعدد المستحديث والمستعدد والمستعدد والمستعدد والمستعدد والمتدد والمتعدد والمتعدد والمتعدد والمتعد والمتعد والمتعدد والمتعدد is and in the matter grown I all the Bill of the Arment I a state out the which the state of]ಷ್ಯಾವರ್ ವ

"Provided that -IL" war -- to, was, -m - r c amand a 0 16 7.14 (E) Tr 1) Orto-Establish Lid Lot to between coened (3) on outsome forms a finite raped to what the man of committee plan pur-If he omits to do this, and on the first service has he aim takes judgment in default aguingt the firm and the normal real of XXI is \$0. - Yes to save execution along the finite i who are the time time on the most as fewara partaer taen the debt was commerced, the Court will remove to come execution against whipartest became no was not made last's or want erred with the rrit (1)

4. (1) Not cuthstanding anything contained in section 45 of Pight of suit on death the Indian Contract Act, 1872, where two of more persons may sue or be seed in the naneof a firm under the foregoing provisions and any of such prisons dies whether before the institution or during the pendency of any such, shall not be necessary to join the legal representative of the deceard as a party to the suit

(2) Nothing in sub-rule (1) shall limit or otherwise affect any right which the legal representative of the deceased may have—

(a) to apply to be made a party to the suit, or

(b) to enforce any claim against the survivor or survivors

Devolution of joint rights —The section of the Contract Act referred to provides that when a person has made a promise to two or more others jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests as between him and them, with them during their joint live and after the death of any of them, with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives all jointly It has been held that this rule is not confined to cases where a suit is brought by or against a firm in the name of the firm The legal representatives of deceased partners may if desired, be brought on the record.(5)

(15)1)

⁽¹⁾ R 9 (1) and of Worcester City (4) Banking to v Firbank & Co , 1 Q B 784) tou H

⁽²⁾ See Ann Pr. 1 () 48A r 3

⁽⁾ Q B 792 (3) Wigram t Cr

r, notes to r 3, and see Er p D 124, an 10 XXI r 20 note,

ar pear

Dis r Kanhya Lal 17

5 Where a summons is issued to a firm and is seried in settle matrix e.g., the manner provided by ride energy person apon whom it is seried shall be informed by notice in writing given at the time of such service, whether he is seried as a partner or as a person leaving the control or management of the partnership has uses or in both characters, and, in default of such notice, the person seried shall be deemed to be seried as a partner

"Shall be informed, '- If service is effected on the person in control of the luminess and note the esserved as here provided the service is not effective and count the made so. If service is effected on a partner he may be served with the writ with at without a notice for if served with out he is decembed to be served as a partner (See next note). But if the person in control is served without a n tice that cannot be treated as service on a partner unless the depend to the ability of service if he subsequently discovers that the person served was a partner can sweat that he served \$ B a partner in the defendant firm. The natice when served must be served with the writern accordance with the rule. The usual practice is for the person effecting service to take a written notice with him heided in the name of the action and home to the follow in effect - Tike native that the writ served herewith is served on you as the ners a having the management or court lof the parinership business of (A B & Ca) Where a number is served such notice is not delivered with the cons west but where the person in control of the lossings is served on behalf of the firm it is delivered to him with the copy writ. The natice need not and indeed, under the circumstances cannot be iddressed to any one by name Where any difficulty is anticipated in identifying the person served either is a partner or as the person in control of the linemes, the best course is, in any case, to serve with the writ the following notice — Take notice that the writ served he rewith is served on you is a partner in the defendant firm of (A B & Co), and diso as the person in control of the busine s. This practice is authorized by the words of the rule ' or in both characters. (1) Is to entering judgment after such service see below (2) As to effect of not serving such notice and the necessity of proving service of the notice see next note. The object of the notice is to remove the possibility of dispute is to the character in which a nerson has been served. The Legislature did not intend to ruse merely i rebuttable pre umption but to lay down the legal effect of the service (3)

"Deemed to be served as a partner —As pointed out supra, these words obtaite the necessity of serving any notice on a person who is served as a partner, but they render such notice ind proof of service thereof absolutely necessary wherever the firm is served by service on the person in control of the business If, in such a case, the notice is not served with the writ or if the person served is served as a partner by notice such person will be able to protect himself from hability as a partner by entering appearance under protest

⁽¹⁾ Ann. Pr, notes to O 48a, r 4. (3) Bashnab Charan Saha v Bink of (2) See note infra, ' Persons served both Bengal, 19 C L J 581 (1914)

as etc

the 'owners of the cargo" may in an action in rem, suc as such even where the 'owners' consist of a person trading as a firm (1). A person sued by his trading name may be ordered to disclose his real name and private address (rr. 1.3). In a firm of "L. & Co., 'apparently consisting only of L. trading as L. & Co. there was a concealed partner. An action was brought by "L. & Co., against

there was a concerled partner. An action was brought by "L & Co, against G who counterclaimed for jeweller; supplied to L for personal use. Held that counterclaim was bad against the firm (2).

Service—The writing by street is provided by r 3 signer or but

Service—The writ may be served is provided by r 3 supra q v but not m England if the defendant is resident out of the jurisdiction (3) Where a single individual trading as a firm could not be served and there was no re sponsible person in charge of the business it was held that substituted service could be ordered (4)

Appearance — Must appear in his own name (5) Appearance under protest of person served denying that he is the person sued (6) As to effect of non appearance, see O XXI r 50

All subsequent proceedings continue in the name of the firm— See is to this notes in 6-8 supra

Execution -See O AM r 50 ante

- (1) The Assunta P 1.0 (1902)
- (2) Baker: Gent 9 Tunes Rep 1.J (3) See St Gobam & Co v Hoyermanns
- Agency cite Let pra note Curry no on busi
 - (4) Shillito v Child W V (83) 203
- (a) R 6 As to the effect of such an appearance see note to that rule. They shall
- appen individually (f) See r 8

ORDER XXXI.

Suits by or against Trustees, Executors and Administrators,

1. In all suits concerning property vested in a trustee, is executor or administrator, uhere the condicional property vested in trustees, etc.

Tentrol property vested in trustees, etc.

The trustee, executor or administrator shall represent the persons so interested, and it shall not ordinarily be necessary to make them parties to the suit. But the Court may, if it thinks fit, order them or any of them to be made

Representation of beneficiaries-The rule which corresponds with Linglish O 16, r 8, applies only when the contention is between the person beneficially interested and a third person Persons acting as trustees in succession under a will were held to adequately represent all persons beneficially interested in the estate in all suits relating to it (1) Trustees sufficiently represent an unascertained and unascertainable class (2) or persons (3) The rule governs all suits concerning property without distinction (4) The rule has no application when the contention is between beneficiaries and trustees, or between the beneficiaries themselves, though where the section applies it is not ordinarily necessary to make the beneficiaries parties The Court may, if it think fit, do so. The last clause is taken from 15 & 16 Vict c 86, s 42, r 9, and beneficiaries are made parties in England when the trustee is either wholly umnterested, or has an interest adverse to their interest (5) The discretion of the Court is not lumited in this respect (6) A costur que trust may sue on the refusal or mability of trustees to sue (7) Where a suit was brought by an executor and the names of the beneficiaries who took possession of the estate during the pendency of the suit were

parties

Ardesir v Hirabai, 8 B 474 (1884)
 Fussell t Dowding, 27 Ch D 240, Re
 Sheldon, 39 Ch D 52

⁽³⁾ Cardigan v Curzon Howe, 1901, 2 Ch 485

⁽⁴⁾ See Ann Pr, notes to O 16, r 8, which rule was amended to expressly include a case of foreclosure

⁽⁵⁾ Beresford t Ramasabba, 13 W 137, 202 (1883)

⁽⁶⁾ See Day v Radchife, 24 W R (Eo.2) 844. Wilkins i Reeves, 3 W R (En.2) 305. Gas Light, etc., Co v Tower, 35 Ch D 526, May v Newton, 34 ch D 347 cf also D C P 173, 188, 190, 207 1 m Mohananda Chatterjee v Achhoy Kumar, 6 C W N 488 (1991), the Court r fused to add partics. (7) Ann. P 100 cf Weldrum v Soon.

⁵⁰ L F 471

substituted is plaintiffs, it was held, that no new plaintiffs were substituted within the meaning of sect 22 of the Limit ition Act, and that the substitution of names of the plaintiffs did not make a new suit (1)

Where there are several trustees, executors or adminis trators, they shall all be made parties to : Joinder of trustecs. suit against one or more of them: executors and adminis trators.

Provided that the executors who have not proved their testator's will, and trustees, executors and administrators outside British India, need not be made parties.

Suits against executors or administrators -This rule, which, it wil be observed, has (as well as r 3) been extended to the case of trustees, deals only with suits against, and not with suits by, legal representatives or trustees. It combodies the general rule that m actions for administration all executors who have proved, or administrators, must be parties to the suit (2) But if an executor has not proved he should not be made a party, (3) unless he has inter meddled with the assets (4) or has acted as executor, when he may be (5) An executor outside British India, or a renouncing executor, or an abscending executor, is not a necessary party (6) The former section had, instead of the words "outside British India," the words "beyond the local lumits of the juris diction of the Court" And it was held that if a defendant insisted that an executor was a necessary party, it was for him to show that he, the executor, lived within the local limits of the jurisdiction of the Court in which the suit was brought (7) A judgment for general administration cannot be made without a general administrator, (8) an administrator ad litem, (9) or an executor de son tort, is not sufficient (10) A suit, however, may, under circumstances, be suffi ciently well constituted for the purposes of a motion as for a receiver where one only of several executors is defendant, though it may be necessary to add the other executors as defendants before the suit comes on for hearing (11)

Unless the Court directs otherwise, the husband of a married trustee, administratrix or executrix Husband of married shall not as such be a party to a suit by or executrix not to join against hei

9 1

⁽¹⁾ Jahnabi Chowdhurani v Broto Wohmi. 7 C W N 817 (1903) (2) Latch v Latch, 10 Ch 464 . Re Dricup

W N (92) 43 D C P 203

⁽³⁾ Dyson v Morris, 1 Ha 413

⁽⁴⁾ Re Lovett, 3 Ch D 198

⁽⁵⁾ Vickers i Bell, 4 De C J & S 274

⁽b) Drage v Hartopp, 2S Ch D 414

⁽⁷⁾ Kumar Saradındu Roy v Dhirendra Kant Roy, 2 C I J 484 (1905)

⁽⁸⁾ See Re Toleman (1897), 1 Ch 866

⁽⁹⁾ Dowdeswell v Dowdeswell, 9 Ch D

⁽¹⁰⁾ Rowsell v Morris, 17 Lq 20

⁽¹¹⁾ Haf zabat v Kazi Abdul, 19 B SJ, SJ (1893)

ORDER XXXII.

Suits by or against Minors and Persons of Unsound Mind.

- 1. Every suit by a numor shall be instituted in his name (s. Minor to sue by next by a person who in such suit shall be called the next friend of the minor.
- "Minor "-The Code is applicable generally to all descriptions of parties, whether plaintiff or defendant, and its provisions apply as well to minors as Thus a minor can be directed to file a written statement, and his buit is liable to be dismissed if he fails to do so, and an afhdavit of documents may be required of a minor defendant Doubtless, it is not intended that an infant party to a suit should personally obey such orders. It is evident from the provisions of the Codes that it is intended that his next friend or guardian should oboy the orders of the Court on his behalf Hence, in construing the Code, an exception cannot be read as to infants into its provisions generally, but rather a proviso that orders given to an infant may be obeyed for such infant by his next friend or guardian nor can this be done in construing sect 380 (now O XXV r 1) (I) The Indian Majority Act of 1875 enacts that every person, save as therein otherwise provided, shall attain his majority at the completion of his eighteenth year This Act governs Hindus and Mahomedans, and all other British subjects European or atherwise, domiciled in British India Where a guardian has been appointed before the age of eighteen, dis ability extends to twenty one (2) The minority of an English subject not domiciled in India is twenty one years (3)
- "Next friend"—As regards suits on behalf of minors, Acts ML of 1858, and MX of 1864, relating to guardians, bave been repealed by Act VIII of 1890, and the present law is to be found in the rules of the Code which embody the amendments of this Act (4) The effect of this rule and r i is that if there be a guardian he alone can institute the suit unless the Court gives leave to

Bai Porebai - Devji Meghji 23 B 100
 Bass)

⁽²⁾ Notwithstanding the guardian may be discharged Sadho Lall : Murhdhar 23 1 672 (1907)

⁽³⁾ Robilkand Bank r Row 7 A 490 (1885)

⁽⁴⁾ As to the cases under the repealed Acts see O Kinesla s C P C, notes to s 400 The sections of the last Code amended by Act VIII of 1890 (see ss. 53 A B, C, D, E) were st 440 443 440 461, 461 The last paragraph of s 440 of the last Lode was added by s 53a, Act VIII o. 1890

some other person to sue Sect 110 of the list Code required notice to be given to the guardian This has been omitted When there is no suardian, any person who fulfils the qualifications of a 1 may sue In r 1 the word "adult las been removed. It is unnecessary, as majority is one of the required qualifications under r 1 The protection of the minor's interests is left to persons who may be willing to come forward at the risk of costs, and subject to that risk any person may do so (1) In either case the person sum for the minor is called his next friend A minor cannot sue alone He ern only sue or be sued by a next friend or guardian ad litem, and a deerce can only be given for or against him if thus duly represented The reason why no proceeding can be taken by an infant without the assistance of a next friend is on account of an infant's (2) supposed want of discretion, and his mability to hind himself and make himself hable for costs (3) So far as the immor is concerned, the object of his appointment is to secure the minor's interests, and as regards the defendant, in order that there may he some one before the Court to whom the defendant can look for his cost if successful Tho rule was intended for the protection and hencfit of defendants as in England it has been held that when a defoudant waives this benefit and protection the suit may proceed without a next friend (1) Any sane, adult person not a defendant, and having no interest adverse to the minor, may be a next friend (5) No person can be made a next friend without his consent (6) Although the consent of a minor to the institution of a suit hy a next friend is immaterial and a suit may be instituted on his behalf whether he consents or not, the suit is in fact brought in his name and is treated as a suit brought by him (7) The minor is the real plaintiff (8) The next friend is not a party to the suit but a person whose duty it is to prosecute the suit for the minor, and he cannot therefore appeal in his own name (9) The right of a minor to sue by a next friend is a matter of principle, and a rule independent of statutory enactment, and therefore a minor may sue for possession in a Mamlatdar's Court by his next friend although the Manilatdar's Act (Bom, Act III of 1876) makes no provisions for such a

⁽I) Kerakooso v Serle 3 M I A 329 at p 345 (1844)

⁽²⁾ Noor Ahmed v Lulta 2 A H C R 189 (1870) Bama Soondurco v Grish Chunder 3 W R Act X 138 (1865), Chinniah v

Baribun Saib, 5 M H C R 435 (1870) (3) Doorga Mohun v Tahir Ally, 22 C

^{270, 274 (1894)} (4) Ib and see as to waiver of irregularity

Kamalakshmi v Ramasami Chetti, 19 M 127 (1895) cited post and Chinnish v Baribun Saib, 5 M H C R 435 (1870) [advantage of the point must be taken by pleaders objection

⁽⁵⁾ R 4, post

⁽⁶⁾ Sec O I r 10

^{3 4 (1881)}

⁽b) Brijessurce Dossia t Kisboro Doss, 25 W R 316 (1876) Bhol otarini v Sreo Ram,

⁽⁷⁾ Venkatanarasayyı t Achemma, 3 V

⁽¹⁸⁸³⁾

⁹ C 629 630 (1883) The statement in Ban a Soenduree v Grish Chunder 3 W R Act \ 138 (1865) that the minor is himself no party to a suit in the eyo of the law is mear

to th by a

of the minor, and is governed by the law or limitation applicable to the minor Khodabux v Budree Naram 7 C 137 (1881), Jaggwan Amurchand v Hasan Abraham 7 B 179 (1883), Wommohun v Gunga Soondery 9 C 181 (1882) , Lolit Mohun v Janoky Nath 20 C 714 (1893) Representation by a guardian does not remove disability Anantharama t Karuppanan, 4 M 119 (1881) which ho cor is purely personal Rudra Kant v Nobe

Kishore, 12 C L R 269 (1883) (9) Bhobotarmi v Sree Ram, 9 6 6.J

suit (1) The planet should describe the numer planetiff as " A B a more by his next friend C.D." and a minor defendant as "C.D. minor of whom E.F. is guardian ad litem '(2) The representative capacity comes to an end with the death of the minor, and the next friend or guardian ad filem cannot execute a decree after the minor's decease The latter's legal representatives should move in the matter (3) Where a suit is brought in violation of these provisions, the plaint should be returned in order that the error may be rectified (1) When a suit is brought by an alleged minor through his next friend, and when it is found that the plaintiff is not a minor, the suit should not (though the Allahahad High Court dissents) be dismissed, as the defendant can be rademnified by costs. The defendant should apply to have the plaint taken off the file or amended, and if this is not done the next friend's name may be treated as mere surplusage (5) Where, on the other hand, the defendant contends that the plaintiff is a minor. (6) and that the suit cannot be carried on without a next friend . if the plaintiff fails to prove his majority, the Court should not dismiss the suit, but should appoint a next friend (7) Where a minor sued herself without a next friend, but no objection was taken by the defendants until the case came before the Court of first appeal. at which time the plaintiff had attained majority, it was held that the irregularity was warred (8)

Gosts — Thowards in seet 440 of the last Code, "and may be ordered to pay any costs in the suit as if he were the planning," have been omitted. If the suit fails, the next friend will be ordered to pay the defendant the costs, an order addressed to the minor in person to pay those costs heing illegal (9). But as hetween the next friend and the minor, the former is prima facto entitled to costs (10). The Court may,(11) and usually does direct that the next friend should, though the suit be insucces ful, have his costs out of the estate. It friequently is right to make a next friend or guardian hable for costs, but there are also cases in which it is not proper to hold him personally liable (22). As a rule he is entitled to attorney and client costs, except where the fund is re-existency, and then he may claim the difference when the fund comes into

(I) Dattrataya e Vaman, 21 B 83 (1690)

⁽²⁾ See Mongula Dosseat Sharoda Dossee 20 W R 48 (1873), komul Chunder t Surbossur Doss, 21 W R 298 (1874) As to the effect of misdescription see notes to

r 5 post (3) Hulodhur Roy v Judoomath 14 W R 162 (1870)

⁽⁴⁾ Russick Das v Preonath Miss r 10 C. 102 (1883)

⁽⁵⁾ Faqui Jan t Obaidulla, 21 C 866 (1894). Net Lal Sahu v harm Buksh, 23 C 086, 685 (1896), dissented from in Sheorania v Bharat Singh, 20 A 90 (1897)

⁽⁶⁾ As to evidence of minority, see khetter Volum 1 Ramessur, W R (1864) p 304, kaleo Hal lar 1 Sectam Ghose, W R (1864) p 306 [appearance of all, ed minor, positive

oridencel

⁽⁷⁾ Moorlee Dhur v Nathonic Mahtoon, 25

W R 184 (1876)
(8) hamalakahmi v Ramasami Chetti 19

M. 127 (1895)

(9) Rajah Bikromaject & Court of Wards,

²¹ W R 312, 314 (1874) [a pocular case, in which though the suit failed, the defendant had, under the circumstances, to pay], Bai Porchai a Devil Meghli 23 B 100, 102 (1898)

⁽¹⁰⁾ Dunn v Dunn 3 Drew 17, Ann Pr 1903, p 173 See Cross t Cross 8 Beav 445 Stames v Maddox, Mov 31J

⁽¹¹⁾ Devhabart Jefferson, 10 B 248, 253, -54 (1881)

⁽¹²⁾ Damant : Hennell, 33 Ch D 224

42]

possession (1) The Court may also direct that the next friend should pay all the immer's costs, i.e. the costs incurred by himself as next friend, out of his own pocket (2) He is liable to pay the costs of an unsuccessful, (3) or unnecessary, (4) or frivolous or vexatious (5) action or application. If the next friend is personally

ordinarily he is only hable in his representative capacity (7) Execution may be taken out against the representative personally, leaving him to recover the sum so realized from him from the estate (8) A widow defending a suit as guardian of her minor cannot he made hable in her own person as well as representing the heirs of her husband (9)

2. (1) Where a suit is instituted by or ou behalf of a minor without a next friend, the defendant may plaint to be taken off the file, with costs to be paid by the pleader or other file.

person by whom it was presented.

(2) Notice of such application shall be given to such person, and the Court, after hearing his objections (if any), may make such order in the matter as it thinks fit.

Plaint filed by next friend.—This rule refers to a case where the plant on the face of it appears to bave been filed by a person who was a minor it does not contemplate any inquiry into the question of minority where the suit is brought by a person professing himself to be adult, and where the defendant objects to the suit on the ground that he is not an adult, but a minor, and where upon these conflicting allegations an issue is raised for trial. In a case like this the order of the Court, if it finds that the defendant's allegation is correct, is

of the infant

Brijessuree Dossia v Kishore Doss, 25
 W R 316 (1876)

Dovkabat v Jefferson, 10 B 248 (1886)
 Bai Porebai v Devji Meghi, 23 B 100,
 102 (1898), Bligh i Tredgett, 5 De G. & S
 it does not, however, necessarily follow

^{102 (1998),} Bligh: Tredgett, 5 De G. & S. 74, it does not, however, necessarily follow that because the suit is unsuccessful the next friend or guardian should be made hable for costs. Brijessurce Dossia v Kishore Doss, 25 W. R. 316 (1876)

⁽⁴⁾ Re Ihcks, W N (23) 138 (Lag), Lisom si Estate, W N (77) 177 (Eng), Worden v Martin, 75 L T I 220, see Kenrick v Wood, L R 9 Eq 331, as where it is proved that the plaintiff is not a minor, of Pidmer v Walchby, 3 Ch App 732, where an iction was brought on behalf of an illegical lumatic, who was not so In Gurea, balla v Chunder Nant, 11 C 213 (1885), the

next friend was ordered to pay, as there was no evidence that the suit was for the benefit

⁽⁵⁾ Gelds v Keir, W N (Eng.) (84) 46
(6) See Collector of Mymansingh t Kali
Chunder, S D Sum Dec., 1st Sept., 1860,
cated in O Kinealy, notes to s. 440

to costs, no expression of opinion in a judgment can import any such liability for costs into the decree Brijessuce Dossia v Kishore Doss, 25 W. R. 316 (1876)

⁽⁸⁾ Omrao Sing v Prem Natam, 24 W R 264 (1875)

⁽⁹⁾ Brojo Mohun v Roodernath Sumah, 15 W R 192 (1871)

not passed under this rule. Such a case is not expressly provided for in the Code, but the practice is to suspend all proceedings and to allow sufficient time to enable the nunor to have himself properly represented in the suit by a next friend (1). The Court as a rule only strikes a plaint off the file where it appears on its face that it was filed by a person who was a minor, or where it is proved that it was filed with the knowledge that the plaintiff was a minor, and with the intention of deceiving the Court and evading the payment of costs in case the plaintiff falls in the claim. Where the fact of minority is a bonā fide question of evidence and the defendant's allegation is found correct, then the usual course is to suspend all proceedings and to allow sufficient time to enable the minor to have himself properly represented (2). No objection can be taken as to the minority of a plaintiff after remand by the High Court unless the point was urged in the Appel late Court (3). While the person presenting the plaint is liable for costs where a plaint is filed by a minor without a next friend, neither this nor the last rule gives a Court authority to make a minor's easted lable for costs (4).

3. (1) Where the defendant is a minor, the Court, on being is Guardian for the suit to be appointed by Court appoint a proper person to be guardian for the suit for such minor of the suit for such minor.

(2) An order for the appointment of a guardian for the (sent may be obtained upon application in the name and on

hehalf of the menor or by the plaintiff

(4) Such application shall be supported by an affidavit venfying the fact that the proposed guardian has no interest in the matters in controls in the suit adverse to that of the minor

and that he is a fit person to be so appointed

(4) No order shall be made on any application under this rule except upon notice to the minor and to any guardian of the minor appointed or declared by an authority compitent in that behalf or, where there is no such guardian upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the numer is, and after hearing any objections which may be urged on behulf of any person served with notice under this sub-rule

Guardian ad litem.—The Code of 1859 contained no provisions as to ap to the Court of guardians ad litem for minor defindants. According to the then practice it was sufficient if a person was made a party as quardian

Sholapur 13 lk 234 (1555)

⁽¹⁾ Ben Han r Ram Lal 13 C, 18, 191 (1886) See also Main Krishin r Ram Bas, 20 A. 102, 105 (1857), Rattan Bar r (habdidas, 13 B; 11 (1889) In the "rat case it was brill that the order, though purporting to be passed under the former section, must be taken to have been one extent.

rejecting the paint or domining the suit, and so appealable

⁽²⁾ Lattanbar Chabilias, 13 B. 7 (1-53)
(3) Beni Lam r Ram Lali, 13 (1-53)

ISSO). (4) Ameliand Talabehand r (alleet raf

and permitted to act as such on the minor's behalf (1) These provisions have been taken from the Original Sido rules (2) The same reasons which require the representation of an infant plaintiff (3) apply to the case of an infant defendant A minor may appear by attorney or pleader, but he can only plead or conduct the defence by his guardian (4) As to the age of majority, see notes tor 1, ante A guardian ad litem is not within the scope of sect 3 of the Majority Act (5) The rule assumes that there is a suit which may, and indeed must be instituted before a guardian is appointed, and limitation counts from the date of the plaint and not from the appointment of the guardian (6)

Upon the institution of a suit against an infant the question of service of summons is one of some difficulty. There are no special provisions as to the service of summons upon infants, and therefore the same rules appear to aprly as in the case of adults (7) Summons should be assued and served on the minor Where there has been neither personal nor substituted service on the minor defendant or on the certificated guardian, and an ex parte decree has been passed, it will be set aside under sect 108 (now O IX r 13) (8) Where, however, it was not definitely shown that any attempt was made to serve the summons upon the infauts personally, or upon their mother before serving it upon the only adult male member and Larta of the family, but it was not shown that the alleged irregularity had caused any prejudice, it was held to be cured by sect 578 (now sect 99) (9)

Subsequent to the issue of summons, the Court must proceed under this rule to satisfy itself of the fact of innority (10) Where no guardiau ad litem 15 appointed (mere notice of a proposal to appoint a person being insufficient) and an ex parte decree is passed, it will be set aside (11) And where it is so satisfied, the Court should proceed to the appointment of a guardian It is the duty of the Court to see that a minor's interests are properly represented (12) The provisions of the rule are mandatory, and should be strictly followed (13)

(1881)

certif ated guardinus In Dakeshur Rena,

⁽¹⁾ Subramanya Pandya a Sira Subra manya, 17 M 316, 335 (1894) (2) Suresh Chunder v Jugut Chunder, 14

Cat p 209 (1880)

⁽³⁾ I : le r 1

⁽⁴⁾ Kası Doss v Kassını Sait, 16 M 344, 146 (1892), these provisions apply to the Parsi Marriago Act, Scrulp r Buchoobal, 15 B 306 (1894)

⁽⁵⁾ Gordhandes i Harry Mulder, 21 b

^{281 285 (1896)} (6) Khem Karan : Har Dayal, 4 A 17

⁽⁷⁾ Surcsh Chunder : Jugut Chunder, 14 C 201, 217 (1886), where Wilson, J , doubted whether service on a guardian al litera was good service und r the Code. In Jatindra Mohan t Srmath Roy, 20 C 267 (1898), it was said that is 74 and 76 ue recontrolled by this section, lut in that case no summons was served either upon the minors or their

²⁴ C 25 (1896), an attempt to serve the latter trocofficient blad er #

⁽⁸⁾ Jatindra Weban t Smooth Roy, 26 (267 (1898)

⁽⁹⁾ Walian v Banko Behari, 30 C 1021

^{(1903),} Vunnu Lal e Ghulam Abbas, 32 A 287 P C (1910), 37 I A 77

⁽¹⁰⁾ Suresh Chunder t Jugut Chun ler 14 C at p 217 (1886)

⁽¹¹⁾ Bhur, Wal t Har Kishan, 24 1 383 (1902) Dakeshur t Rewat, 24 C 25 (1896)

⁽¹²⁾ Aursunghomoyee Gooptia i Peary

Soondurce, 2 Sev 699 (1863), and a (ourt should not pass a decree against a minor without taking care that he is properly represented, Sheoburrat Singh t Lalline Chowdhry, 13 W R 202 (1870)

⁽¹³⁾ Walian : Bauko Behari, 30 C. 1021 (1.03), s.c. 7 C W N 744, 5 Bom L. B 822. Jatin ira Mohan t Srmath Roy, 20 C 267 274 (1838) . Blury Ved v Her Kishan, 24 1 at p. 386 (1902)

0 32, r 3

No order appointing a guardian should be inside expante, so that opportunity may be given for the making of an application on behalf of the infant under r 3, though the fact that an order appointing a guardian at the instance of the plaintiff is made expinters not necessarily fatal to the suit (1). If the innor or his friends and relatives, in whose care he may be, fail to move the Court to appoint a guardian, then the appointment may be made at the instance of the plaintiff (2). The appointment is made by the Court and not by the parties, though it is on their application, (3) and by the Court in which the higation is pending (4). The appointment of a guardian od litem under this rule is wholly distinct from the appointment of a guardian under the Guardian and Wards Act (5). The Code

whether or not a tet gives precedence.

Though advisable it is not necessary that there should be a formal order of appointment if it appears on the face of the proceedings that the Court has sanctioned the appointment (7)

As to who may be appointed, seer 4 Sub rule (2) of that rule gives precudence (3) to guardians of the person or property unless special reasons exist
against their appointment. So while there is nothing to prevent a guardian
sumg her ward in such a case the minor must be represented by some other
person whose interest is not adverse to him (9). Where a guardian filed a
written statement which was prepulcical to the interests of the minor, the Court
observed that in a suit in which it is not necessary for a minor defendant to take
an active part, no guardian is ever justified in taking any step prejudicent to his
ward. If he can do nothing positively for the minor's benefit he ought simply
to leave the matter to the Court (10). A father cannot act as guardian ad litem of
his son when there is a clear conflict of interest between them. Thus where a
father, professing to act as the head of a Mitalshara family executed a mortgage
of the family joint-property, it was not open to him to impugn its validity, but

 ⁽¹⁾ Suresh (hunder ε lugut (bunder, 14
 C 204 (1886)

⁽²⁾ Ib See Lure Mottram 11 B II C R 21 (1874), Babaji v Maruti 11 B II C R 182 (1874), under the Code of 1859, where the plantiff failed to give the name of the quardian (vile aute), the Court dissumsed the case Radha Kristo i Ram Chunder, II W R 200 (1869) See rr 3 4, post (3) Gura Chura v Kali Kassen, II C 402

^{(1885) [}neither the Code nor Act XL of a 1853 give a plaintiff any power to institute a suit against a person named by himself as guardian ad litem] Sreenarun Utiter v Sreemuty Kishen, 11 B L R at p 191 (1873), Doorgapersad v Keshopersad, 8 C 6.66 (1882) [manager of extate] (4) Ruling, 5 V II C R App viii (1869)

⁽⁵⁾ Vithaldas v Dattaram, 26 B 298 (1901)

⁽⁶⁾ Dakeshur v Rewat, 24 C 25 (1896)

⁽⁷⁾ Walian t Banko Behari, 30 C 1021 (1903), Suresh Chun ler t Jugut Chunder, 14 C 204 (1889), Jatindra Mohan t Smath Rot, 26 C at p 272 (1898) Kunhammad v

kuth, 12 V 90, 91 (1888)
(8) Cf under Act VL of 1858 Baldco
Day v Gobind Shankar, 7 A 914 (1885)

⁽⁹⁾ Rakhalmonn Dawn: Adota Prosad, 7 C W N 419 (1900), s c, 30 C 013, in which case the plaintiff alleged that the natural futher of the minor defendant had frauddiently, and without the knowledge of the plaintiff, obtained the appointment of the plaintiff as guardian of the minor as her husband's alleged adopted son.

⁽¹⁰⁾ Court of Wards v Raj Coomar, 17 W R 142 (1871), the usual practice in such cases is to state that the defendant is a minor, and that he leaves his interests to the protection of the Court

it would be the duty of the guardian ad lifem of the infant son to urge as a defence that the mortgage was beyond the scope of the father's authority, and it was therefore held that the father could not be the guardian ad litem (1) Where the plaintiff alleges that the defendant is not a minor, and minority is pleaded as a defence to an action, masmuch as an alleged minor cannot be treated as if he was of full age during the investigatious of any material averment in a suit a guardian should be appointed for the defendant and a prelimmary issue should be framed and tried as to whether the defendant is or is not a minor (2) Though by sect 440 of the last Code the next friend of a plaintiff might be made hable for costs there was no similar express provision with respect to a guardian But according to the English practice, which has been followed by the Bombay High Court, he has been made to pay costs where he has been guilty of gross misconduct in the case, (3) as where a guardian put executors to proof of a will which he wished to upset for his own private purposes, and which the evidence showed was to his knowledge duly executed (4) The Madras High Court, in a case (5) which does not appear to have been considered in the one last cited, has held that the Code does not authorize a Court to decree costs against the guardian of a defendant except in the case referred to in sect 458 (now r 11) which deals only with costs when a guardian is removed

"Shall appoint"-The provisions are imperative, and where they are not substantially complied with the minor is not properly represented and any decree which may be passed against him is a nullity (6) Thus where a decree had been passed against a minor who was described in the suit as of age it was held that it was a nullity so far as he was concerned (7) The Court must not only appoint a guardian but satisfy itself that the proposed guardian is a fit and proper person to represent the nunor, to put in a proper defence and generally to act in the interests of the minor The duty of the Court is not a mere matter of form (8)

Clause (4) -This is hased on sect 443 of the last Code The Legislature has considered it necessary to ensure that notice should reach one interested in the minor s welfare and this rule aims at securing this result. It was beld that the appointment, apparently by an oversight as guardian ad litem to a minor defendant, of a person other than the certificated guardian amounted t no more than an irregularity not vitiating the decree or sale thereunder see next rule clause (2) (9)

⁽¹⁾ Balkesen t Tapesur 17 C W V 219 (1311), of Ganesha Row v Tuljaram Rov PC, 18C L J 1 (1913)

⁽_) Karı Doss : Kassım Sait, 16 M 344

⁽³⁾ Goolam Hoosein v Fatmal ar S B 391 (1884)

⁽⁴⁾ Ib

⁽⁵⁾ Narasımha Rau ı Lakshmıpatı 3 M

⁽⁶⁾ Hanuman Prasad t Muhammad Ishaq, 28 A 137 (190 a)

⁽⁷⁾ Purno Chandra v Bejoy Chan 1 18 C L J 18 (1913) following Rashid un nisa v Muhammad Ismail P C, 31 A 572 13 C W N 1182 (1909), and Narsing 1 1 Sheikh Jahi, 15 C L J 3 (1911) disting ush ing Waltin v Banko Behary sipri 30 (

^{1021 (1903)} (8) Ramehandra Das i Joti Prasad --

A 675 (1907) (9) Dammar Singh i 1 ril hu Singh 29 1

^{290 (1907)}

Little School MINORS AND PERSONS OF ENSOLNE MIND 0 32. 1 4

Petition for guardian ad litem .- See anic where the procedure will be found dealt with A person cannot be appointed cuardian ad litem against his will and this is now enacted by r 1. (1) but where a guardian of literal has once been appointed, his appointment enures for the whole of the his in the course of which it has been made, unless and until it is revoked by the Court . (2) and therefore for purposes of appeal (3) A Court has purisdiction to try a suit against a minor notwithslanding the appointment of one of its officers (1) to be the muor's cuardian ad blem (5)

(1) Any person who is of sound hund and has attained majordy may act as next friend of a minor Who may act as next or as his quardian for the suit:

triend or be announted guardian for the suit

Provided that the interest of such person is not adverse to that of the minor and that he is not, in the case of a next friend, a defend int, or, in the case of a quardian for the

sut, a plaintiff

(2) Where a minor has a guardian appointed or declared by competent authority, no person other than such guardian shall act us the next friend of the minor or be appointed his guardi in for the suit unless the Court considers, for reasons to be recorded. that it is for the impor's welfate that another person be permitted to act or be appointed, as the case may be

() No person shall without his consent be appointed quardian

for the suit.

(4) Where there is no other person fit and willing to act as guardian for the suit, the Court may appoint any of its officers to be such guardian, and may direct that the costs to be incurred by such officer in the performance of his duties us such quardian shall be borne either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the minor as interested, and may give directions for the repayment or allow ance of such costs as justice and the encumstances of the case man require.

Who may act -bec untestor 1, aute

Who may be next friend and guardian -A married woman may be maxt friend.(6) though under the provisions of sect 157 of the last Code which

⁽¹⁾ Jadow Yulji t Chhao in Raichand, 5 B 306 (1881), Issur Chunder : Nobo Kusto, 7 C L R 407, 410 (1880) Varsingh a Sheikh Jahi, 15 C L J 3 (1911)

⁽²⁾ Juala Dei 1 Peibhu, 14 A. 35 (1831) (3) Venkata t Alakurajamba 22 W 187 (1898)

⁽⁴⁾ See Issur Chunder : Nobo Aristo, 7

Baban v Maruti, II B C L 1. 407 (1850) H C R 182 (1874)

⁽⁵⁾ Jadow Wuln v Chhagan Raichand, 5 B 306 (1881)

⁽⁶⁾ Astrum Bibi : Sharip Mondul, 17 C 488 (1890), F B , overruling Curu Pershad v Gossam Munry, 11 C 733 (1585)

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have not in this respect been is enicted, she could not be appointed guardian ad litem (1) In a suit by minors to obtain a declaration that a decree did not effect them masmuch as they were not properly represented by their mother who was incapable of acting as guardian, they were held entitled to a decree (2) Whatever he the propriety of making provision by the appointment of a public officer for the institution of suits on behalf of infants, it is of the utmo tim port ince that no person should be appointed of whom even a suspicion can exit that he may be barred by personal interest. The Prive Council therefore dis approved of the appointment of the Registrar, who, according to the practice of the Supreme Court, was entitled to a commission of 5 per cent on all sums paid into Court (3) It was held that the Code did not apply to all guardians, for it did not apply to natural guardians See notes to last rule (4)

(1) Every application to the Court on behalf of a minor, other than an application under rule 10, sub Representation of rule (2), shall be made by his next friend or minor by next friend or guardian for the suit by his guardian for the suit (2) Every order made in a suit or on any application 4]

before the Court m or by which a minor is in any way con cerned or affected, without such minor being represented by a next friend or guardian for the suit, as the case may be, may be discharged, and, where the pleader of the party at whose instance such order was obtained knew, or might reasonably have known, the fact of such munority, with costs to be paid by such pleader

Applications to be by representative — The Code no doubt ditin guishes between next friends and guardians for the suit, the former terra being used in respect of plaintiff minors, and the latter when the minors at defendants But if a guardian ad litem has not been appointed for a defendant a next frieud can apply (5)

Order obtained by next friend or guardian - this rule hous that no order by which a mmor or lunatic is in any way concerned or affected can legally be made without such minor heing represented by a next friend of guardian for the suit (6) The words "may be discharged ' uppear to give discretionary power to the Court (7) No order binds a inmor unless he was

(-) Shari Lal v Chasita, ... J A 153 (1301)

⁽¹⁾ See Lachaya Kuttali v Ulumpum thala, 29 M 58 (1906) 50 GI, Kalı Shankar Sahai v Pratab Udai Nath Sahi, 6 C L J 35 (1907), Kundan Lal v Guadhar Lal -9 A 728 (1907) The disability has now been removed But see \arsingh v Sheikh Jahi, 15 C I J 3 (1911) appointment of a married woman as guardian ad litera for an infant defendant renders the proceedings a nullity so far as the infant is concerned.

⁽³⁾ Kerakoose v Scrie 3 W 1 A 329 (1814) (4) Budhdall Manji t Morarji Premji, Jl B 413 (1907) [testamentary ouardust appointed by Hind i fither]

⁽⁶⁾ Joundmonath Witter t Ry Kristo 16 C 771 (J889) (6) Amschand Talakchand t Collector of Sholapur, 13 B 234 (1888) [application to

suc as pamper] (7) Doorga Mohen : Lat r My - C at

p _7' (1597)

It I therefore and I dethe time it was mad (1). Where an order for sale was male when the min r was frop rly represented, the absence of a guardian was hold in t to affect the validity of sub-equent proceedings (2). And where i Him lu willow during the course of a fitta ation adopted a son but did not put him on the roo rl it was held that she was justified in pursuing the hightion benefite for his ben fit and that he was bound by the decree (3) If, however, a p r on cutified to represent a minor does purport to represent him a mere mis le cription in the cause title is not fatal to the suit. In all cases the question to be decided is wheth r on a construction of the plaint and ple idings the minor is really a party to the suit or not, and, if he be, any arregularity is provided for by sect 99, ante (1) And where a minor has been properly represented he is is much bound by a judgment in his own action as if he were of full age (5) and the principle of respublic its upplies (6) What the decree is sought to be executed, the Court executing the decree cannot entert un the plea of non representation, is it must presume that the deerce was rightly passed. The minor's remedy is to apply for a review or to file a suit for an injunction restraining the execution of the decree (7) If a minor desire to have a decree set aside because any availthic good ground of d lence was not put forward at the hearing hy his guardian he should apply for a review. If the decree was ex parte, the procedure to be a lopted is that I rescribed by the Code for setting uside ex parte decrees. Where a decree has been made against in infant duly represented and the former on majority seeks to set that decree aside by separate suit he can succeed only on proof of fraud or collasion on the part of his autrdian (8) The costs may be

(1) Mrinar our Dabia e Shibchand Chucker butty, o C 400 (15"9) Vishni Kesbav t Hamchandra Bhaskar 11 B 130 (1886) Dali Himat e Dhirairam Sadaram 12 B 18 (1887) Ganga Prosad t Umbica Churu 14 C 7.4 (1857) Jungce Lall v Sham Lall .0 W R Lo (18"2) Durg spersad a Kesho 1Kraid 8 C 650 662 (1882) Radha Kristo t Ram Chunder 11 W R 300 (1869) Russick Das t Preonath Misrie 10 C at p 10s (1883), Sham Lal t Ghasita 23 A 450 (1901) As to carrying on suit after majority. see notes to r 12 (2) Net Lali Saloo v Sheikh Kareem 23

C 686 (1896)

(3) Harı Saram v Bhubaneswarı 16 C 40 (1888) 15 I A 195 ref Vasudev : Krish пар "О В 534 (1895)

(4) Bhaba Pershad : Secretary of State 14 C 150 Io3 I B (1886) Jogi Singh v Kunj Behari II C 503 (ISSJ) Suresh Chunder v Jugut Chunder 14 C 204 (1886) Sapproved by P C, Walian v Banke Behars 30 C 1021 1032 (1903)] Natesayyan v Narasimmayyar 13 M 481 (1890) hedar I rosanno v Pratap Chunder 20 C 11 (1892) Goongo Monce t Ram Komul 17 W R 144

tun : Jhalo 12 C 48 (1884) But sco Shonal Bews a Monoram Mundul 11 C L R lo (1882) (rsh Cl un ler Mookerreo r Maller, 3 C L R 17 19 (18 8) [thore is no authority for saying that where minors have been really sued though in a wrong form a d'cree against them would not be valid | Subramany a Landa t Siva Subra manya 17 M at 11 337 338 (1894)

(5) Modhoo Soodun v 1 ritheo Bullub 16 W R 231 (1871) Sherafutoollah Chowdhry v Sm Vbedoonissa 17 W R 374 (1872) [and the minor is liable to arrest] unless there be fraud or collusion Raghubar Dyal t Bhilya Lal 12 C 69 76 (1885) Cursandas t Ladka Vahu 19 B 571 (189o)

(6) Bonomally Kesh v Hungshessur Roy 17 W R 492 (1872) Venkatachalam t Mahalakshmamma 10 VI 272 (1886)

(7) Nawab Mahomed v Har Charau 6

A H C R 98 (1874)

(8) Raghubar Dyal v Bhikya Lal 12 C 63 (1885). Daben Dutt v Subodra Bibee, 25 W R 449 (18"6), Cursandas t Ladka Vahu 19 B 571 (189a) as to estoppel against the mmor, see Ganesh Lala : Bapu, 21 B 198 (1895) Brohmo Dutt v Dhurmodasa Ghosh,

J.

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directed to be paid by the pleader.(1) But the minor being unrepresented, the Court has no authority to make his estate hable for costs (2)

6. (1) A next friend or guardian for the suit shall not,

Receipt by next friend or guardian for the suit of property under decree of property under decree of a minor either—

(a) by way of compromise before decree

(b) under a decree or order in favour of the minor.

or order, or

(2) Where the next friend or guardian for the sut has not been appointed or declared by competent anthority to be guardian of the property of the minor, or, having been so appointed or declared, is under any disability known to the Court to receive the money or other moveable property, the Cont shall, if it grants him leave to receive the property, require such security and give such directions as will, in its opinion, sufficiently protect the property from waste and ensure its proper application.

Receipt of property under decree —This section was substituted in the last Code by Act VIII. of 1850 sett. 53 (d). It has been held that this rule did not apply in the case of a managing member of a Mitak-hara joint-family who was appointed guardian ad litem of his numer brother for the purpose of a rent sur in which both the brothers obtained a decree for arrears of rent (d)

Agreement or compromise by next friend or guardian for the suit shall without the leave of the Court, expressly recorded in the proceedings, enter into any agreement or compromise on behalf of a minor with reference to the suit in which he acts as next friend

or guardian.

(?) Any such agreement or compromise entered into without the leave of the Court so recorded shall be voidable against all

parties other than the minor.

Scope of rule.—The provisions of this rule are intended to protect the interests of immors, (4) and have been adopted (5) from the rule previously laid down by the Privy Council (6) A suit relating to the estate or person of an infant,

²⁶ C 388 (1898), Ameer Ah and Woodroffe s Lydence Act, ~ 115, 6th ed In Ramschari e, Duraisami, 21 M 167 (1897), the alleged inners were of ago but acqueseed.

⁽¹⁾ See Shonat Ben v. Monorum Mundal,

 ¹¹ C L. R 15 (1882)
 (2) Amichau I Talakchaud v Cellector of Sholapar, 13 B 234 (1888)

⁽J) Haribar t Mathura, 35 C 561 (1908) (4) Rajagopal Takkaya t Subramanya

Ayyar, 3 M 103, 104 (1881)

(5) Sharat Chunder : Kartik (hunder, J

C 510 (1883)
(6) Monly in Abdool e Mozuffer Hossem, 16

W R P C 22 (1871)

and for his lenefit, less the effect of making him a word of Court, and no act can be done affecting the projectly of the minor unless under the express or implied direction of the Court uself (1). This principle on which the linkers based, has been applied to a case which, it was held, strictly did not fall within its terms, it being held that when the next friend of a minor withdrew from a suit, though it was not proved that the defindant entered into my agreement with the next friend, it was not proved that the defindant entered into my agreement with the next friend, it was open to the minor through another mixt friend, thought guilty of no fraudulent conduct, was grossly negligent of the minor's interest in withdrawing from the suit (2). The rule contemplates the existence of a guirdian and a pending litigation, and was therefore held not to apply where, when

As to the effect of a compromise entered into without have, rule post. Where a compromise was effected and allowed by the Court, and a decree was under in accordance with its terms, it was held that no apps all ay against the compromise decree, and that the remedy for setting it aside was by way of review or regular suit (1). Where a guardrin had entered into a compromise without leave but undertook to present the petition to Court and subsequently declined to do so, and opposed a decree being passed in its terms, it wis held that intenued a sleave had not been asked for and the guardian objected to the Court passing a decree in terms of the compromise, the Court had no power to enforce it, even though its terms might appear to be beneficial to the minors (3). A decree holder who rists his case, upon his decree having been made against a minor by consent, is under the necessity of proving that the consent was given by some one having authority to hind the minor (6).

Leave.—The Court has to grant leave The form, however, of expression us of slight importance The question is whether the Court, after a consideration of the circumstances, really intended to grant leave (7) The Court must, however, in some form show that it has considered the question and granted leave And the mere passing of a decree on a compromise does not amount to sanction, which will not be interred from the subsequent passing of a decree in terms of such compromise (8) In order that a compromise may be binding upon a minor, the leave of the Court must be express, and it must be arrived at upon the exercise of a judicial discretion is at the propriety of the compromise in the interests of the minor and the section makes no exception in the case of

Doraswami Pillate Thungasami Pillat, 27 M 377 (1903)

⁽²⁾ Ram Sarup t Shah Latafat, 29 (735

⁽³⁾ Vithaldas v Duttaram, 26 B 298 (1901), s c, 3 Bois L R 887

 ⁽⁴⁾ Rakhalmom Dassi * Adoita Prasad 7
 C W. N 419 (1903)
 (5) Ranga Rao * Rajagopala Raju, 22 M

<sup>378 (1899)
(6)</sup> Multimmad Munter : Sheoratangur,

²³ C 934 (1896) (7) Virupalshappa + Shidappa 26 B 109

^{(1901),} s c, 3 Bom L R 565
(8) Arunachalam Chetty: Miyappa Chetty,

²¹ M 91 (1897), Rujagopal Takkaj v Subramunja Ayjar, 3 M 103 (1881), Shirat Chunder & Kartik Chunder, 9 C 810 (1883) See Wuohar Lal 1 Judunath Singh 28 A 585 (1906), Krishun Provad 1 Romesh, Li C. W. M (23 (1908)

a certified guardi in (1) Under the last Code such leave was presumed in certain cases (2) The amended rule now requires that the leave should be expressly recorded following the Privy Council decision that it should in some way, not open to doubt, he shown that the leave of the Court was obtained (3) Where a Hindu father was party to a partition suit and was himself the guardian ad litem of his minor son (also a party) it was held that the fact that he repre sented the family did not exempt him from the duty of obtaining leave for a compromise which was clearly intended to affect the son's interest, and that since such leave was not obtained, the son was not bound by it (1)

The Court should not make a decree by consent against an infant with out ascertaining that it is for his benefit that such a decree should be pro nounced (5) The Court must have before it the materials necessary to enable it to airive at a judicial conclusion with respect to the compromise The terms und evidence of their propriety and reasonableness must be before it (6) In order to make an agreement or compromise, to which this rule applies, a lawful agreement or compromise, it is necessary that the next friend or guardian should ask the Court to consider the proposed terms of the agreement or com promise, and before making the agreement or entering into the compremise should obtain permission from the Court to enter into the agreement or com promise proposed The Court should record the fact that such application was made to it, that the terms of the proposed agreement or compromise were considered by the Court, and that, having regard to the interests of the unau, the Court granted leave to the making of the agreement or compromise From the mere fact that the Court passed the decree in accordance with the com promise it cannot be inferred that any of those steps preliminary and necessar) to the making of the decree have been taken by the Court (7) If leave 18 given, under a music presentation of a material fact, due either to fraud or culpable and wilful ignorance it is not binding (8)

When necessary -The rule does not only refer to agreements out of Court but to such agreements as also to compromise decrees, namely, those agreements which are given effect to by a decree of the Court The words "any agreement ctc, include a compromise finally determining the suit (9) The provisions apply to compromises after decree (10) Applications in execution are proceedings in the suit, so that a compromise of such a proceeding would be a compromise

⁽I) Lala Wajlis v Musst Naram, 7 C W N 90 (1902) In an early case the Court re quired the certificate holder to procure the consent of the Court by which the certificate was granted to the films of the compromise Sheonundun Singh v Katesa Kooer, 6 A H C R 179 (1874), and see Pirojshah v Manibhar, 36 B 53 (1911) (no exception in the case of a Collector)

⁽²⁾ Sridhar Rao i Ram Lal, 31 A 7 (1.008)

⁽³⁾ Manchar Lal v Jadunath Singh, 25 A 187 (1 80) Kunwar Partah Singh : Bil uti 5 ngh P (18 (I J 384 (1911)

⁽⁴⁾ Ganesha Row v Tuljaram Row, P C. 40 I A 132, 36 M 290, 18 C I J 1, 17

C W N 765 (1913)

⁽⁵⁾ Rum Churn : Mungal Sircar, 16 W 1

^{232 (1871)} (6) Virupakshappa v Shidappa 26 B 10J

^{(1901),} s c, 1 Bom L R 565 (7) halavatav Chech Lal 17 A 531 (1690)

⁽⁸⁾ Biben Solomon : Ab lool Arcer 6 b 687 (1881) (9) Lake Majlis : Narum Bil : 7 (W)

^{90 (1,)02)}

⁽¹⁰⁾ Arunachellam v Ramana llum 29 V 10.11 (10.1

"with reference to the sut" (1) A guardian has no power to waive a right to compensation for part of the estate taken under the Land Acquisition Act, (2) nor to enter into an agreement to refer matters in suit to arbitration, (3) though the contrary his also heen held, (4) or to withdraw a suit without the leave of the Court (5). A mere matter of proof, such as the consent hy a guardian of a ninor defendant to accept the oath of the plaintiff (6) or abstaining from pressing objections, it heing uncertain whether there was evidence sufficient to sustain them (7) is not within the rule.

Effect of want of leave.—A decree hy consent without leave is invalid and not binding on the minor (8). The only modes, however, of setting aside a decree are by review under sect 114 or by a separate suit, (9) and not by application for a rule in the original suit, (10) or in execution proceedings under sect 47 the question whether a decree was void as against the minor not heing one relating to the execution of the decree (11). The compromise can be avoided by a minor either on or before his attaining majority (12). In a recent Privy Council decision where a Hindu father had been appointed guardian ad littom of an infant son in a suit for partition by a member of the joint family and had made a compromise without the leave of the Court it was held that the

 ⁽¹⁾ Virapakshappa v Shidappa 26 B 109
 (1901), s. c., 3 Bom L R 565

⁽²⁾ Luchmeswar Singh t Chairman, Dharbhanga Municipality, 18 C 99 (1890) (3) Lakshmana Chetti v Chinnathambi

Chetti 24 M 326 (1900) As to arbitration out of Court see Romon Kissen v Hurrololl Sctt, 19 C 334 (1892)

Hardeo Sahai v Gauri Shankar, 28 A
 (1965) Atimaram v Bhila Ganpat (1912)
 Bom L R 223, and see Lutawan v

Lachya 36 A 69 (1 B) (1913) (5) Doraswami Pillar r Thungasami Pillar, 27 M 377 (1903)

⁽⁶⁾ Chengal Reddn i Venkata Reddn 12 M 483 (1889), Sheo Nath v Sukh Lal, 27 C 229 (1889) s c 4 C W N 327 See Lakshunan Chetti i Chinnathambi 24 M at p 330 (1990)

⁽⁷⁾ Mralt Rahmthoy i Rehmooble v lo B 534, at p 597 (1891), per Baylev. J la has however hen held that actual waiver will not bind a minor if not for his benefit Swamirao i Collector of Di arwar, 17 B 299 (1832)

⁽⁸⁾ Armachellam r Marugappa, 12 M 503, 604 (1893), Vurpakshuppa t Shidappa, 20 B 105, 114 (1901), as to an adjustment being but ling at thy rate upon parti a not minors, so Lak-limana (hettir Chimathanid), 24 M 120, at p. 121 (1900). The effect of the decir is in Manai Shigh. I Arrain Shigh.

A 93 (1807), is not clear but apparently sanction was given after the compromise had been entered into and not before See Sethuram v Vasanta 34 M 314 (1910) (in which Aman Singh v Naram Singh was not followed), and Bhiwa v Develand 35 B 322 (1911) (the fact that the minor has benefited by the settlement makes no difference)

⁽⁹⁾ Warls Rahimbhoy r Rehmochhoy, 18
B 594 (1801) Which deals at p 509, with the
case of Lahan Chundra Salooi v Nundamons
Dossec 10 C 357 (1834)], Vurupskappa t
Shidappa 23B 692 (1899), ac l Blom L.R
S2 [and not by the Court proprosions but
see as to this decision, Virupakahappa t
but
dappa, 20B 109, at p 113 (1901)] where the
Court wrongly rejected an application for
review, the High Court interfered in revision
Doraswami Pillas T Hungasami Pillas 27 M
377 (1903) Barbiamdeo Prasad v Banaris
Prand 3 C L J 119 (1904) [when decree
abould be set uside by suit and when by
review]

⁽¹⁰⁾ Mirali Rahimbhoy i Rehmoobhoy supra a.c. in Lower Court, sub toc. harmali Rahimbhoy r Rahimbhoy Habibhoy, 13 B 137 (1855)

⁽¹¹⁾ Arunachellan - Maru, app., supra but see Rajagopal Takkava : Muttuj laem Chetti, 3 M. 103 (1881)

⁽¹²⁾ Virupakshappa v Shi laj pa, 2 i B 109 (1901)

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compromise was not binding on the nunor and that he was remitted to his original rights under the decree in partition (1)

8 (1) Unless otherwise ordered by the Court, a next friend shall not retire without first procuring a fit person to be put in his place and giving security for the costs already meurred

(2) The application for the appointment of a new next friend shall be supported by an affidavit showing the fitness of the person proposed, and also that he has no interest adverse to that of the minor.

"Retire"—The words "at his own request" have been omitted but the sonse is the same (2)

Removal of next triend.

Is adverse to that of the number of numbers is adverse to that of the number of numbers is adverse to that of the number of numbers in sadverse to that of the number of numbers in the number's interest will be properly protected by him, or ukers he does not do his duty, or, during the pendency of the suit, ceases to reside within British India, or for any other sufficient cause, application may be made on behalf of the number or by a defendant for his removal, and the Court, if satisfied of the sufficiency of the eause assigned, may order the next friend to be removed accordingly, and make such other order as to costs as at thinks fit

(2) Where the next friend is not a guardian appointed of declared by an authority competent in his behalf, and an application is made by a guardian so appointed or declared, who desires to be himself appointed in the place of the next friend, the Court shall remove the next friend unless it considers, for reasons to be recorded by it, that the guardian ought not to be appointed the next friend of the minor, and shall thereupon appoint the applicant to be next friend in his place upon such terms as to the costs already mourred in the suit as it thinks fit

Removal of next friend —Where a Court finds that a next friend does not do his duty in relation to a suit it is its duty not to permit him to prejude the interests of the minor, but to adjourn the suit in order that some one interested in the minor may apply on his behalf for the removal of the next friend and for the appointment of a new next friend, or in order that the minor plaintiff may,

⁽¹⁾ Ganeshy Pow t Julyram Row, 36 (2) Banarsi v Ram Naram 30 v 100 W 290 P ((1.113) 10 I v 1.132, (1.107)

on coming of a_ee, elect to proceed with the suit or withdraw from it (1). Courts can be moved to stay a suit uniproperly brought on behalf of an infant, and to remove an improper next friend of an infant and to substitute a proper person in his place (2). It has been considered expeding to end to enact that where a guardian invision his right to be appointed next friend in the place of another there should be power to require him to become hable or give security for costs in the suit irregionally incurred, and the second clause has been amended accordance.

10. (1) On the retirement, removal or death of the next is friend of a minor, further proceedings shall removal, etc., of next intend.

The stayed until the appointment of a next friend in this place.

(2) Where the pleader of such minor ounts, within a reasons to able time, to take steps to get a new next friend appointed, any person interested in the minor or in the matter in issue may apply to the Court for the appointment of one, and the Court may appoint such next in issue as it thinks fit.

11. (1) Where the guardian for the suit desires to retire or is settlement remotal or does not do his duty, or where other sufficient ground is made to appear, the Court may permit such guardian to retire or may remove him, and may make such order as to costs as at thinks fit.

(2) Where the guardian for the suit retires, dies or is is removed by the Court during the pendency of the suit, the Court

shall appoint a new guardian in his place

Costa.—The former section ran "and may order him to pay such costs as may have been occasioned to any party by his breach of duty". This may be done now. This rule is not, so far as regards payment of costs, applicable to any person appointed to act as guardian ad litem without his previous consent (3). As to whether the Court may decree costs against a guardian, except in the case mentioned in this rule, see notes to r 3, ante

12. (1) A minor plaintiff or a minor not a party to a suit is by minor plaintiff or a minor not a paptean on attaining shall, on attaining majority, elect whether he majority will proceed with the suit or application.

(2) Where he elects to proceed with the suit or application, is he shall apply for an order discharging the next friend and for

leave to proceed in his own name.

⁽¹⁾ Doraswami Pillai r Thungasumi Pillai, (1598)

 ²⁷ M 377 (1993)
 (2) Bai Porebai t Devji Meghir, 23 B 100
 (3) Judow Mulji v Chhagan Raichand, 5
 (4) B 306 (1881)

() The title of the suit or application shall in such case be corrected so as to read thenceforth thus -

"A. B, late a minor, by C. D, his next friend, but now

having attained majority"

(4) Where he elects to abandon the suit or application, he shall, if a sole plaintiff or sole applicant, apply for an order to dismiss the suit or application on lepayment of the costs incurred by the defendant or opposite party or which may have been paid by his next friend

(5) Any application under this rule may be made ex parte, but no order discharging a next friend and permitting a minor plaintiff to proceed in his own name shall be made without

notice to the next friend

Election of minor to proceed -An application under this rule may be made ex parte and does not require notice Leave (which may be nunc pro tune) will be given as a matter of course unless there is an absolute bar by positive enactment The provisions as to correction of title refer to a pending suit and not to a suit after final decree, in which it only remains to proceed to execu The omission to comply with the requirements of this rule is a mere irregularity and will not bar execution of a decree (1) Quare-whether a minor who having been a party to a suit but not properly represented was served with summons afterwards on attaining majority curried on the suit as transferee of the estate from the previous owner, was not bound as a party (2)

(1) Where a minor co plaintiff on attaining majority desire; to repudiate the suit he shall apply Where minor co-plainto have his name struck out as eo pluntiff, tiff attaining majority desires to repudiate suit and the Court, if it finds that he is not ? necessary party, shall dismiss him from the suit on such terms as to costs or otherwise as it thinks fit

(?) Notice of the application shall be served on the next

friend, on any co plaintiff and on the defendant

(3) The costs of all parties of such application, and of all or any proceedings theretofore had in the suit, shall be pud by such persons as the Court directs

(3) Where the applicant is a necessary party to the suit, the

Court may direct him to be made a defendant

Majority -Sect 451 of the list Code required that the attunment of majority must be proved by affidavit Though this provision is omitted prof of course is still necessary

⁽²⁾ Partab Naram r 1rd kinath 11 t (1) Durga Mohun t Talur M 22 (720 15 (1881) 11 J A 107 (15)1)

1147

THAT S BER MINORS AND FERSONS OF UNSOLND MIND, O 32,0 H II.

14. (1) A minor on attaining inspority may, if a sole is urreasonable or implaintiff, apply that a sint instituted in his name by a next friend he dismissed on the ground that it was unreasonable or improper

(2) Notice of the application shall be served on all the parties concerned, and the Conrt, upon being satisfied of such intreasonableness or impropriety, may grant the application and order the next friend to pay the costs of all parties in respect of the application and of anything done in the suit, or make such other order as at thinks fit

15. The provisions contained in rules 1 to 14, so far as is Application of rules to they are applicable, shall extend to persons ethothough not so adjudged to be of unsound mind and to persons tho though not so adjudged are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be ineapable of protecting their interests when sump or being suced

Persons of unsound mind or mentally infirm—By sect 163 of the last Code the provisions meets 110 to 162 of that Code were declared mutatis mutandist to apply in the case of persons alpidaged to be lunaries under Act XXXV of 1838 or any other lunary law for the time being in force. It was held that the provisions of act 110 of the last Code were by that section to be applied to lunaries. Whatever might be the meaning of the word 'guardian in sect 440, when amors were concerned, it was held that there was no reason to suppose that the La-slature intended to after or affect the existing law in respect of the persons who alone in entitled to bring suits on behalf of the estate of a lunario. The person denominated guardian must mean the person who is himself competent to sue. A guardian of the person only of a lunario has no right to bring a suit in respect of the lunarial sestate. The manager of the estate is the person to do so though under sect. 410 a person other than the guardian of the estate could ilso size with the few of the Court (1).

Sect 163 of the last Code applied in terms only to those adjudged to be of unsound mind and therefore in other cases of unsoundness of mind a next friend or guardian could not be appointed under Chapter XXXI (2). The provisions however of that Chapter were held not to be exhaustive and the Courts to have an inherent power to act in the interests of justice. Though a person alleged to be a lunatic though not so found might appear either in person or through a vakil, (3) if it was held that a person of unsound mind was not entitled to sue by a next friend or defend by a guardian until he had been adjudged to be a lunatic, serious failure of justice might result (1). Where therefore, a person

⁽¹⁾ Bai Divali : Hiralal 23 B 403 (1898) As to execution against manager see Omrao

As we execution against manager see Umrao Singh v Prem Narain, 24 W R 264 (1875) (2) Jonnagadla : Thatiparthi (M 380 (1883)

⁽³⁾ Uma Sundarı v Ramjı Holdar 7 (242 (1881)

 ⁽⁴⁾ See Nabbu Khan v Sita 20 A 2 at
 pp 4 5 (1899), Kadala Reddi t Naisi, 24
 M 504 at p 507 (1901), where also it is

was admitted or was found to be of unsound mind, although he had not been adjudged to be so, he should, it was held, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardan ad liters where he was a defendant (1). It had to be first ascertained whether the person in question was or was not of unsound mind, and in the case of a suit instituted by a next friend whether the suit was for his benefit (2). It will be observed that the amended rule gives effect to these rulings, and the preceding rules are made directly applicable both to adjudged and non adjudged lunatics. The rule also includes the mentally infirm so as to cover the case of a person incapacitated from protecting his interests by reason of his mintal weakness or of his being a deaf mute.

16. Nothing in this Order shall apply to a Soveregation of the Governor General in Conneil or a Local Government in the name of an agent or many other name, or shall be construed to affect or in any way derogate from the provisions of any local law for the time being in force relating to suits by or against minors or by or against limites or other persons of unsound mind.

Princes and Chiefs —Sect 464 of the last Code, which this rule replaces was substituted for the former section by sect 53 (e), Act VIII of 1890 The former section ran, after the word "name," "and nothing in sects 442-462 applies to any minor or person of unsound mind, for whose person or property a guardian or manager has been appointed by the Court of Wards (3) or by the Civil Court under any civil law

pointed out that it was wrongly assumed, in Narayana v Krishna, 8 M 214, 217 (1885), that any suitor could obtain an adjudication in lunary, the fact being that only certain

specified persons can move in the matter (1) Nabbu Khan v Sita 20 A 2 (1897) Venkatramana Rambhate Timappa Devappa, 16 B 132 (1891), Kadala Reddi v Naris, 24 M 504 (1891), Pransukhram Dimanath v Bai I adkor, 23 B 673 (1899), where as also in the first and third cases etted, it is pointed out that the rule as to next freeds in Fingland is no longer that stated in the passage of Damell's Chancery Practice, which was relied on in Tul'arum Anan't Vithal Joshi, 13 B 636 (1899) In Kirparam Jhum chrain i Mo ha Dovalji, 19 B 135 (1894) the matter was queri. I Rawk Lai Datata i

Bidhumukhi Dasi, 33 C 1904 (1906) Lakhya Dasja v Uma Kanto, 14 C W N

256 (1909) (2) Pransukhram Dinanath v Bai Ladkot

23 B 653 (1899)
(3) See Sahla v Puttamma, 14 M 289,
293 (1890), Boresford v Ramasubba 13 M
197 (1889), Bhoopendro Naram t Baroda
Prosad B 6 C 500 (1891), Bircswar Rey c,
Shoshi Shekar 17 C 683 (1880), Dinesh
Chunder v Golam Mostapha, 16 C 89 (1885)
Where a suit was brought by a manage
under the Court of Wards and it was objected
that he had no authority to sue, the Priy
Council refused to entertain the objection
on appeal Hurdey Naram: Rooder
Puthali 10 C 726 (1884)

ORDER XXXIII

Suits by Paupers

Subject to the following provisions, any suits may be t instituted by a pauper. Suits may be instituted

ın formâ pauperis Explanation .- A person is a "pauper" when he is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit, or, where no such fee is prescribed, when he is not entitled to property worth one hundred supees other than his necessary wearingapparel and the subject matter of the suit.

"Suit" "Instituted "-It was held that the wording of this and the following rules indicate that the only I and of application contemplated by the Legislature is an application to institute a snit (1) The word 'instituted" has now been substituted for "brought It was however held in the case last cited that a Court had power to allow a suit instituted in the ordinary form to be continued in forma pauperis (2) It has been held that an order to an e security for costs obtained in a suit filed in the ordinary course ceases to operate as regards intecedent costs if leave is given to continue the suit as pauper provided the lowe is granted before the time for giving security has expired (3) Although the provisions in the Code only provide for suits to be brought by a pauper, it has been held that the Court has power to allow a defendant to defend in forma pauperts (1) Order XLIV post provides for pauper appeals and as to cross appeals in forma pauperts see notes to that order Sect 111 provides for the procedure in miscellaneous proceedings and the provisions of Chapter XXVI of the last Code, which these rules replace have been held applicable to petitions for Probate (5) and to suits sanctioned for removal of trustees under the Religious Endowments 1ct (6)

"Pauper'-The only question is whether an applicant is a pauper as defined in the Explanation A person is not bound to try and raise funds by

⁽¹⁾ Scoargument in Thompson & Calcutta 1 ramuay Co., 20 C 319 320 (1893)

^{(2) 1}b , foll Armul Chandra e Doyal Nath, 2 (130 (1577), Revn Patil r Sak haram, 5 B. 615 (1854)

⁽³⁾ Bar Laxmi e Horman Nathu ar B

^{415 (1 111)}

⁽⁴⁾ Doorga Churn e Attokally Dossee, 5 (519 £1550)

⁽⁵⁾ In re Will of Dawular, 18 B 237, 231

⁽f) Gurusami i hrishnasami, 21 M 413

mortgramg his claims (1) A Hindu father's wealth is not a bar to a son sung as a pauper to prove his adoption , (2) nor does a husband's wealth preclude a wife suing is a pauper when she einnot claim from him the means of carrying on the suit (3) In the case of minors the English practice (4) appears to be not to allow a minor to institute a suit through his next friend, unless he gives proof not only that he is himself a pauper, but that the next friend is a pauper, and that he counct get any substantial person to act as next friend (5) Following this practice, the Calcutta High Court allowed a suit to be brought in forna purpers by a next friend who was also a pauper (6) The question whether a minor might sne as a pauper by a next friend who was not a pauper was not decided in that ease, but the right was subsequently affirmed by the Madras High Court, (7) which held that the English practice to the contrary was not justified by the Code The Code does not evelude persons holding a fiduciary character, and therefore an executor or administrator can sue 111 forma pauperis (8) It has been held that there is no necessity for an inquiry whether an alleged representativo of an admitted pauper is a pauper or not, and that the Court if satisfied that ho is the legal representative, should admit him to carry on the suit (9) But the Bombay High Court has disagreed (10) The conditions of pauperism are different (a) when the plaint requires a court fee, and (b) when none is required. In either ease the effect of pauperism is the same the first case the measure is the sum required to pay the fee on the plaint. In The intention in both cases is the same the second case Rs 100 is the measing viz to fix a certain sum-in one case the fee on the planet, and in the other case Rs 100, and to provide that if the petitioner has not this sum at his disposal he will be exempt from court fees (11) So, property admitted to be the propert) of the petitioner is not the "subject matter of the suit," although claimed in the potition (12) The concluding portion of the Explanation, "other than he necessary wearing apparel," etc., do not govern its flist part (13)

Formerly excepted suits -Uuder sect 402 of the last Code a pauper could not sue to recover compensation for loss of easte, libel, slander, abusine language or assault The suits excepted were strictly limited to those men tioned Where it was argued that Chapter XXVI of the former Code nas

(1900)

⁽i) Vedanta v Perindevamma 3 Vl 249 (1881) distinguished in Kapil Deo : Ram,

³³ A 237 (1910) (2) Chutto Ram Tewari Petitioner, S D

Sum Dec 7th Sept , 1846

⁽³⁾ Laloonissa, Petitioner & D Sum Dec. 15th Dec , 1845

⁽⁴⁾ Sec Lnglish O 16 rr 22 31

⁽a) Venkat marasayya i Achemma 3 M 3 (1881)

⁽b) Golaupmonto v Prosonomeye, 11 B L. R 373 (1873) See also Misser v Mutty Lall, 1 ulton, 4 '0 (1514)

⁽⁷⁾ Venkatanarasayya v Achemma 3 M J (1881) As to payment of costs by next

friend, see notes to r 11 post (8) I re Bell 7 M 330 (1881) In re Will

of Dawubai 18 B 237 (1593), for Luglish rule see case first cated and Ann Pr notes to O 16, r 31 Oldfield v Cobbett, 1 Ph 615,

D C Pr 87, 88 (9) Bhagbut Doss ν Baloram Dos* 3 W I?

Misc 20 (1865), but see In re Danubal 18 B 237

⁽¹⁰⁾ Manaji Rajuji v Khandoo, 36 B

^{279 (1911)}

⁽¹¹⁾ Dwarka N the Matherray, 10 B -07, 200 (1880), in which it is suggested that the wording of the section might be amend d But see Latmabas a Dossabhoy, 34 B 634

⁽¹⁹⁰⁹⁾ (12) 15

⁽¹³⁾ Arishnal at v Manol ar, 10 B 533

intended to apply only to suits for the enforcement of personal claims and therefore not to suits under the Religious Endowments Δct or sect 539 (now 92, 93) of the Code, it was held, that in that Chapter and particularly in sect 402 and the former section corresponding with r 5, the restrictions on the liberty of the right to sue as a pauper were expressly prescribed and that the Court would be adding to those restrictions if it held that a person should not be allowed to sue as a pauper when his suit is one that is brought under the Δct mentioned (1). There are, however, now no excepted suits as sect 402 of the last Code has not been re-enacted. The Special Committee stated that in the light of the case law it was musleading, so far as it suggested that a suit would be for loss of caste or abusive language, and they saw no sufficient reason for withholding from a painer a right to sue as such in respect of defamation or assault.

- 2 Liesy application for permission to sue as a pauper contents of applica shall contain the particulars required in the particulars required in the state of the
- Resentation of application shall be presented to the extension. Court by the application shall be presented to the extensive the appearing in Court, in which case the application may be presented by an authorized agent who can answer all material questions relating to the application and who may be examined in the same mainer as the party represented by him might have been examined had such party attended in person

Presentation of application —Where an applicant dies before leave is granted the legal representative may present a fresh application or may institute a suit for the same relief which the deceased sought to recover if the right to sue survives in him (2)—R—3 is imperative and a petition to sue as a pauper must be presented in person unless the pauper is exempted from appearing in Court under sects 133–133 and (3)—So where a petitionic was in jail and did not present the petition in person it was rejected, (4) and the mere fact that several persons jointly present an application does not authorize the Court to entertain it on behalf of applicants who do not appear in person (5)—A leader may be in authorized agent, (6) but in that case he must be specially authorized

⁽¹⁾ Gurusann i krobnasani -4 M 419 eximpted Wazir un bissa i Ilahi Baksh, 21 (1901) 1 172, 173 (1901)

⁽²⁾ Lalit Mohan Mandal : Satish Chandra Das, 33 C. 1163 (1900)

⁽³⁾ Lx parte Dorgir Guru 4 B 11 C. ft., L. (J 31 (1807) So a pardanashin is

^{(4) 1}b

⁽a) Burgess r Salden, 10 M 103 (1857) (6) hisheree Mohan r Gour Monce, 15 W 1 105 (1871)

as the pauper's attorney, an ordinary talalutnamah not being sufficient (1) If the applicant does not appear in person he may, under r 4, be examined by commission

4. (1) Where the application is in proper form and duly presented, the Court may, if it thinks fit, examine the applicant, or his agent when the applicant is allowed to appear by agent, regarding the merits of the alexance of the applicant.

the claim and the property of the applicant.

(2) Where the application is presented by an agent, the

If presented by agent, Court may order applicant to be examined by commission.

application is presented by an agent, the Court may, if it thinks fit, order that the applicant be examined by a commission in the manner in which the examination of an absent witness may be taken.

Examination of applicant —It was held under the corresponding section of the Code of 1859, that the examination referred to is that of the petitioner of his or her agent, and that at this stage the Court has no power to examine witnesses (2). The present rule also speaks inerely of the examination of the petitioner or his agent. If on the examination some of the grounds appear which are mentioned in the next rule then notices are to issue as provided in 1.6, and they pave the way to the formal hearing mentioned in 1.7, at which the question of the applicant's pauperium his is to be determined. The proceedings under this (3) and the next rule are of a preliminary character, and a rejection under them is not as in the case of 1.7, of a final kind and a bar to a subsequent application (4).

The rule directs the examination of an applicant regarding the merits in order that it may be ascertained whether his allegations show or do not show a right to sue (5). The mere statements in the plaint cannot be accepted as the sole material on which a decision as to this question and object, for if this were so, the granting of an application would depend not on whether the pauper had in fact any merits to go upon but on the skill of the person drafting his petition and plaint, and the examination as to the merits under this section would be

superfluous (6)

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tion.

5. The Court shall reject an application for permission to Rejection of applica-

(a) where it is not framed and presented in the manner prescribed by rules 2 and 3, or

⁽¹⁾ Musat Bhu, obutty & Gancah, 21 W R

^{308 (1874)} (2) In re Puthash Ojha, 25 W R 74

<sup>(1870)
(3)</sup> The case cited in next note says

s 105, but this appears to be a mistake
(4) Chatturpal Singh t Raja Ram, 7 1

⁶⁶¹ at pp 663, 664 (1885)

⁽⁵⁾ Aoka Ranganayaka v Koka Venkat i

⁽⁶⁾ Kamrakh Nath v Sundar N

⁽⁶⁾ Kamrakh Nath v Sundar Nath, 20 A 233, at p 301 (1898), Nawah Bahadur :

Harish, 13 C L J 533 (1310)

(b) uhere the applicant is not a pauper, or

(c) uhere he has, within two months next before the presentation of the application, disposed of any property fraudulently or in order to be able to apply for permission to site as pauper, or

(d) where his allegations do not show a cause of action, or

(e) where he has entered into any agreement with reference to the subject-matter of the proposed suit under which any other person has obtained an interest in such subject-matter.

Rejection or application —The provisions of this rule, operating as they do in derogation of the ordinary rights of a litigant, must be construed strictly, and the exercise of the Court's power to reject under this rule is limited to the grounds specified in the various chapses of the rule itself (1)

There are conflicting decisions as to whether an appeal does (2) or does not (3) he from an order rejecting an application to sue as n pumper. It has, however, been held in several cases (4) that such an order is subject to rovision.

is to limitation in the case of pauper applications, see below (5)

Clause (d) in the last Code ran, "that his allegations do not show a right to suo in such Court." The concluding words, "sue in such Court," lent some support to the argument that the paragraph referred to the jurisdiction of the Court, and not to the cause of action disclosed in the application (6). It was, however, held that the words "show a right to sue cannot be read as limiting the Court's discretion to merely ascertaining whether "the right to sue aross within its jurisdiction, but have a more extended meaning, namely, that an applicant must make out that he has a good subsisting cause of action capable of enforcement in Court, and calling for an answer and not barred by the law of imutation or any other law (7). This is now made clear in the amended clause

⁽¹⁾ Chattarpal Singh t Raja Ram 7 A 661, 670 (1885), ger Vahmood J

⁽²⁾ Baldeo v Gula kuar, J 1 129 (1887)

⁽³⁾ Secretary of State t Jillo 21 A 133 B (1808) See Skinner t Orde 2 A 241 at p 245 the question of paupersam is not a point in the cause it is a mero matter of procedure, per Str M. Smith In Numbazan v Rasulan, 23 A 364, 366 (1901) it was

v Rasulan, 23 A 364, 366 (1901) it was treated as clear that no appeal lay from an order granting leave to sue as a pauper (4) Chattarpal Singh t Haja Ram 7 1

⁽⁴⁾ Cantarpat Singir Findi Ram 7 i 60 (1855), per Mahumoud, J. Muhammad Husain r Judhu I rasad, 10 % 467 (1858) Secretary of Stato r Jillo 21 A 133 136 (1898), hoka Rangainayaka t hoka yen katachellapati & M. 232 (1851), Dibo Dhas i Mobunt Ram 2 C W. A "4" (1858), Gopal Chandra r Ikoo Mistry, 5 C W. 70

^{(1903),} under s 115 ante, but not under the Charter, Shaukh Babur v Goldul Lall 24 W R 62 (1875)

⁽⁵⁾ S 4 let XV of 1877 Mitra's Limita tion Act 677 lth ed Janardan Vithal t Anant Mahadev 7 B 373 (1883) [application death of opponent substitution of heurs]

⁽⁶⁾ Amerikam r Alwar Mandskam, 27 M 37 3J (1903) and see per Mahmood J, in Chattarpal Singh t Raja Ram, 7 1 661, at

p 671 (1885)

⁽⁷⁾ Chattarpal Sugh t Raja Ram 7 A 601 (1854) k B Dulart Vallabdas, 13 B Lu (1852), Vijendra c Sudhedra, 19 M 137 (1894), hamrakh Nath c Sundar Nath, 20 A. 209 (1858), hamrakh nath an c Alwar Mantkan 27 M 77 (1903)

So the Court will see not only whether it has jurisdiction, (1) but whether there is a right to sue or cause of action to be entertained,(2) and, assuming so, whether the intended suit is barred by res judicata (3) or limitation, (4) or whether a previous application has been refused (5) The Madras High Court in one case, (6) and apparently the Calcutta High Court, (7) have held that if the petitioner shows a right to sue, the Judge should allow the application without going into the ments of the claim, the examination as to the ments under r 4 being merely for the purpose of ascertaining whether the allegations do or do not show a right to sue, or cause of action Where a plaint in forma pauperis has been admitted, but the Court holds that it has no jurisdiction, and retuins the plaint to the plaintiff, it has no jurisdiction to make the plaintiff pay the court fees (8) An agreement by a plaintiff, about to sue to redeem a village, to pay his vakil a lump sum of Rs 1500, and in default to realize it out of the revenue of the property, was held to be an agreement within the scope of clause (e) (9) No leave to appeal in forma pauperis will be given where there is subsisting such an agreement (10)

Where the Court sees no reason to reject the applica-6 tion on any of the grounds stated in rule 5, Notice of day for reit shall fix a day (of which at least ten days' cerving evidence of apclear notice shall be given to the opposite plicant's pauperism. party and the Government pleader) for acceiving such evidence as the applicant may adduce in proof of his pauperism, and for hearing any cyidence which may be addreed in disproof thereof.

(1) On the day so fixed or as soon thereafter as may be convenient, the Court shall examine the Procedure at hearing. witnesses (if any) produced by either party, and may examine the applicant or his agent, and shall make a memorandum of the substance of their evidence.

(1) See In re Ganga Dass Adhikaree, 14 W R 281 (1870) In Brohms Moyee v Anund Chunder, 22 W R 120 (1874), the defendant was held on appeal estopped from raising the question of jurisdiction, and sec Akbar Husain v Alia Bibi 25 A 137 (1902), where it was held that there was an estoppel to objection to plantiff's representative suing

as a pauper (2) Vijendra t Sudhindri, 19 M 197

⁽¹⁸⁹⁵⁾

^{(3) 1}b

Chattarpal bingh 1 Raja Ram (4) 1b supra In re Parkash Ojha, Lo W R 74 (1876), Chundeo Churn t Ram Naram, Corst 8 (1561)

⁽⁵⁾ Bisheshur Singh t Moheshur Baksh,

S D N W (1864) n 189 (6) Kola Ranganayaka v hoka Venkata

chellapati, 4 M 323 (1881) (7) Debo Das t Mohunt Ram, 2 C W N 474 (1898), where, at p 478 the Court said that if the Judge bad stated that the allega tions did not show a right to sue it was extremely doubtful whether the Court could interfero in revision , Got al Chandra t Bigoo

Mistry, 8 C W N 70 (1903) (8) Collector of Ratnagure Janardan, 6 B

⁵J0 (1682) (9) Manohar Ramchandra v Lakshman

Mahadev, 0 B 371 (1850)

⁽¹⁰⁾ Hansfa Bal v Haji Si lick, 30 M 517 (1.00)

(2) The Court shall also hear any argument which the parties may desire to offer on the question whether, on the face of the application and of the evidence (if any) taken by the Court as herein provided, the applicant is or is not subject to any of the prohibitions specified in rule 3

(3) The Court shall then either allow or refuse to allow the

applicant to sne as a pauper

Examine — The examination must be conducted by the Judge in person (1) as appears from the second paragraph, and was previously held (2) the examination is not limited to the question of painperism, but embraces all the matters referred to in r 5, anke (3). This paragraph enables the parties to argue the question if they so desire but does not preclude the Court if no argument is officied from considering that question (4). If a now defendant be added an inquiry must be made in the presence of uch new defendant (a). Semble, that an order dimitting a plaintiff to so as a papier made by one Court becomes the duty of the Court before which the petition is obsequently presented to presented to the content of the Court before which the petition is obsequently presented to presented the content of the Court before which the petition is obsequently presented to presented the provious rule takes place before any suit is in evitine for until an application to sue as a papier is granted there is no plaint and consequently no suit (7) Is to appeal and revision ce notes tor 5, and as to review notes tor 15.

8 Where the application is granted, it shall be num Procedure it applies bered and registered, and shall be deemed the plant in the suit, and the suit shall proceed in all other respects as a suit instituted in the ordinary manner, except that the plantiff shall not be hable to pay any court-fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader of other proceedings connected with the suit

Admission of application —When an application is granted no appeal lies (8) The order cannot be set aside either on appeal or motion by a superior Court. If subsequently to permission being granted it appears that the order has been obtained improperly application should be made to the Court ont of which the order issued (9) Limitation depends on the date of the application.

⁽¹⁾ In re Eknath 1 B H. C R 102 (1863)

⁽²⁾ In re Gunga Dass 14 W R 281 (1870)

⁽³⁾ See notes to r (3)

⁽⁴⁾ Amirtham : Al ar Manikkam -7 M 37 (1903)

⁽a) In re Hur Chunder Lahori S D Sum D c 26th July 1847

⁽⁶⁾ Skinner t Orde 6 A. H C R "-

⁽¹⁵⁷⁴⁾ This case distinguished on question of lim tation in Kishavlal t Mayathar 9 Bom

I R _04 (1J07)

⁽⁷⁾ Duarks Nath v Madhavrav 10 1 20, (1839)

⁽⁸⁾ Mumtazan e Lasulan 23 A. 364 366

<sup>(1901)
(9)</sup> In re hhodejoonissa 7 W R 486(1864).

⁽⁹⁾ In re khodeponissa 7 W R 486(1861), as to whether the propriety of the order can be questioned if and when the case is appealed see notes to s. 10.

and not on the day when the application is granted and registered, otherwise a case might be barred whilst the Judge is considering whether the application to sue as a pauper should be admitted (1) As to limitation in cases in which an application is withdrawn or refused see notes to r 15, post There is no suit in existence until the application has been granted (2) The exemption from hability upon that event only extends to the eases mentioned So a pauper must pay the proper stamps and penalty (if any) on a document on which he relies (3)

The Court may, on the application of the defendant, or of the Government Pleader, of which seven Dispaupering. days' clear notice in writing has been given to the plaintiff, order the plaintiff to be dispanned-

(a) if he is guilty of vexatious or improper conduct in the

course of the suit.

(b) if it appears that his means are such that he ought not

to continue to sue as a pauper, or

(c) if he has entered into any agreement with reference to the subject matter of the suit, under which any other person has obtained an interest in such subject matter

Dispaupering -If it appears from facts that have been di covered after permission to sue in forma pauperis has been granted that the applicant ought not to be allowed to continue to litigate as a panper, the remedy is by application under this rule to the Court which made the order, and not by appeal or motion in the superior Courts (1)

10 Where the plaintiff succeeds in the suit, the Court costs where paper shall calculate the amount of court fees which would have been paid by the plaintiff if he succeeds had not been permitted to sue as a pauper, such amount shall be recoverable by the Government from any party ordered by the deeree to pay the same, and shall be a first charge on the subject matter of the surt

Rights of Government -As to the meaning of the word 'succeed, see

⁽i) Vinayak Dhavle v Samvat 4 B H C, 1 C J 39 (1867) S etaram Cower : Goluknath Dutt Marsh 174 (1862) in the last cast the application was not admitted until more than one year after it was | re sented.

⁽_) Dwarks Nath : Madhavrav 10 B _07 (1886) Janardan Vitlide Inant Wilades, 7 B 1 (1883) Bits o Imfikal itu i

Duarka Prasad 30 1, 93 (1907) (tl cro s a contentious proceeding as soon as tho all lies tion has been filed)

⁽³⁾ Golam v Lkram 10 W R 3.7 (1868)

⁽⁴⁾ In is Khodejoon ssa 7 W R 480 (1867) as to orders when a pauper appeal is withdrawn see Chandaba t Kuver Sal ob 18 B 464 (1831)

notes to next rule. The Crewn has a right to receive fees at the institution of every suit. It temporarily foregoes (r 8) its right in the case of pauper plamtiffs, and thus places means in their hands to proceed to judgment against their defendants. Without the ferhearance of Government to insist on its ordinary rule, the suit in such a case could not have been brought or the money realized. It is therefore reasonable that the Crown, in consideration of its giving up its rights to these fees, should have for their defrayal the first claim on the proceeds of the pauper suit (1) The order should not be a contingent one (2) The amount of court-fees is a first charge (3) on the subject-matter (4) To enforce it the Government need not bring a separate suit, but can realize the court fee from the property by proceedings in execution (5) The rule is enabling, and though it indicates the manner in which the Crown may proceed to realize the debt, it does not preclude the Crown or its representatives from urging its prerogative and insisting on its rights to precedence over all their creditors (6) The period allowed to Government is the ordinary period allowed for execution to an individual under the Limitation Act (7) The section provides that persons who have been successful as paupers shall, so far as the subjectmatter of their success is concerned, be hable to satisfy, out of what they recover, the amount of the fees which have been for a time, pending the decision of their suit, remitted to them. But the Collector cannot sell the decree, that is, the whole of the plaintiff's right in the decree, which he has got without waiting for the recovery by the plaintiff of that for which he has got his decree (8) An order under this rule for sale of property for the purpose of realizing court fees, and a sale under such order, are ultra tires and a nullity when, in fact, there was ne jurisdiction in the Court to make the order (9) In addition to their being a first charge, they are also recoverable from any party ordered to pay If the pauper succeeds, the fees payable to Government are, under this rule, recoverable from the defendant (10) A defendant should not, however, be made hable to

⁽I) Ganpat Putaya v Collector of Kanara, 1 B 7, 9 (1875), the point here decided ifoll in Collector of Moradabad t Mahomed Daim. 2 A 100 (1879)] has since been made clear by the introduction of the words " shall be a first charge," etc , which were not in the Code of 1859 See Pran Aristo t Collector of Moor shedabad, 15 W R 205 (1871), Ramchandra v Pitcharkanni, 7 M 434, at p 436 (1883); Ragho Prasad t Mewa Lal, 39 I A 62 P C (1912), 34 A 223, 16 C W N 433, 15 C I J 327, 14 Bom L R 212, 22 M L J 457

⁽²⁾ Shostee Churn v Collector of Chitta gong, 13 W R 155 (1870), in which case, by reason of the form of the order, the Covern ment could get nothing from either party until wasilat was determined, and the parties refused to carry on the proceedings for this

⁽³⁾ See Janki t Collector of Allahabad, 9

A 64 (1886), Putha Valappil v Veloth Assenur, 25 M 733 (1902)

⁽⁴⁾ As to the meaning of this term, see Janks v Collector of Allahabad, 9 A 64 (1886)

⁽⁵⁾ Ram Das v Secretary of State, 18 A

^{419 (1896)}

⁽⁶⁾ Gayanoda Bala Dassee v Butto Kristo Bairagee, 33 C 1040 (1906)

⁽⁷⁾ Collector of Beerhhoom v Sreehurry, 22 W R 512 (1874), Appaya v Collector of Vizagapatam, 4 M 155 (1881), Venubai e Collector of Nasık, 7 B 552 (1877), Collector of Broach v Desai Raghinath, 7 B at p. 549 (1883)

⁽⁸⁾ Joundro Nath : Dwarks Nath, 20 C 111 (1891)

⁽⁹⁾ Balwant Rao v Muhammad Husam, 15

^{4. 324 (1593)} (10) Jetha Mulchand r Gulraj Jasrup, 8 B

^{577,} at p. 552 (1854)

pay court fees on any sum greater than that decreed against him (1) If the pauper fails, these fees are, under the next rule, recoverable from the plaintiff (2) Government may be deemed to have been a party to the suit, and therefore orders deciding any matter between Government and the party charged are open to appeal under sect 47, ante (3) See r 13, post

Where the plaintiff fails in the suit or is dispaupered, or where the suit is withdrawn or dismissed. Procedure where pauper fails (a) because the summons for the defendant

to appear and ansuer has not been served upon him in consequence of the failure of the plaintiff to pay the court-fee or postal charges (if any) chargeable for such service, or

(b) because the plaintiff does not appear when the suit is called

on for hearing the Court shall order the plaintiff, or any person added as a co-plaintiff to the suit, to pay the court-fees which would have been paid by the plaintiff if he had not been permitted to sue as a pruper

Failure of suit -There has been some conflict as to the meaning of the word 'fuls" It has been held that r 10 only applies where there has been a contest, or else an admission of the claim which has avoided a contest, and refers to cases of adjudicated success, and that, similarly, this rule opplies only to cases of adjudicated failure, and to the other cases specified, as where the plaintiff has been dispaupered or the suit has been dismissed under O IX ir 2, 3 ante (4) It was held, therefore, not to apply where the parties came to in annicable arrangement under which the suit was to be dismissed (5) And where an appeal in forma pauperis was withdrawn it was held that no order could be made either under this rule or r 9, and that it was not open to the Court to order the respondents to pay any fees on the strength of any agreement between the parties (6) The last decision but one has, however, been dissented from by the Madras High Court, which has held that the words "succeeds" in the last rule and "fails" in this, refer to the ultimate decision or the result of the sint, and not to the mode in which the decision is arrived at, that it would be doing violence to the language of the section to introduce the words " after contest and that a pauper plaintiff is liable to pay the stamp duty if his suit is dismissed without trial (7) A Pull Bench of the Bombay High Court has more recently

⁽¹⁾ Chandrareka v Secretary of State 14 M 163 (1890)

⁽²⁾ Jetha Milchanl : Gulraj Justup,

S B 577 (1884) (3) Janks e Collector of Allahabad 9 A CI (1556) Secretary of Stator Blugaranti, 13 \ 3.6 (1631) Secretary of State t Natayan % B 419 4 (O (1 H I)

⁽⁴⁾ Collector of Kanara v Krishnapi a 15

B 77 (1890) (5) Ib

⁽⁶⁾ Chandaba v Kuver Saheb, 18 B 464 (1594)

⁽⁷⁾ Collecter of Vizagapatam : Abdul Klarim 21 M 113 (1897) in which case the (at interfered under a 6-2 (now 115)

held that where there is a withdrawal as the result of a compromise, the plantiff does not succeed within the meaning of the last rule, but "fals" within the meaning of this (1). The section has now been amended to include a withdrawal

The terms of this rule are mandatory, and it is obligatory upon the Court when it passes its decrea to provide in that decree for payment by the plaintiff of the court fees (2). The decisions, however, are conflicting upon the question whether where the Court omits to make an order, the Government may,(3) or may not,(4) apply to rectify the decree. It is now declares the right of Government to apply. An order under this rule amounts to a decree in favour of Government against the unsuccessful plaintiff for the amount of the court fees, and can he executed by attachment and sale of any property he possesses (5). This and the last rule only deal with the fees payable to Government. Costs, that is costs of parties inter se against a pauper plaintiff, might, it was held, be awarded to a successful defendant under Chapter XVIII of the former Code (6).

Where a suit is instituted by a next friend on behalf of a minor, the latter is the plaintiff. It frequently is right to make a guardian or noxt friend liable for costs, but there are also cases in which it is not proper to do so. And it does not necessarily follow that because the suit is unsuccessful, the next friend is, as

n matter of course, to be ordered personally to pay the costs (7)

The origin of the last penal clause of sect 142 of the last Code is to be found in sect 53, Reg IV of 1827 known as Elphinstones Code where however, it is made applicable to all plaintiffs alike. It was omitted from the Code of 1859 but re enacted in that section with respect to pauper plaintiffs not for the purpose of exempting them from paying costs to a successful defendant but because it was deemed necessary to provide a special protection to defondants against being harassed by persons who exhapothesis are not likely to be influenced by the fear of having to pay costs (8). It has now been altogether omitted

12 The Government shall have the right at any time to apply

Government may apply to the Court to make an order for the payment for supplied from for the fourt fees under rule 10 or rule 11

"May apply"—See notes to last rule An order passed on an application by Government under this rule for payment under rr 10 or 11 of this Order is under sect 47 and appealable (9)

- (2) Secretary of State v Bhagwanti Bibi, 13 A 326 329 (1891)
- (3) Collector of Kanara v Krishnappa 15 B 77 (1890) Collector of Kanara i Rambhat 18 B 454 (1893)
- (4) In re Secretary of State, 2 C. L. R. 461 (1878), Shusti Churan v Karmar Ali, 1 Shome 266 (1878) on the ground that

- Government is not a party to tle suit
- (5) Jwala Sahai z Masart Khan 26 A 34c, at p. 348 (1994) as to order for payment where the Court has no jurisd ction see notes to r 5 ante
 - (6) Jetha Mulchand v Gulraj Jasrup 8 B 577 (1884), F B
 - (7) Brijessurce Dossia v Kishore Doss 25 W R 316 (1870)
 - (8) Jetha Mulchand v Gulraj Jasrup 8 B 577, at pp 580 581 (1884)
- (0) Secretary of State v \arman 35 B 448 (1911)

Secretary of State t Bhagurathibat
 B 10 (1906) and see Secretary of State
 Arayan Balkushua 29 B 102 (1904)
 Secretary of State t Varayan 35 B 448 (1911)

18. All matters arising between the Government and any Government to be party to the suit under rule 10, rule 11 or deemed a party rule 12 shall be deemed to be questions arising between the parties to the suit within the meaning of section 47.

"Between the parties"-See ante, note to r 10

14. Where an order is made under rule 10, rule 11 or Copy of decree to be rule 12, the Court shall forthwith cause a copy of the decree to be forwarded to the Collector.

Refusal to allow applicant to sue as pauper to bar subsequent application of like pature,

An order refusing to allow the applicant to sue as a pauper shall be a bar to any subsequent application of the like nature by him in respect of the same right to sue; but the applicant shall be at liberty to institute a

suit in the ordinary manner in respect of such right, provided that he first pays the costs (if any) incurred by the Government and by the opposite party in opposing his application for leave to sue as a pauper.

Bar to subsequent application —There must be a "refusal" Therefore the rule does not apply where the Court has not passed such an order, as, for instance, if it returns the application to have the question of pauperism tried by a Court of concurrent jurisdiction, (1) or strikes off "for the present" the application for default by non appearance. Under such circumstances the application may be renewed (2) The provisions, morcover, of this rule do not affect the right of a person against whom an order of refusal has been made to obtain a review, and an order under r. 7, refusing leave to sue as a pauper, is subject to review under sect. 114 (3) Assuming however that there is an order which is final, the bar under this rule being one to jurisdiction, a Court is competent and bound to take notice of it at any stage of the suit (4)

On the rejection of an application for leave to sue as a pauper, the only course open to the applicant is that declared in this rule, and to institute a suit in the ordinary way, and the date of the institution of that suit for the

⁽¹⁾ Skinner v Orde 6 Å H C 225 (1874) (2) Bhoj Singh i Mahi Koonwer, 3 Aera Mise I (1864), as to whether an unsuccessful application to suc in formal purpers is a demand by way of action see Rance Khapoo roomska i Pance Ryceoomska 2 I Å 235

⁽³⁾ A larji Ldulji r Manikji Ldulji, 4 B 414 (1880) [but as to the application being accompany of 12 copy of judgment etc., see Wajst Ali r Nawal Kisters, 17 X 213 211

^{(1893)],} Ranchol Morar v Bezanji Edulji, 20 B 86, 90 (1894)] in which it was also lell that both the applications were made in respect of the same right to sue), In re Ram Umasun lari, 5 B L R 11 p 29 (1870) [in which the Court interfered under a 15 of the C.

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purposes of limitation is the actual date thereof, and not the date when the application to sue as a pauper was made (1) . Iliter, when leave to sue as a pauper having been granted, the applicant is dispaupered (2). The rule does not expres ly provide for the case of withdrawal by the petitioner of his applica tion for leave and payment by him of the court fees. It has, however, been held by the Cilcutta High Court, (3) dissenting from the opinion of the Allahabad High Court (4) that if an application for leave to sue as a pauper is made, and, upon the defendant opposing it, the applicant puts in the proper court fee and asks the Court to treat his application as a plaint, the application should be decined for the purpose of limitation to be a plaint presented on the date on which it was filed

Costs incurred.- Although this rule makes it a condition precedent in the institution of an ordinary suit by a person whose application to sue in forma paupers has been rejected that he should first pay the costs incurred by Govern ment the suit ought not to be dismissed for default in payment of such costs when no demand for the payment has been made either on behalf of the Govern ment or by the Court (5)

The costs of an application for permission to sue as a [pauper and of an inquiry into pauperism Costs shall be costs in the suit

⁽¹⁾ Keshav Ramchandra t Krishparao Venkatesh 20 B 503 (180a) Naraini Kuar r Makhan Lal 17 A 526 (1895) Aubhoya Churn v Bissesswart 24 C 880 (1887) heshavlal t Mayabhai 9 Bom L R 204

⁽²⁾ Narami kuar t Wakhan Lal 17 A

^{720 (1897)}

⁽³⁾ Janakdhar, Sukul v Janki Koer, 28 C 427 (1900) foll Skinner v Orde, 2 A 241 (1879) P C

⁽⁴⁾ Abbasi Begam v Nanhi Begam, 18 A 206 (1896)

⁽a) Mrinalini t Tinknuri 16 C W \ 641 (1912)

ORDER XXXIV.

Suits relating to Mortgages of Immoreable Property

1 Subject to the provisions of this Code, all persons having parties to suits for an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage

Explanation —A pursue mortgagee may sue for foreclosure or for sale without making the prior mortgagee a party to the suit, and a prior mortgagee need not be joined in a suit to redeem a subsequent mortgage

Mortgage suits -This Order is taken (with the exception of rr 9 and 11 which are new) from sects 85-90, 92-94, 96, 97 of the Transfci of Property Act (IV of 1882) R 14 is a provision analogous to sect 100 of that Act both dealing with charges Certain amendments, chiefly by way of addition, have been made, to which notice will be drawn The object of the introduction of this Order was stated to be that hitherto some confusion had been occasioned by the co existence of the provisions of the Transfer of Property Act and of the Code in regard to execution in mortgage suits The incorporation of this Order in the Code would, it was said be welcomed by every one who is familiar with the almost endless controversies which have gathered round the applicability of the provisions of the Code to the enforcement of decrees for sale under the Ir insfer of Property Act It was considered that the provisions relating to execution in mortgage suits-that is, questions of procedure-should be dealt with in their entircty in the Code, and this Order has been introduced to give effect to this view As a consequence of this the sections above mentioned of the Fransfer of Property Act as also sect 99 (as to which see r 11) and a portion of sect 100 of that Act, have been repealed by the fifth schedule The general effect of this order, therefore is that the ordinary provisions of the Code apply to mortgage suits and the execution of mortgage decrees unless there be some special exception to the contrary It has been said that the effect of the in c reporation of these sections of the Transfer of Property Act is that the Original Si le of the Calcutta High Court should discard any independent practice by ed on the old procedure (1) The subject of this Order has already been fully de ilt

⁽¹⁾ Sarat r Nahapiet 3" C 907 (1910) and see Ambek (1 ali Sarat 38 C 313 (1311)

with hy Di Rash Behary Ghose in his work on mortgages and hy Mr H S Gour in his Law of Transfer in British India It is not necessary, therefore, to go over the same ground We therefore content ourselves with noting the amendments and additions effected by the present Code

R 1 is taken from seet 85 of the Transfer of Property Act, but after the word "interest substitutes in heu of the words "in the property comprised in a mortgage, '(1) the words "citler in the mortgage security or in the right of The former phrase 'Having an interest in the property, etc., has been the subject of numerous cases, which will be found collected in Mr Gour's work. It was proposed to add at the end of the first paragraph of the rule the words 'and the decree shall not bind any person not so joined ' Seet 85 of the Act contained the proviso following ' Provided that the plaintiff has notice of such interest It was pointed out that this proviso had given rise to certain doubts which it was sought to remove by substituting for it the words cited with a view to making it clear (2) that a person not a party is not hound by a decree It has been recently held that a mortgageo who is made a defendant and who omits to set up a mortgage is harred from swing on such mortgage where in consequence of lus emission the property is ordered to be sold free from the mortgage which had not been pleaded (3) As regards the former provise it was said (4) that the provise subordinating the obligation to join to notics was unnecessary and misleading For, in the absence of any discriminating equity affecting the right of excluded interests it was not clear what object the provise was intended to serve Could it be supposed that if the plaintiff had omitted to join a necessary party because he had no notice of his interest, then his interest would be differently affected to what they would ho if he was excluded even though the plaintiff did have notice of his interest? Notice may sometimes affect the question but it does not always do so The proviso has now been comitted but the proposed addition has not (probably as being unnecessary) been made. It has been held that a son in a Mitakshara joint family is a person having an interest in the mortgage and is a necessary party (5) But in a suit for sale on a mortgage where the defendant-mortgagois were the managing members of a Mitakshara joint family who in that capacity had purchased the mortgaged property it was held by the Allahabad High Court that the family was sufficiently represented by them and that the suit would not fail through non joinder of the other members (6) The Calcutt High Court has recently dissented from this holding that under this rule a mortgage suit brought by the Large of a joint family without making the other members of the family parties is not maintainable (7). It has also been

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⁽¹⁾ See Jagg swar Duit : Bhuban Wehan Mitra, 33 C 4.5 (1900)

⁽²⁾ Of Ram Nath Rat : Luchman Rat 21 \ 193 (1899) Ram Taran Goswami r Ran swar Malia 11 C. W \ 10 5 (1.07)

⁽³⁾ Nallu Krishnama e Annan, ara Chariar 23 11 353 (1907)

⁽⁴⁾ H S. Gour Law of Transfer in British

It has Notes to seet work Act IV of 1882. () Benanath : Jandy, 40 C 342 (191)

⁽⁶⁾ Hari Lal r Munman 34 A 549 (1312) Madan Lale Andan Snah 34 1 5-2 (131-) of hadian Prasad v Har Nara n. 33 1 272

⁽¹¹⁰¹⁾ () Salls awari Procede Dharar 14 Nara n 19 C L J 437 (1914) p. 440 following Lala Surja Pr wad r Golab Chand, 27 C 7.4 (1904) descrita g from Hart Lale Menman hanwar and Madan Lal r hadan borgh

held that the effect of an intentional non joinder of a subsequent mortgagee in a suit on a prior mortgage would not be the dismissal of the suit but only of so much of it as relates to property affected by the subsequent mortgage (1)

Even if the non joinder as a party defendant who ought to have been made a party to a suit for sale on a mortgage is by itself a defect fatal to the suit. such defect is cured if the Court acting under O I r 10, sub rule (2), adds such

person as a defendant (2)

The Explanation to r 1 is new There were a number of decisions on the question whether a prior mortgagee was a necessary party in a suit to enforce a subsequent mortgage, a question the determination of which depended upon the meaning to he attached to the word "property" in sect 85 Was all that was involved in the puisne mortgagee's suit the equity of redemption, in which case the prior mortgagee not being interested therein need not be joined, or was the interest involved something more than the equity? in other words, the mortgaged property subject to the rights of the prior mortgagee, in which ease the latter was a necessary party This question has now been settled by the exclusion of the amhiguous word "property" in the body of the rule and the addition of the Explanation which removes the doubts which have arisen from the conflict of authorities on the point

In r 2 (c) the words " of so required " have been added before "retransfer" The special Committee stating that according to Mofusil practice a retransfer was not ordinarily required, and heing of opinion that this practice should not he altered It has been held that a Court passing a preliminary decree in a mortgage suit under this rule has no power to award interest at other than the contractual rate up to the time fixed for payment unless for some legal reason

it sees fit to interfere with the contract as to the rate of interest (3)

The same Committee as regards r 3 omitted a proposed provision as to the defendant prying money to the plaintiff, considering it better that in every case be should pay into Court Clauses (a) and (b) of the same rule are new, as are also the similar clauses in rr 5 and 8 R 5 (2) deals with an application by the plaintiff only The concluding words of sect 89, "and thereupon the defendant's right to redeem and the security shall both be extinguished,' have been omitted

Clause (3) of r 8 appears to he an addition The question which may be raised in connection with this rule, whether one suit for redemption has the effect of barring a second suit for the same rulef, has already been dealt with See notes to sect 9, O II r 2 sects 11-14, and Index

R 9 is new. It is a recognition of existing practice and remedies and is an obvious omission in the Transfer of Property Act

So also is r 11, which has been inserted in compliance with the suggestion of the Privy Council (1) This rule was in the Iransfer of Property Bill, but

Singh, 36 1 220 (1914), Rameswar Loca (1) Mam Su oh v Gokal Sunch 35 % 154 v Mahomid Mehdi -6 C 39 (1898) (1313)(4) Copt Naram Khanna t Babu Bans d

⁽a) Kun lan Lal : Fagir (land, 27 1 70 (1.04)

⁽³⁾ Lapuarta Kunuar e Slara Saram

har 32 I 1 123 (110.), Sundara Redduf : Sibbiah Koun lan 24 V L. J -8 (191-)-

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was omitted by the Select Committee in that Bill on the ground that it ought to find a place in the Civil Procedure Code

The third paragraph of r. 13 has been amended

2 In a suit for foreclosure, if the plaintiff succeeds, the Court Preliminary decree in shall pass a decree—

foreclosure-sut (a) ordering that an account be taken of
uhat will be due to the plaintiff for principal and
interest on the mortgage, and for his costs of the suit (if
any) awarded to him on the day next hereinafter

referred to, or

(b) declaring the amount so due at the date of such decree,

and directing-

- (e) that if the defendant pays into Court the amount so due on a day within six months from the date of declaring in Court the amount so due to be fixed by the Court, the plaintiff shall deliver up to the defendant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him, or, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the property,
 - (d) that, if such payment is not made on or before the day to be fixed by the Court, the defendant shall be debarred from all right to redeem the property
 - 3 (1) Where, on or before the day fixed, the defendant pays

 Final decree in foreinto Court the amount declared due as aforesund,
 losure-suit
 together with such subsequent costs as are men-

tioned in rule 10, the Court shall pass a decree—

(a) ordering the plainliff to deliver up the documents which under the terms of the preliminary decree he is bound

to deliver up,

and, if so required,

(b) ordering him to retransfer the mortgaged property as directed in the said decree.

and, also, if necessary,

(c) ordering him to put the defendant in possession of the

property.

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree.

that the defendant and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the defendant to put the plaintiff in possession of the property

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time time postpone the day fixed for such payment

(3) On the passing of a decree under sub rule (2) the debt secured by the mortgage shall be deemed to be Discharge of debt.

Clauses (a) and (b), sub rule (1) - See notes to r 1 ante The liansfer of Property Act did not contain any provision for the passing of a final decree in cases where payment was made in accordance with the terms of the picluminary decree This was an omission which has been supplied in the first clause of this rule, and of ir 5 and 8, post These provide for the passing of final decrees in such cases

Extension of time —As to appeal see O XLIII r 1 (o)

(1) In a suit for sale, if the plaintiff succeeds, the Court Preliminary decree in shall pass a decree to the effect mentioned in clauses (a), (b) and (c) of rule 3 and also direct suit for sale ing that, in default of the defendant paying as therein mentioned, the mortgaged property or a sufficient part thereof be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is declared due to the plaintiff as aforesaid, together with subsequent interest and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same

(2) In a suit for forcelosure, if the plaintiff succeeds and the Power to decree sale mortgage is not a mortgage by conditional sale, in foreclosure suit the Court and the conditional sale, the Court may, at the instance of the plaintiff or of any person interested either in the mortgage money or in the right of redemption, pass a like decree (in her of a decree for fore closure) on such terms as it thinks fit, including the deposit in Court

of a reasonable sum, fixed by the Court, to meet the expenses of sale and to sceure the performance of the terms

(1) Where on or before the day fixed the defendant pays into Court the amount declared due as aforesaid, together with such subsequent costs as are for sale mentioned in rule 10, the Court shall pass a decre-

(a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound

to deliver up,

and, if so required,

O 34, ir 6,7

(b) ordering him to retransfer the mortgaged property as directed in the said decree, and also, if necessary,

(c) ordering him to put the defendant in possession of the

monertu

(2) Where such payment is not so made, the Court shall, on application made in that behalf by the plaintiff, pass a decree that the mortgaged property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as is mentioned in rule 4.

Clauses (a) and (b), sub rule (1)—See notes to r. 1 and 3 ante. It is now provided by this rule that the application which follows a preliminary decree for sale is for a decree for sale (1). An application for a decree absolute for sale of a mortgage charge, under the terms of a consent decree which provided for satisfaction of the decretal debt by instalments, is an application under this order, and is governed by Art 181, Sched I of the Limitation Act, and must be made within three years from the accrual of the right to apply (2)

6 Where the net proceeds of any such sale are found to be Recovery of balance insufficient to pay the amount due to the plaintiff, if the balance is legally recoverable from the defendant otherwise than out of the property sold, the Count may pass a decree for such amount

In making a decree against the moitgagor personally under this rule, the Court may direct payment by instalments under O XX r 11 (3)

7. In a suit for redemption, if the plaintiff succeeds, the

Preliminary decree in Court shall pass a decree—
redemption suit (a) ordering that an account be taken of

uhat will be due to the defendant for principal and interest on the mortgage, and for his costs of the suit (if any) awarded to him on the day next hereinafter referred to, or

(b) declaring the amount so due at the date of such decree,

and direction of the amount so the at the date of such accrec, and directing—

(c) that, if the plaintiff pays into Court the amount so

due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff, or to such person as he appoints, all documents in his

(1913)

⁽¹⁾ Amlooh Chand Parrack t Sarat Chunder Mookerjee, 38 C 913 (1911), and see Tara Prosanna Bose t Admont Lhan,

⁽²⁾ Datto Atmaram v Shankar Dattatrya,
38 B 32 (1913)
(3) Bidhu Sudhury v Mahatabuddin, 16

⁴¹ C 418 (1913), and for Court fee on appeal (3) Budhu Sudhury v Mah Bagranji Lal t Mahabir Kunwar, 35 A 478 C W N 44 (1911)

possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the plaintiff free fram the martgage and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff in possession of the property, but

- (d) that, if such payment is not made on ar before the day to be fixed by the Caurt, the plaintiff shall (unless the mortgage is simple ar usufructuary) be debarred from all right to redeem ar (unless the mortgage is by conditional sale) that the mortgaged property be sold
- 8 (1) Where, on or before the day fixed, the plaintiff pays and decree in re into Court the amount declared due as afore semption suit said, together with such subsequent costs as are mentioned in rule 10, the Court shall pass a decree—

(a) ordering the defendant to deliver up the documents which under the terms of the preliminary decree he is bound

to deliver up,

and, if so required,

(b) ordering him to retrainfer the mortgaged property as directed in the said decree,

and also, if necessary,

(e) ordering him to put the plaintiff in possession of the

monert

(.2) Where such payment is not so made, and the mortgage is not simple or usuffuctuary, the Court shall, on application made in that behalf by the defendant, pass a decree that the plaintiff and all persons claiming through or under him be debarred from all right to redeem the mortgaged property and also, if necessary, ordering the plaintiff to put the defendant in possession of the property

(5) On the passing of a decree under subjule (4) the debt

secured by the mortgage shall be deemed to be discharged

(i) Where such payment is not so made, and the mortgage is not by conditional sale, the Court shall, on application made in that behalf by the defendant, pass a decree that the mortgaged property or a sufficient part thereof be sold and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of what is found due to the defendant, and that the balance (if any) be paid to the plaintiff or other persons entitled to receive the same

1 inst benku () 34, it 9-12

Provided that the Court may, upon good cause shown and upon such terms (if any) as it thinks fit, from time to time postpone the day fixed for payment.

Clauses (a) and (b), sub rule (1) —Where in a suit for redeinption of a mortgage, the plaintiff owing to a bona fide mistake paid into Court less than the sum due, it was held that under this rule the Court had power to extend the time limited for payment of the full decretal amount (1) See notes to rr 1 and 3,

Extension of time - is to appeal see O XLIII r 1 (0)

9 Notwithstanding anything hereinbefore contained, if it appears, upon taking the account referred to in rule. That nothing is due to the defendant or that he has been over paid a decree directing the defendant, if so required, and to pay to the plaintiff the amount which may be found due to him, and the plaintiff shall, if necessary, be

put in possession of the mortgaged property

Nothing found due —See notes to r 1 ante

- 10. In finally adjusting the amount to be paid to a mortgagee Costs of mortgagee in case of a forcelosure or sale or redemption, subsequent to decree the Court shall, unless the conduct of the mortgage has been such as to discrittle him to costs, add to the mortgagenous ysuch costs of suit as have been properly incurred by him since the decree for forcelosure or sale or redemption up to the time of actual payment
- Where property is mortgaged for successive debts to suclight of mesne mort gages to redeem and institute a suit to redeem the interests of the prior mortgagees and to foreclose the rights of those that are posterior to himself and of the mortgagor

Successive mortgages - See notes to r 1 ante

12 Where any property the sale of which is directed under sale of property subject to prior mortgage this Order is subject to a prior mortgage, the gage, direct that the property be sold free from the same, giving to such prior mortgage the same interest in the proceeds of the sale as he had in the property sold

⁽¹⁾ Het Singh v Tika Ram, 34 A 388 (1912), and see Kahan v Sadho Lal, 35 A 226 (2912)

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13. (1) Such proceeds shall be brought into Court and applied Application of pro as follows.—

first, in payment of all expenses incident to

the sale or properly incurred in any attempted sale secondly, in payment of whatever is due to the prior mortgagee on account of the prior mortgage, and of costs, properly

incurred in connection therewith.

thirdly, in payment of all interest due on account of the mortgage in consequence whereof the sale was directed, and of the costs of the suit in which the decree directing the sale was made,

fourthly, in payment of the principal money due on account of

that mortgage, and

lastly, the residue (if any) shall be paid to the person proving himself to be interested in the property sold, or if there are more such persons than one, then to such persons according

to their respective interests therein or upon their joint receipt

(3) Nothing in this rule or in rule 12 shall be deemed to affect the powers conferred by section 57 of the Transfer of Property Act, 188?

Prior mortgage -See notes tor 1 ante

14 (1) Where a mortgagec has obtained a decree for the suit for sale necessary payment of money in satisfaction of a claim for bringing mortgaged arising under the mortgage, he shall not be entitled to bring the mortgaged property to sale otherwise than by instituting a suit for sale in enforcement of the mortgage, and he may institute such suit notwibstanding anything contained in Order II, rule 2

(!) Nothing in sub rule (1) shall apply to any territories to which the Transfer of Property Act, 1882, has not been extended.

It has been said that this rule has merely effected a change of procedure in the manner in which mortgaged property must be realized in execution of money decrees (1)

Sunt for sale—The Code repeals seet 99 of the Transfer of Property Let In its place this rule has been enacted. The first part of that section provided that a mortgagee should not bring the mortgaged property to sale otherwise than by instituting a sunt under sect 67 of that Act. In so far as it procluded the mortgage from a llingthe mortgaged property under a judgment unconnected with the mortgage debt, it has been considered inextedior. It was beyond doubt competent to a mortgage to purchase the equity of redemp

⁽¹⁾ Hai Canga t Rajaram 35 B 419 664 (1511) Ashu t Behari 35 C 61 (1511), Alshart Rajar t Nath int, 13 C L J (1907)

TIRST SCRIP 0 34, r 15

tion from the mortgagor by an agreement subsequent to, and distinct from, the mortgage transaction There was no reason, therefore, why it should not be equally competent to him to have it sold in satisfaction of any claim which he might have against the mortgagor unconnected with the mortgage (1) This has accordingly been enacted Sect 99 spoke of "any claim whether arising under the mortgage or not" The present rule is limited to claims arising under the mortgage To this extent only the former provisions are retained. The Select Committee were also at one time of the opinion that seet 99, in so far as it precluded the mortgagee from selling the property under a judgment for the mortgage deht, served no useful purpose As to this they wrote understand that the provision was enacted to prevent mortgagees from suing their mortgagors on the deht as such, and in execution selling the mortgagor's interest in the property, we, however, think that no such provision was needed. seeing that under the law, as it stood prior to the Act, the Courts never allowed the sale of a hare equity of redemption under a judgment on the covenant" (2) It was, however subsequently considered that as the mortgagor would be deprived of the henefit of the period of redemption given him by a mortgage decree under the provisions of the Transfer of Property Act, unless the former provisions were maintained in respect of claims arising under the mortgage, the former restrictions should to this extent be retained in those territories to which that Act applied Where a usufructuary mortgaged who had not obtained possession brought a suit for possession and this was compromised and by consent a simple money decree was passed in his favour it was held that the decree being one passed on a compromise, he was not precluded from bringing the mortgaged property to sale in execution of it (3) Where usufructuary mort gagees obtained a decree for possession and costs and then in execution of the decree for costs applied for attachment of part of the property, it was held that this application was not barred by this rule (4) In a recent case where mortgagees stating that they had relinquished their claim under the mortgage, obtained a simple money decree, and when this was not satisfied proceeded to put their mortgage into Court and prayed for a decree for sale on it it was held that the former proceedings were not a bar to this suit (a)

All the provisions contained in this Order as to the sale or redemption of mortgaged property shall, so far as may be, apply to property subject to a charge within the meaning of section 100 of the Transfer of Property Act, 1882

⁽¹⁾ The Select Committee referred to Kluara mal e Dann 32 C 296 (1904) , La le v Reeve, 1902 1 C 461

⁽²⁾ The Select Committee referred to Syed Linam : Rajcoomer Doss, 23 W R. 187 (1875). Khiarajinal e Daim, 32 C. 290 (1904) Report of Scheet Committee, Feb 12, 1903

⁽³⁾ Ganesh Singh r Debi Singh, 32 4, 377 (1910) For limitation as regards payment

of interest by instalments, see Abdul Ahad r Wahtab Bibi 35 \ 378 (1913) For lon ta t on in case of usufructuary mortgant by conditional sale, see Bakhlawar Be am t Husami Khanem P C, 19 C L J 477

⁽⁴⁾ Haribana Lai e Sri Niyas Naik, 35 A. 518 (1913) dilinguishing kliarajmal t Daim, tupra

⁽⁵⁾ Indarpal Singh r Mews Lal, 30 1, 204

⁽¹⁹¹⁴⁾

ORDER XXXV.

Interpleader.

- 1. In every suit of interpleader the plaint shall, in addition Plaint in interpleader to the other statements necessary for plaints, sult. state-
 - (a) that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs,

(b) the claims made by the defendants severally, and

- (c) that there is no collusion between the plaintiff and any of the defendants
- Where the thing claimed is capable of being paid into Court or placed in the custody of the Court, thing claimed into Court. the plaintiff may be required to so pay or place it hefore he can be entitled to any order in the suit.
- Where any of the defendants in an interpleader suit is actually sung the plaintiff in respect of the Procedure where defendant is suing plaintiff subject-matter of such suit, the Court in which the suit against the plaintiff is pending shall, on being informed by the Court in which the interpleader-suit has been instituted, stay the proceedings as against him; and his costs in the suit so stayed may be provided for in such suit, but if, and in so far is, they are not provided for in that suit, they may be added to his costs incurred in the interpleader-smit
 - (1) At the first hearing the Court may-

(a) declare that the plaintiff is discharged Procedure at first hearing. from all hability to the defendants in respect of the thing claimed, award him his costs,

- and dismiss him from the suit; or (b) if it thinks that justice or convenience so require, retain
- ill parties until the final disposal of the sint

(2) Where the Court finds that the admissions of the parties or other evidence enable at to do so, it may adjudicate the fitle to the thing clumed.

- (3) Where the admissions of the parties do not enable the Court so to adjudicate, it may direct—
 - (a) that an issue or issues between the parties be framed and tried, and
 - (b) that any claimant be made a plaintiff in lieu of or in addition to the original plaintiff,

and shall proceed to try the suit in the ordinary manner.

5. Nothing in this Order shall be deemed to enable agents to sue their principals, or tenants to sue their principals, or tenants to sue their placed-study.

Landlords, for the purpose of compelling them to interplead with any persons other than persons making claim through such principals or landlords.

Illu trations

(a) A dejosits a box of jewels with B as his igent. C alleges that the jewels were wrongfully obtained from him by A and claims them from B. B.

cannot institute an interpleader suit against A and C

(b) A deposits a hox of lowels with B as his agent. He this is writes to C for the purpose of making the lowels a security for a debt due from himself to C. A afterwards alleges that C a debt is satisfied, and C alleges the contrary Both claim the lowels from B. B may institute an interpleader suit against A and C (1).

6. Where the suit is properly instituted the Court may is coil.

Charge for plaintin's provide for the costs of the original plaintiff by giving him a charge on the thing claimed or in some other effectual way.

Interpleader—Prior to the Euglish Judicature Acts, the right of interpleader at Common Law thildered from that in Equity Common Law unterpleader but (1.6.2 Will 4 c.58) and the C. L.P. Act of 1860 (2). The language of sects 470 and 471 of the last Code was almost identical with that of the first mentioned statute, and the Euglish rulings, so far as the two enactimats are the same applied (3). The Euglish Acts with the exception of sect. 17 of the C. L.P. Act. 1860 are now repealed, and the right of interpleader and practice in interpleader proceedings are regulated in England evaluatively by O. 57. As to the form of an interpleader suit see case last etted. The prohibition in r. 5 forbidding a tenant to bring a suit to compel his landlord to interplead with another person not claiming through

Shelly Bonnerjee v Raj Chandra, 37
 552 (1910)

⁽²⁾ Annual Practice, O 57

⁽³⁾ Bombay Baroda Railway v Sassoon, 18 B 231, 235 (1893) As to the earlier

English decisions passed before O 57 came into force see Daniell's Ch Pr, and Day's C L P Acts. As to interpleader generally,

sce Seton, 509-514 , Chitty, Arch., 1354-1377

him does not apply where the title of the landlord to grant the lease is not dis puted, but it is alleged by such other person that the landlord only acted as trustee in granting such lease (1) In execution of a decree against B, the halliff 1 seized certain goods, which were released on C paying under protest the sum mentioned in the warrant A paid the money into the office Held, that C sremedy was not by interpleading but suing for money had and received (2) An interpleader suit is not improperly constituted merely because one of the defendants does not claim the whole of the subject matter (3) An applicant may apply for relief before an action is commenced against him. In the case cited, (4) the plaintiffs sued, and were held to have properly sued, for an injunction restraining the defendants from suing them The former section spoke of a person whose only interest was that of a stakeholder. The phrase has been altered but the meaning remains the same R 3 provides for a stay where the stakeholder has been actually sued. In this connection, however, the provise to sect 88 is to be borne in mind R 1 requires that a person constituting an interpleader suit should have no interest otherwise than as a mere stakeholder, that is no interest other than for charges and costs. A lien in respect of freight and charges is allowable (5) And personal relief may be sought by way of an injunction restraining the defendants from suing the plaintiff (6) There must be no collusion This term does not entail anything inorally wrong Where plaintiffs had entered into an agreement with the stakeholders by which they hound themselves to defeat the claim of the other claimants to the fund, it was held that there was collusion within the rule (7) Under r 2, the subject of dispute may be required to be paid into or placed in the custody of the Court In the case cited (8) the plamtiffs had not done so and it was therefore held that their charge for wharfage and demuriage could not be allowed. There is an appeal from orders in interpleader suits under rr 3, 4 6 Sec O XLIII (9) As a general rule, a plaintiff in a properly instituted interpleader suit is entitled to his costs In such case he is entitled to a hen for his costs on the fund, and is not forced to take his chance of getting them from the defendant, against whom the Court decides (10) An interpleader suit with a prayer for declaration of the titles of the several acts of defendants in the disputed land by the tenant against the landlords in whose favour he has executed separate Kabulyats is not maintamable (11)

(July (1310)

⁽¹⁾ Orr v Chidambaram 33 M 220 (1909)

⁽²⁾ Cohen v Mullick, 1 Gasper, 139

⁽³⁾ Secretary of State v Mir Muhammad, 1 M H. C R 360 (1863)

⁽⁴⁾ Bombay Baroda Railway t Sassoon, supra and see O J7 r 1 (a) and notes in

⁽⁵⁾ Bombay Baroda Railway : Sassoon, 18 B 231 (18.3)

^{(6) 1}b, at p -3.

⁽⁷⁾ Murrieta t South American Co 62

¹ J Q B 333

⁽⁸⁾ Bornbay Baroda Railway : Sessoon

⁽⁹⁾ An adjudication upon the claims of defendants in an interplicader suit is a dicric and appealable under section 96 Maharaj Singh v Chittar Mal 30 A 22 (1907) And an order diamissing such a suit is a decree offer v Chitambaram, 33 M 2.0 (1904)

⁽¹⁰⁾ Secretary of State v. Mir Muharima I, I.M. H. C.R. J. O. 301 (1863) and see Boin Liy Baroda Railvay v. Sassoon. 18 B. 31

⁽¹⁸³³⁾ (11) Shelly Bonnerpo t 1 aj Chandra 37

ORDER XXXVI.

Special Case.

1. (1) Parties claiming to be interested in the decision is power to state ease for court's opinion.

of any question of fact or law may enter into court's opinion.

an agreement in writing stating such question in the form of a case for the opinion of the Court, and providing that, upon the finding of the Court with respect to such question,—

(a) a snm of money fixed by the parties of to be determined by the Court shall be paid by one of the parties to

the other of them; or

(b) some property, moveable or immoveable, specified in the agreement, shall be dehvered by one of the parties to the other of them, or

(c) one or more of the parties shall do, or refram from doing, some other particular act specified in the agreement.

- (2) Every case stated under this rule shall be divided into consecutively numbered paragraphs, and shall concessly state such facts and specify such documents as may be necessary to enable the Court to decide the question raised thereby.
- 2. Where the agreement is for the delivery of any property, is where value of subjection or for the doing, or the reframing from doing, matter must be stated.

 property to be delivered, or to which the act specified has reference, shall he stated in the agreement.
- 3. (1) The agreement, if framed in accordance with the is Agreement to be said and registered as suit, the Court which would have jurisdiction to entertain a suit, the amount or value of the subject-matter of which is the same as the amount or value of the subject-matter of the agreement.

(2) The agreement, when so filed, shall be numbered and registered as a suit between one or more of the parties claiming to be interested as plaintiff or plaintiffs, and the other or the others

of them as detendant or defendants, and notice shall be given to ill the parties to the agreement, other than the party or parties by whom it was presented.

- 4. Where the agreement has been filed, the parties to it shall be subject to the jurisdiction of the Court's jurisdiction.

 Court and shall be bound by the statements
- 5. (1) The case shall be set down for hearing as a suit

 Hearing and disposal of instituted in the ordinary manner, and the
 case. provisions of this Code shall apply to such
 suit so far as the same are applicable.

(2) Where the Court is satisfied, after examination of the

parties, or after taking such ovidence as it thinks fit,-

(a) that the agreement was duly executed by them,

(b) that they have a bona fide interest in the question stated therein, and

(c) that the same is fit to be decided, it shall proceed to pronounce judgment thereon, in the same way as in an ordinary suit, and upon the judgment so pronounced a decree shall follow.

Proceedings on agreement —As O XIV ir 6, 7, ante, deal with the stiting by consent of an issue in a suit, upon the finding of which an agreement becomes absolute, so the present rules deal with the power of parties to state a case for the Court's opinion which shall be set down for hearing as a suit (1)

Estina Bibi t Advocate General, 6 B 42

⁽¹⁾ Suc 22 521, Act VIII of 1893, (1881), Nombey Bernald Co v Doubly Lar notes in Annual Practice to O 24, and the following cases stated under this section 17 C 786 (1890) Kraal v Whymper,

ORDER XXXVII.

Summary Procedure on Negotiable Instruments.

1. This Order shall apply only to-

Application of Order

(a) the High Courts of Judicature at Fort (
William, Madras and Bombay,

(b) the Chief Court of Lower Burma;

(c) the Court of the Judicial Commissioner of Sind; and

(d) any other Court to which sections 532 to 537 of the Code of Civil Procedure, 1882, have been already applied.

Small Cause Courts.—As Chapter AXXIX of the list Code has been transferred to the rules clause (c) of sect 533 of that Code has not been reproduced, as its appropriate place will be in rules under the Presidency Small Cause Courts Act 1862

2 (1) All states upon hills of exchange, hundrs or proinstitution of summary
suits upon bills of extange, etc.

the summons shall he in the form No & in Appendix B or in

such other form as may be from time to time presented.

(2) In any case m which the plant and summons are in such forms, respectively, the defendant shall not appear or defend the suit unless he obtains leave from a Judge as hereinafter provided so to appear and defend, and, in default of his obtaining such leave or of his appearance and defence in pursuance thereof, the allegations in the plaint shall be deemed to be admitted, and the plaintiff shall he entitled to a deeree for any sum not exceeding the sum mentioned in the summons, together with interest at the rate specified (if any) to the date of the deeree, and such sum for costs as may be prescribed, unless the plaintiff claims more than such fixed sum, in which ease the costs shall be ascertained in the ordinary way, and such deeree may be executed forthwith.

Scope of rules —In 1885 was passed the English Summary Procedure on Bills of Exchange Act (18 & 19 Vict c 67) Subsequently to the passing

of the Code of 1859, the Indian Bills of Exchange Act (V of 1866) was passed The words of the Indian Act were slightly larger than those of the English Act , (1) but in spirit the two Acts were piecisely the same (2) The Code of 1877 con solidated the provisions of the Code of 1859 and of Act V of 1866 from sect 2, of which Act sect 532 in the last Code was taken (3) The intention of the Act was that where there was no pretence for a defence the party sued should not be allowed to defend, and the plaintiff should have judgment as of course, but that if the defendant bad a real, though it may not be a good, defence, he should have leave to appear and to set it up (4) The effect of the provision therefore is, that where leave is refused, the plaintiff gets a decico on his allegations merely, unsupported by evidence, on proof of service of summons and on the usual certificate of the Registrar that no leave to defend has been obtained (5) If leave is granted, the suit proceeds as one instituted in the ordinary course, evidence being taken on both sides

"Suits upon bills of exchange," etc -The rule is confined to suits on negotiable instruments (6) and the plaintiff is entitled to claim by his summons and obtain by his decree whatever sum, principal, and interest is, on the legal construction of the instrument, demandable (7) As, however, abeady stated, the plaintiff, when no leave to defend is grauted, gets his decree upon his simple statement in the plaint unsupported by any evidence. It was accordingly formerly held, (8) that it was not the intention of the Legislature that a summons served in the form prescribed by the former section should have the effect of enabling the plaintiff's statement of the fact, in his petition to prevail without evidence The section it was considered, applied only to those simple cases in which the negotiable instrument itself, together with mere lapse of time, was sufficient to establish for the plaintiff a prim i facie right to recover There fore the section was held not to apply where a promissory note was payable by instalments, and contained a stipulation that on default in payment of the first instillment the whole amount was to become due, and a suit was brought to recover the whole amount on default in payment of the first instalment, as in such ease the pluntiff was obliged to allege the occurrence of another fact besides the lapse of time since the making of the bill, viz that the first instalment had not been paid, which fact was necessary according to the terms of the bill in order to complete the plaintiff slight to sue (9) The Explanation to the section of the last Code overruled this decision and declared that a suit

⁽¹⁾ The let is now repealed in the High Court (O II r 6), but is in operation in County Courts In the former Court the pro ecdure is by specially en lors d writ (O 111 r 6, O XIV r 1), which may be had in suits other than those on negotiable instru rients to which the procedure is confined un ler the Code

⁽²⁾ Voidintray i Narayan Su ah 6 B L R

¹¹ pc 61, 60 (1871)

⁽³⁾ See Lu km las Vithaldas : 11rahua Osman 2 B at || 648 643 (1978)

⁽⁴⁾ Youlitzoy'i Narayan Sigh sapra

citing Bramwell, B , in Agra and Masterman & Bank v Laighton, 2 L R Ex 56

⁽⁵⁾ See Remfry v Shillingford, 1 C 130 at

p. 131 (1876) (b) S o Bank of Bengal : Kartick Chund r

¹⁶ C 504 (1859) Last India Banl : Vulle Goolwany, 1 Ind Jur. \ 5 -47 (1816)

⁽⁷⁾ Du Souza t Ranguan 6 M H C B

^{(1871) 7}س

⁽S) Reinfry : Shill refort 1 C 130 13-(15-6)

⁽J) 1b

on a negotiable instrument was not limited to such cases. Thus, had the ease eited occurred after the enactment of the Explanation, a decree would have been gruted (1). The last mentioned case appeared, however, to throw doubt on the point, and with a view to clear it up the following amendments were succested.—

"The provisions of this rule shall not be deemed to be inapplicable to a suit merely because the cause of action includes facts which, if not admitted by the defendant,

would have to be proved by the plaintiff '

Illustrations

(a) A sucs B upon a promissory note bearing an endorsement of payment which has been cancelled. This section is not mapplicable merely because A must prove that the note was endorsed by madeertence, but that payment was not made and the endorsement cancelled in consequence.

(b) A executes, in favour of B, a promissory note for Rs 1,000 payable in two equal instalments on the 1st July and 1st September, respectively with a stipulation that, in default of payment of the first instalment, the whole amount shall become immediately payable. On the 13th July, B sucs A for the whole amount. This section is not inapplicable merely because B must allege and prove that the first instalment was not paid on the 1st July.

As regards, however, the proposed amendment, the Special Committee reported that the explanation to sect 533 of the last Code was inserted to negative the effect of the decision in 1 Cal 130 but its meaning as it stood was obscure. They therefore deleted the explanation and added the words italicized in the body of the rule, "the allegations in the plaint shall be deemed to be admitted "which will remove the doubts at which the explanation was aimed. Suits under this Order must be brought within six months from the time the instrument sued on becomes due and payable (2)

Summons—The plaint is in the ordinary form but as evidence is not receivable, particular care must be taken to see that all the facts showing how the cause of action arose are stated in the plaint (3). The summons, however either follows the Form in the Schedule, or is in such other form as the High Court may from time to time presente (See notes to next rule). After the usual return of service and the expiration of the period mentioned in the summons an order of Court for a decree should be obtained (4). Quarre—whether the Court has power to grant an extension of time if an application for such extension be made hefore the time fixed by the summons has expired. But the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time (5). But see now seet 148 and notes to next rule. The plaintiff is entitled to claim by his summons whatever sum,

3 B L R, O C 146 (1863)

This view of the case was not con sidered in Bhupati Ram t Sourendra Mohun, 30 C 446 (1903) As to the actual point decided, tife 204

⁽⁴⁾ Schiller t Marker, I Ind Jur, N S 283 (1866) (5) Quazie Mahinudar Rohman t Sarat

⁽²⁾ Limitation Act, 1rt. 5

Chandra, 5 C W A 259 (1900)

⁽³⁾ Chartered Mercantile Bank : Seconde,

principal, or interest is, on the legal construction of the instrument, demandable, though as to interest beyond the scope of the instrument the question is a different one, and out of the scope of the Act (1). The rule, however, says that the plaintiff is entitled to a decree for a sum not exceeding that mentioned in the summons, together with interest at the rate specified (if any). Where a suit has been instituted under these provisions, which was held to be not maintain able under them, a fresh summons under the ordinary procedure may be ordered (2)

Leave to defend -See notes to next rule

Payment into Court -See notes to next rule

Decree —In a suit against the drawer, acceptor, and inderser, a decree containing a condition exempting the indoser from hability until the plaintiff has exhausted his remedies against the drawer and acceptor is illegal (3)

3. (1) The Court shall, upon application by the defendant, need on ments to have leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to prove consideration, or such other facts as the Court may deem sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing and recording issues or otherwise as the Court thinks fit

Leave to defend —Applications for leave to appear and to defend a sunt must, according to the Limitation Act, be made within ten days from the date when the summons was served (4) It has been held, however, that the Court, on granting leave to issue a plaint under these provisions, may fix a reasonable time, having regard to the residence of the defendant, within which the latter may apply for leave to defend, and that the ten days presented hy the Form was not an unalterable limit (5) In the last cited case twenty eight days was

(3) Bank of Bengal v Kartick Chunder

Roy, 16 C 804 (1889)

(4) Limitation Act, Art 159
(5) An extension of time may be nicessary [see Chandrakant Roy v Pogos, 3 B L. R
O C 83 (1890), the headnote of which is meetrict, Quazie Mahmudar t barat Chandra, 5 C W N 2.5 (1900), and see Grobe Palmer, 1 Ind Jur, N S 395(1800), that guare whether such extension is consistent with the Limitation Act, under with application for leave to appear must be million to within the time mentioned in the surmons, but within ten days of the date of its service. See S. 118, and

⁽¹⁾ Do Souza t Rangaian, 6 M. H. C R 2.07 (1871) [in this case the Registrar had refused to insert a claim for interest in the summons because the note sued on did not bear interest on the face of it? In Bhupati Ram i Sourindra Mohun, 30 C 446 (1903), 7 C W N 13, the case was held not to fall within the section, as no interest was specified in the note, and the claim for it was on an agreement apart from the note. The suit a parently was on two causes of action—the note and a separate agreement. In the case Riemfry is Shillingfort, 1 C 130 (1876), referred to, the stip dation in case of default was contained in the note it if

⁽⁴⁾ Remfry v Shilin oford, I C 139, 132 (1870), B¹ upati Ram r Sourcadra Mohun,

fixed by the summons itself as the time within which the defendant might apply for leave. But where the time fixed by the summons itself is ten days, though it has been a question of doubt whether the Court has power to grant an extension of time if an application for such extension be mide before the time fixed by the summons has expired, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend his expired, to extend the time (1) But see now notes to last rule. It has been held that in an application for leave to appear and defend, the defendant cannot go into the question whether the summons was served on the date shown by the sheriff's return or not at all (2).

not at all (2) When there is no pretence for a defence the party sned should not be allowed to defend, and the plaintiff should have judgment as of course, but if the defendant has a real (it is not necessary to say a good) defence, he should have leave to appear and set it up. As eases, however, sometimes occur where an apparently real defence is shown, but its sincerity is doubtful, there the defendant is let in to defend, only on the terms of his bringing the money into Court (3) It was held under the English Act that it was not necessary that there should be a defence on the merits, and that if the defendant appears and discloses any defence, legal or equitable, he will be allowed to appear and defend (1) In a summary suit, if a defendant has been arrested before judgment and claims compensation under sect 95, he is entitled to apply for leave to defend, and if n prima facie case is made out, leave should be given (5) Where there is n reason to doubt the bone fides of the defence, the condition of paying the money into Court, or giving security, will be imposed (6) In giving leave to defend, the Court has a discretion to order security for costs, not only where there is a doubt as to the bona fides of the defence, but also where it appears unnecessary, though allowable (7) If the plaintiff has not been heard at first against the defendant's application, he will be allowed to apply to have the leave resemded (8) Where n conditional order is passed, but the condition is not performed, the order is a nullity, and subsequent steps to set it aside are unnecessary (9)

4. After deeree the Court may, under special erreum-is may to set aside stances, set aside the deeree, and if necessary stay or set aside execution, and may give leave to the defendant to appear to the summons and to defend the suit, if it seems reasonable to the Court so to do, and on such terms as the Court thinks fit

⁽¹⁾ Quazio Mahmudar Rohman v Sarat Chandra, 5 C W N 259 (1900)

⁽²⁾ Madhu Lall v Woopendranaram, 23 C 573 (1896), a somewhat peculiar case

⁽³⁾ Vonlintzgy v Narayan Singh, 6 B L R App. 64 (1871)

⁽⁴⁾ Casella v Darton, L R 8 C P 100 In Simon v Halum, 19 M 368 (1890), leave to defend was refused, as it was held that the collateral agreement set up was no answer to the suit on the note

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⁽⁵⁾ Roulet v Fetterle, 18 B 717 (1894) (6) Vonlintzgy v Narayan Singh, 6 B L R

App 64 (1871) In Ram Lal v Haran Chan dra, 3 B L R, O C J 130 (1869), leave was given on the terms of bringing the money into Court

⁽⁷⁾ Vonlintzgy v Narayan Singh, supra

⁽⁹⁾ Gourdas Mistry v Hewitt, Fulton, 18 (1845).

principal, or interest is, ou the legal construction of the instrument, demandable, though as to interest beyond the scope of the instrument the question is a different one, and out of the scope of the Act (1). The rule, however, says that the plaintiff is entitled to a decree for a sum not exceeding that mentioned in the summons, together with interest at the rate specified (if any). Where a suit has been instituted under these provisions, which was held to be not maintain able under them, a fresh summons under the ordinary procedure may be ordered (2).

Leave to defend -See notes to next rule

Payment into Court -See notes to next rule

Decree —In a suit against the drawer, acceptor, and indorser, a decree containing a condition exempting the indorser from liability until the plaintiff has exhausted his remedies against the drawer and acceptor is illegal (3)

3 (1) The Court shall, upon application by the defendant, person ments to have leave to appear and to defend the suit, upon affidavits which disclose such facts as would make it incumbent on the holder to sufficient to support the application.

(2) Leave to defend may be given unconditionally or subject to such terms as to payment into Court, giving security, framing

and recording issues or otherwise as the Court thinks fit.

Leave to defend —Applications for leave to appear and to defend a suit must, according to the Limitation Act, be made within ten days from the date when the summons was served (4) It has been held, however, that the Court on granting leave to issue a plaint under these provisions, may fix a reasonable time, having regard to the residence of the defendant, within which the latter may apply for leave to defend, and that the ten days prescribed by the Form was not an unalterable limit (5) In the last cited case twenty eight days was

Roy, 16 C 804 (1889) (4) Lamitation Act, Art 159

⁽¹⁾ De Soura v Rangatan, 6 M H. C R 257 (1871) [in this case the Registrar had refused to insert a claim for interest in the summons because the note sued on did not bear interest on the face of it] In Bhupati Ram i Sourendra Mohun, 30 C 446 (1903), 7 C W N 13, the case was held not to fall within the section, as no interest was specified in the note, and the claim for it was on an agreement apart from the note. The suit apparently was on two causes of action—the note and a separate agreement. In the case Rumfry v Shillingford, 1 C 130 (1876), referred to, the stipulation in case of default was contained in the note its lf.

⁽²⁾ Remfry v Shillingford, I C 130, 132 (1870), Bhupati Rain v Sourcadra Mohun,

supra -(3) Bank of Bengal v Kartick Chunder

⁽⁵⁾ An extension of time may be necessary [see Chandrakant Roy ν Pegose, 3 B L R O C 83 (1899), the headnote of which is necessary to the second of the consecutive second Chandra, 5 C W N 259 (1900), and see Grob ν Palmor, 1 Ind Jur, N S 395 (1866)]

mons, but within ten days of the date of its service. See s 118, ante

fixed by the summons itself as the time within which the defendant might apply for leave. But where the time fixed by the summons itself is ten days, though it has been a question of doubt whether the Court has power to grant an extension of time if an application for such extension he made before the time fixed by the summons has expired, the Court has no power, after the time fixed by the summons for obtaining leave to appear and defend has expired, to extend the time (1). But see now notes to last rule. It has been held that in an application for leave to appear and defend, the defendant cannot go into the question whether the summons was served on the date shown by the sheriff's return or not at all (2).

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⁽¹⁾ Quazie Mahmudar Rohman r Sarat Chandra, 5 C W N 259 (1900) (2) Madhu Lall t Woopendranarain, 23 C

^{573 (1896)} a somewhat peculiar case

⁽³⁾ Vonlintrgy t \arayan Singh, 6 B L.R. App. 64 (1871)

⁽⁴⁾ Casella r Darton, L. R s C. P 100 In Simon r Hakim, 19 M 368 (1996) I-are to defend was refused, as it was held that the collateral agreement set up was no answer to the suit on the note.

⁽⁵⁾ Roulet v Fetterle, 18 B 717 (1894)

⁽⁶⁾ Vonlintrgy v Narayan Singh, 6 B L R App 64 (1871) In Itam Lal v Haran Chan dra, 3 B L. R O C J 130 (1869) leave was given on the terms of bringing the money

into Court.
(7) Vonlintzo) v Narayan Singh, sujeu

⁽⁹⁾ Gourdas Mistry v Hewitt, Pulton, 18

^{(1645).}

"Special circumstances"—The Court will determine in each ease what these are. The point is, is it reasonable that the deerce should be set aside? Under this rule, though a defendant has not come in within the time required, yet he may appear and make his defence on the decree against him being set aside (1) The question as to what took place upon the occasion of the service of summons by the Sheriff is one which may properly be taken into consideration on an application under this section to set aside the decree (2) But irregular service of summons on two out of three defendants to an action brought on a joint promissory note, does not give the defendant properly served any ground to question the decree passed against him (3)

- In any proceeding under this Order the Court may order the bill, hundi or note on which the Power to order bill, etc, to be deposited with suit is founded to be forthwith deposited officer of Court. with an officer of the Court, and may further order that all proceedings shall be stayed until the plaintiff gives security for the costs thereof
- The holder of every dishonoured bill of exchange or promissory note shall have the same remedies Recovery of cost of for the recovery of the expenses meurred in noting non-acceptance of dishonoured bill or note. noting the same for non acceptance or nonpayment, or otherwise, by reason of such dishonour, as he has under this Order for the recovery of the amount of such bill or note
 - 7. Save as provided by this Order, the procedure in suits hereunder shall be the same as the procedure Procedure in suits. m suits instituted in the ordinary manner

⁽¹⁾ Luckmidas : Ebrahim, 2 B 644 647 C 573, 575 (1896) (3) Ewing & Co v Gosaidas, J B L R. (1878)

⁽²⁾ Madhu Lall v Woopendranaram 23 App 7 (1869)

ORDER XXXVIII

Arrest and Attachment before Judament

treest before sudament

Where at any stage of a suit, other than a suit of the is 1 nature referred to in section 16, clauses (a) Where defendant may be called upon to furnish to (d), the Court is satisfied, by affidavit or security for appearance otherwise .-

(a) that the defendant, with intent to delay the plaintiff, or to avoid any process of the Court or to obstruct or delay the execution of any decree that may be passed against him,-

(1) has absconded or left the local limits of the jurisdiction of the Court, or

(11) is about to abscond or leave the local limits of the

nurisdiction of the Court, or

(111) has disposed of or removed from the local limits of the jurisdiction of the Court bis property or any part thereof, or

(b) that the defendant is about to leave British India under circumstances affording reasonable probability that the plaintiff will or may thereby be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit.

the Court may issue a warrant to arrest the defendant and hring [s him before the Court to show cause why he should not furnish

security for his appearance

Provided that the defendant shall not be arrested if he pays to the officer entrusted with the execution of the warrant any sum specified in the narrant as sufficient to satisfy the plaintiff's claim, and such sum shall be held in deposit by the Court until the suit is disposed of or until the further order of the Court

(1) Where the defendant fails to show such cause the (s 4 Court shall order him either to deposit in Court Security money or other property sufficient to answer

the claim against him, or to furnish security for his appearance at any time when called upon while the suit is pending and until satisfaction of any decree that may be passed against him in the suit, or make such order as it thinks fit in regard to the sum which may have been paid by the defendant under the proviso to the last preceding rule.

(2) Every surety for the appearance of a defendant shall bind himself, in default of such appearance, to pay any sum of money which the defendant may be ordered to pay in the suit

Application for security -These rules amalgamate sects 477, 478, 179 of the last Code The object of the process in this and the following rules is to have some security for the execution of the decree when it is passed, and that the person of the defendant will be within reach at that time however, not entitled, merely because he has a just demand against his debtor, to arrest him before judgment, (1) nor can a debtor he arrested simply to secure easy execution of the decree should one be obtained (2) The procedure is only intended to secure to a creditor his rights when it is shown that a dehtor with one or other of the intentions (3) mentioned in r 1, has done or is about to do the acts montioned in clauses (1), (11), (111), or is about to leave British India (4) under the circumstances stated And if a creditor procures the arrest of his dehtor without reasonable or probable cause, he renders himself liable to a suit for damages or to summary proceedings under sect 95 It is not the principles governing the English writ ne excat regno which govern the matter, but the words of the Code (5)

Warrant -For a form of warrant of arrest hefore judgment, see First Schedule, Appendix F , No I

Order to give security .- In showing cause it may he shown that the suit is not a bona fide one, that the defendant has not done or is not about to do the acts charged in clauses (i), (ii), (iii) of r 1, or that he is not about to leave India, or that, if he is about to leave, none of the circumstances mentioned exist, or that even if the suit is bona fide the institution of it has been vexatiously delayed till the defendant is about to depart from India in order to embarrass or coerce him (6) It has been held that the word "claim" in sect 479 of the last Code meant the amount of money claimed, and that the security required to be given by a defendant who is arrested before judgment did not include security for costs (7)

R 278 (1870)

⁽¹⁾ Goutsère : Charriol, 1 A H C R 91 (1869)

⁽²⁾ Kelaram Majee v Naram Dass, 13 W

⁽³⁾ Teenarain t Ram Rutton, 2 Hyde, 181

^{(1864),} Goutière t Charriol, supra (4) Agra Bank v Minto, 1 Ind Jur. N S

^{265 (1866) ,} Goutiere v Robert, 2 A H C R 353 358 (1876), Harrison t Dickson, 1

Bouln, 33 Probodh Chunder v Dowey, 14 C

^{695 (1887)} (5) Probodh Chunder v Dowey, supra

⁽⁶⁾ See Spenco s Hotel : Anderson, I Ind

Jur. N S 204 (1866) (7) Reinhold v Holloway, Suit 655 of

^{1877,} November 26, cited in O Kincaly,

C P C, notes to this section

1185

FIRST SCHED ARREST AND ATTACHMENT BEFORE JUDGMENT. O 38, rr 3,4

(1) A surety for the appearance of a defendant may at any time apply to the Court in which he Procedure on applicabecame such surety to be discharged from his tion by surety to be discharged. obligation.

(2) On such application being made, the Court shall summon the defendant to appear or, if it thinks fit, may issue a warrant

for his arrest in the first instance

(3) On the appearance of the defendant in pursuance of the summons or warrant, or on his voluntary surrender, the Court shall direct the surety to be discharged from his obligation, and shall call upon the defendant to find fresh security.

Where the defendant fails to comply with any order under rule ? or rule 3, the Court may commit Procedure where dehim to the civil prison until the decision of fendant falls to furnish security or find fresh the suit or, where a decree is passed against the security. defendant, until the decree has been satisfied

Provided that no person shall be detained in prison under this rule in any case for a longer period than six months, nor for a longer period than six weeks when the amount or value of

the subject matter of the suit does not exceed fifty rupees Provided also that no person shall be detained in prison

under this rule after he has complied with such order

Failure to give security -It is of course only in the event of a defendant neither furnishing security nor offering a sufficient deposit that he can be committed to custody (1) When committed the Court can secure the defendant's appearance by a warrant to the jailor (2) The defendant is to be committed until the suit is decided or where a decree is passed against him until the decree has been executed The words in the former Code were "until execution of the decree ' These last words were somewhat obscure It was and that they could not mean until steps were taken to execute the decree as such a construction would put an immense power of oppression into the hands of the judgment creditor. It was held therefore that execution meant contlete executionthat is until possession was given to the plaintiff of what was ordered by the An arrest therefore under this section became after decree an irrest until the decree was satisfied or wholly executed. It therefore became subject to the limitation 18 to time imposed by sect 312 (now 58), which forbade extension of such arrest beyond the period of six months (3). The amen liment gives effect to this view

⁽¹⁾ Kelaram Major v Naram Das 13 W R. 278 (1870) (2) 1b

⁽³⁾ Ghanashamdas : Joharimull 7 B. 431 (1883) In Le halla Chand, I Ind. Jur. N 5. 125 (1 × 1), it was held that after decree the

nommitment becomes one in execution, and that after judgm at the left r must have substance money or he released. A 452 of the last (ade however provided for subswitcher sauties

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Attachment before judgment

(1) Where, at any stage of a suit, the Court is satisfied, by affidavit or otherwise, that the defendant, Where defendant may with intent to obstruct or delay the execution be called upon to furnish of any deeree that may be passed against

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security for production of property

(a) is about to dispose of the whole or any part of his property, or

(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court,

I the Court may direct the defendant within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show cause why he should not furnish security

(2) The plaintiff shall, unless the Court otherwise directs, I specify the property required to be attached and the estimated

value thereof

(3) The Court may also in the order direct the conditional lattrchment of the whole or any portion of the property so specified

Scope of rule -This rule corresponds with sects 81 and 83 of Act \ III of 1859 and amalgamates sects 183 and 184 of the last Code Clause (b) of the former sect 483 has been omitted. The main object of an attachment before judgment is to enable the plaintiff to realize the amount of the decree supposing a decree is eventually made from the defendant's property (1) Though an attachment I efore judgment is directed by r 7 to le made in the same manner as attachment in execution, the objects for which these two sorts of attachment are made are entirely different. An attachment prior to decree is not an attachment for the enforcement of the decree hut it is a step taken merely for preventing the debtor from delaying or obstructing such enforce ment when the decree subsequently passed is sought to be executed (2) An attachment after decree is an attachment made for the immediate purpose of carrying the decree into execution and it presupposes an application on the

⁽¹⁾ Ganu Singh v Jang: Lal, 26 C 531 533 (1899) by preventing alienation or removal, but the process is inoperative to charge the property in the subject of the attachment Sarkies v Bundhoo Baco 1 A H (R 172 185 (1569) and see Gamble v Bl h r 2 B H C R at p 100 (1560) er

create a hen Sarlies : Bindloo Bace I A H C R at pp 184 185 (1865) Sec notes to

r f 101 (2) Sri Rammanik v T ncown Rat 4 B I R 63 67 68, 1 B (1869) Busrm t Katty syam 38 C 448 (1911) 15 C W

part of the decree holder to have his decree executed (1) The scope and object of this and the following rules are merely to protect a plaintiff against loss arising from the defendant making away with his property pending the suit They do not ensure to the plaintiff payment, in any event, of whatever may be They do so only so far as that is ensured by preventing the decreed to him defendant making away with property (2)

The application -The jurisdiction given to Civil Courts to attach before judgment should be exercised with great discretion, and no Court should grant such an attachment on light grounds or unless it is perfectly satisfied by trust worthy evidence that the defendant is about to dispose of his property or to remove it from the jurisdiction of the Court (3) In all applications for attach ment before judgment, there must be uberrima fides on the part of the plaintiff, and where the most perfect good faith is wanting the application should be rejected (4) The application can be made at any stage of the suit, but can be entertained only so long as the suit is pending (5) The facts mentioned in clauses (o) and (b) must bave been done with the intent mentioned in the first paragraph, namely, to obstruct or delay the execution of any decree which might be passed (6) Clause (a) says, is "about to dispose of etc., therefore the section does not apply where the defendant has actually parted with the property (7) The section does not refer exclusively to moveable property but applies to immoveable property also (8) Where it was contended that the words in sect 484 of the last Code, " produce and place at the disposal of the Court ' show that moveable property only can be attached it was held that the term "property" as used in the section, was wide enough to include property of every description inoveable and immoveable, whether in the actual possession of the defendant or of some other person on his behalf and the words mentioned only referred to such property as is capable of being produced in Court (9) Attachment of property covers its profits (10) \ Small Cause Court cannot, however attach immoveable property (11) Where the property is the property in suit, an injunction should be obtained under O XXXIX r 1 clause (o) which may be enforced under r 2 of that order by imprisonment or attachment And where the property is not that in suit, an alternative remedy is given under r 1 of the same order clause (b) where the word 'property' is not confined to property within the jurisdiction or to property which is in disjute in the suit (12) This rule has no application in divorce proceedings (13)

TIRST SCHED

⁽I) Sri Rammanik t Tincown Rai 4 B L

R (F B) 63, 68 (186)) (2) Ib, at p. 74

⁽³⁾ Gamble : Bh lagir 2 B H C R 14%,

Inl (1566) (4) Ahmed Alice Glaft ne Wall 7 W

R 503 (1867) (5) Sri Rammanik . Tincowri Rai, 4 B L

R (P B) at p. 68 (1869)

⁽c) See Ram Narain r Lavy, 2 Hyde 183 (1564)

⁽⁷⁾ Soory e humar e Issur Chunder, Bourke, 243 (1860)

⁽⁵⁾ Po bambarr Sukl dest, to \$ 180(184)

⁽J) Chedi Lal r huarn Dielit, 17 A 82 (1591)

⁽¹⁰⁾ Ram Coomar: Golin Insth, 12 W. R. 391 (1943) but if the owner is allowed to enjoy them the profits cease to be specifically luble to

⁽¹¹⁾ Life post (12) Itaja Goculdas : Jankibai, 5 Bom.

L. R 570 at p. 5"4 (1503), where it is pointed out that Joynaram Geeree r Shibpershad, 6 W H Misc. I (1900) is not applicable, as # 93 of the Lode of 1800 was expressly limited to the property in dispute '

⁽¹³⁾ It Il par Itall ,s 37 C. 613 (1)10).

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(b) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant, within a time to be fixed by it, either to furnish security, in such sum as may be specified in the order, to produce and place at the disposal of the Court, when required, the said property or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, or to appear and show eause why he should not furnish security

(2) The plaintiff shall, unless the Court otherwise directs, I specify the property required to be attached and the estimated

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(3) The Court may also in the order direct the conditional lattachment of the whole or any portion of the property so specified

Scope of rule -This rule corresponds with sects 81 and 83 of Act \ III of 1859, and amalgamates sects 483 and 484 of the last Code Clause (b) of the former sect 483 has been omitted. The main object of an attachment before pudgment is to enable the plaintiff to realize the amount of the decree supposing a decree is eventually made, from the defendant's property (1) Though an attachment before judgment is directed by r 7 to be made in the same manner as attachment in execution, the objects for which these two sorts of attachment are made are entirely different. An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step tal en merely for preventing the debtor from delaying or obstructing such enforce ment when the decree subsequently passed is sought to be executed (2) An attachment after decree is an attachment made for the immediate purpose of carrying the decree into execution, and it presupposes an application on the

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Ganu Singh v Jangi Lal, 26 C 531, 533 (1899), by preventing abenation or removal, but the process is inoperative to charge the property in the subject of the attachment: Sarkies v Bundhoo Bace, I A 11 (lt 172 185 (1869), and see Gamble v Bl 14-1r, 2 B H C R at p 100 (1866) er

⁽²⁾ Sri Rammanik v Tincowti Rai, 4 B J R 63, 67, 68, P B (186J), Basirum t Kattyayani, 38 C 448 (1911), 15 C W A

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⁽I) Sri Rammanik v T'no un Rai 4 II 1 R (F B) 63, 68 (186 1)

⁽²⁾ Ib at p. 74 (3) Gamble t Bh lagir 2B H (P 146 1(1566)

⁽⁴⁾ thred the Ghit to Walls 7 W

R. 503 (1567)

⁽⁵⁾ Sri Rammank v Tacouri I.al 4 B L R. (F B) at p. 65 (1563)

⁽v) See Lam Varane Ly 2 113 le 193

⁽⁷⁾ Soon e humar e laur Chapler Bucke 243 (1960).

⁽⁵⁾ I Lambarr Sull Lault 1 15: (14.4)

⁽J) Cicil Late Karji Diel t 17 A 82 (1511)

⁽¹⁰⁾ Ram Germary C. I. minati. 12 W. R. 331 (1863) Ist if the empericall net to enjoy them the profiter assets be specifically latte ab

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⁽¹²⁾ Laja Czullas v Jarklai, S Bom L. I 5"0 at gao" ((130) who to it is go late !

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Property without the jurisdiction.—It was held under the last Code both that the section did not (1) and did (2) apply where the property sought to be attached was beyond the jurisdiction of the Court in which the suit was pending. A Court which cannot attach primarily in execution of its decree cannot attach in antiopation of it. It was therefore held, under the Code of 1859, that a Court of Small Causes could not attach immoveable property under this section (3). This is the law now. It was held that the Court had jurisdiction where the property was a chose in action due from the Collector who, like the judgment-debtor, resided within the jurisdiction of the attaching Court (4).

Effect of attachment -See notes to next rule

Call for security —For form of order calling for security, see Sched I, App F, No 5 As to whether property beyond the jurisdiction can be attached under this rule, see last paragraph but one Cause can be shown after security has been furnished to avoid attachment (5) Sect 145 ante, applies to sureties under this rule (6) An order under sect 483 of the last Code was not one of those in respect of which an appeal was given under sect 588 of that Code, (7) though an appeal lay from au order of attachment under the following section An appeal lies under the present section (see O XLIII r 1 (q)) The words "produce and place at the disposal of the Court" refer only to such property as is capable of being produced in Court (8)

"Conditional attachment"—"Conditional attachment" might mean an attachment to be made conditionally on the security not being furnished or cause shown by the prescribed day, or it night mean an immediate attachment of a provisional kind conditioned to become plenary if security should not be furnished or cause shown according to the terms of the order—The form shows that the latter was the intention of the Legislature (9)

Attachment where cause not shown or security not

furnished.

Where the defendant fails to show cause why he should not furnish security, or fails to furnish the security required, within the time fixed by the Court, the Court may order that the

(3) Marthamma v Kittu, 6 M H C R 91

(1871)
(4) Ravji Moreshwar i Narayan Ballal, ?

Bom L R 462 (1901) (5) Lotlikar v Lotlikar, 6 B 643 (1881) (6) Baboo Ram v Hurkhoo Singh, 7 W R

(6) Haboo Ram v Hurkhoo Singu, 7 W 23 329 (1867) (7) See Ahmed Ali t Gladstone Wyllic, 7

(7) See Anmed All & Gladstone Wyllis W R 503 (1867)
(8) Chedi Lal v Knarp Dichit, 17 A 82

(1894) (9) Isthiart Lothkar, supa, at p 644

⁽¹⁾ Ha₁₁ Jiva v Abubakar, 8 B H C R , O C J 20 (1871) Balaram Mulhek v Solano, 8 B L R 335 (1871), Krishnasam v Engel, 8 M 20 (1884), Kedar Nath v Seeva Veyana, 1 C L R 336 (1878), Ram Pertab v Pokur Mull, Unreported, Sust 413 of 1898, Cal H C , referred to in 7 C W N 216, Raja Goculdas v Jankban, 5 W N L R 570 (1903) (the Court, however, granted an injunction under s. 492, clause (b) of the last Codel

⁽²⁾ In re Abraham, 0 B H C R, A C J 170 (1509) [but see Hap; Jiva v Abubakar, 8 B H C R, O C J at p 37, where it is said the Judges afterwards considered that the ruling could not be sustained], Rain Pertab

v Madho Rai, 7 C W N 216 (1902) [under s 648 read with s 483], and see remarks of Russell J, in Raja Goouldas t Jankibai 5 Bom L R 570, at p 574 (1903)

1 iest Sched. Arrest and attachment before judgment. 0 38, r c.

property specified, or such portion thereof as appears sufficient to satisfy any decree which may be passed in the suit, he attached.

(2) Where the defendant shows such cause or furnishes the required security, and the property specified or any portion of it has heen attached, the Court shall order the attachment to he withdrawn, or make such other order as it thinks fit.

Order of attachment.—This rule corresponds with seet Si of the Code of 1859 It is only on the defendant's failure to show cause or furnish security that attachment can be made. So the latter cannot be ordered unless security has first been demanded,(1) and on one or other of the grounds stated in r. 5, ante (2) As to the form of an order under this section, see Sched I, App F, No 7 An appeal lies from it (3)

Effect of attachment.-The property in the goods attached is in nowise altered by the attachment, but remains as before in the defendant. The Court, as it were, locks up the goods, so that they cannot be disposed of or carried away in any mode that would delay or defeat the execution of the decree if ohtamed.(4) There is nothing in the Code which makes an attaching creditor a secured creditor, or creates any charge or hen in his favour over the property attached The order does not purport to deal with any question of title other words, attachment prevents alienation, it does not confer title making of an order of attachment only operates so as to give the judgmentereditor certain rights in execution (5) It has always been held that an attachment before judgment conferred on the plaintiff no right prior to that of the Official Assignee (6) And it makes no difference whether the vesting order is before or after deerce, for it cannot be contended that a decree qua decree simply constitutes the judgment creditor a secured creditor, or gives him any charge or hen over the property of the judgment-debtor (7) Under, however, the Code of 1859, an attachment, previous to the date of the vesting order, in the

beneficial interest ib, at p. 159

⁽¹⁾ Gobind Persad Khan, S D A. Sum Dec., 12th June, 1848

⁽²⁾ Bepin Behari Ghose, ib, 27th Sept,

¹⁸⁴⁷ (3) O XLIII r 1 (q), Mir Ali v Bibari

Lal, 21 B 273 (1895)
(4) Sava Ramin v Jadavii Natbu, 2 B
H. C R. 142, 143 (1865), property passes, not
by senure but by sale Gamble v Bhologur,
2 B H. C R 146, at p 156 (1866), though
the judgment creditor, by force of the
sexure, has at least a security, but this does
not impart present property, nor oven

⁽a) Kristnasawmy t Official Assignee, 26 M 673, 078 (1903), Peacock t Madan Gopal, 29 C. 428 (1902)

⁽⁶⁾ Bank of Bengal v Newton, 12 B L R App I (1873), Petumber Mundle v Goccool Doss, I Ind Jur, N J 327 (1866), Ramper sun i Callacbund, I Ind. Jur, N S 325, 373 (1866), Gamble v Bholagur, 2 B H C R

 ^{149 (1866),} Sarkies v Bundhoo Baee, I.A. H.
 C. R. 172 (1866), Sava Ramji v Jadavji, 2
 B. H. C. R., O. C. J. 142 (1865), Shib Kristo

Miler, 10 C 150 (1883), Sadagappa v Ponnana 8 M 554 (1883), Miller v Mon Mohun Roy, 7C 213 (1881), a. c, 8 C L R 213, Turner v Postoni, 20 B 403 (1893), Kristnasawmy v Official Assignee, 26 M. 673

⁽⁷⁾ Aristnasawmy v Official Assignce, 26 M. 673, at p 679 (1903)

execution of a decree, conferred on the judgment creditor a right prior to that of the Official Assignee (1). This was so because under that Code the first attaching creditor had priority over other judgment creditors. But no such priority is now allowed. In fact, there is now no question of priority in a matter of this description, for under sect 295 (now 73) all decree holders who have applied for execution of that decrees for money against the same judgment-debtor hefore the realization of assets from him are entitled to rateable distribution (2). As already stated, an attachment creates no hen. Whether the attachment be hefore or after judgment, all creditors are entitled to share rateably, subject to the provisions of sect 73. An attaching creditor has no exclusive claim until a sale at his instance has actually taken place. The amendments of the law of procedure in this country have been hased upon the principle that so far as possible the creditors should be treated pare passu, and that nothing short of actual realization of the deht due should give rights of priority (3)

Save and except in the two classes of cases mentioned in ir 9 and 10, the intention of the Legislature was that an attachment before judgment should be fully operative. The effect of such an attachment, whether made hefore or after a decree, is the same, provided that in the former case a decree is made for the plaintiff at whose instance the attachment takes place. Therefore though there is no distinct provision such as that which is to be found in sect 64, any private alienation of property attached before judgment during the continuance of the attachment is void as against all claims enforceable under the attachment (4). An attachment does not affect rights of strangers. See r. 10, post. Where an attachment under the former section, issued by a Court at the instance of a third party, prohibited the creditor from recovering and the debtor from paying the debt, it was held that an order on those terms was not an order staying the institution of a suit within the meaning of sect. 15 of the Lamitation Act (5)

7 Sare as otherwise expressly movided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Mode of attachment—This section conresponds with sect 55 of the Code of 1859. As to attachment of property in execution, see O XXI, ante See also Forms in Sched I, the concluding words of the former section, "for money," have been omitted

⁽¹⁾ Anand Chandra Pal v Pauchilal Sarma, 5 B L R 691, I B (1870), s c, 14 W R (F B) 33, Aga Mahomedt Judah, 7 B L R (1870), s c, 14 W R (1870), s c, 17 W P 624

^{50 (1871),} a c, 17 W R 234
(2) Miller v Mon Mohun Roy, 7 C 213
(1881), Peacock v Madan Gopal, 29 C 428
(1302) [overruling Miller v Lukhmant Debi, 25 C 113 (1301)], Soubul Chunder Law t

Russick Lall Mitter, 15 C 202 (1888)
(3) Kristnasawmy v Official Assignce, 26

⁽³⁾ Kristnasawiny v Oil M 673, 680 (1903)

⁽⁴⁾ Canu Singh v Jangi Lal, 26 C 531 (1899), Sarkies v Bundhoo Bree, 1 A H C R 172, 183 (1861)
(5) Bett Maharani t Collector of Ltawib

⁽⁵⁾ Bet: Maharam : Collector of Llaw 17 A 138 (1831), 14 A 162 (1832)

PIRST SCHLD ARREST AND ATTACHMENT BEFORE JUDGMENT. 1191 U 38, rr 8, 9

claim is preferred to property attached t Where any before indgment, such claim shall be investi-Investigation of claim to gated in the manner herembefore provided property attached before judgment. for the investigation of claims to property attached in execution of a decree for the naument of money

Claims to attached property - I his rule corresponds with sect 86 of the Code of 1859 (1) The order dealing with the investigation of claims is O XXI, rr 58-63, which must therefore be applied to eases of attachment before judgment (2) In the last-mentioned case it was said that this section, which prescribes the manner of investigation, is silent as to the result, the Court apparently considering that the sections following sect 278 of the last Code had not been applied But however this may be, if the defendant has ce used to have any interest in the property, as where a vesting order in insolvency has been made, it is clear that the attachment ought to be raised, for when the law directs the claim to be investigated it implies that if the claim is made good the attachment, which was intended merely to preserve the defendant s interest from the effect of private ahenations shall come to an end (3) The omission to object to the validity of the attachment on the ground that property sought to be attached is not transferable at the time when the application is made for attachment before judgment does not operate as a bar to the investigation of the objection when an appheation has been made for execution of the decree made in the suit (4)

order is made for attachment before indg- is 9 Where an ment, the Court shall order the attachment Removal of attachment to be withdrawn when the defendant furnishes when security furnished or suit dismissed the security required, together with security

for the easts of the attachment, or when the suit is dismissed

Removal of attachment -This rule, which corresponds to sect 87 of the Code of 1809, indicates that in the event of the suit not being dismissed but decreed, the attachment shall subsist, and save in the case mentioned in this rule and in the next, the intention of the Legislature was that an attachment before judgment should be fully operative (5) For the former words "the Court which passed the order shall remove have been substituted the words rtalicized.

⁽¹⁾ See George v Ram Ruttun 3 Agra 272 Ram Ruttun v Gobind 2 Agra, 141. Rammanik Shaw & Seebram Pantool, 2

⁽²⁾ Turner v Postonji 20 B 403 (1895) Hashmat Bibi v Bhagwan Das 36 1 65

²¹ B 273 (189a) it was contended, though unsuccessfully that the liquidators solo remedy was under this section.

⁽⁴⁾ Basıram v Kattyayanı 38 C 448 (1911)

⁽⁵⁾ Ganu Singh v Jangi Lall, 26 C 531, 534 (18J9)

^{(3) 1}b p 407 In Mir Mi Behari Lal.

execution of a decree, conferred on the judgment creditor a right prior to that of the Official Assignce (I). This was so because under that Code the first attaching creditor had priority over other judgment creditors. But no such priority is now allowed. In fact, there is now no question of priority in a matter of this description, for under sect. 295 (now 73) all decree holders who have applied for execution of their decrees for money against the same judgment-debtor before the realization of assets from him are entitled to rateable distribution (2). As already stated an attachment creates no lien. Whether the attachment be before or after judgment, all creditors are entitled to share rateably, subject to the provisions of sect. 73. An attaching creditor has no exclusive claim until a sale at his instance has actually taken place. The amendments of the law of procedure in this country have been based upon the principle that so far as possible the creditors should be treated pare passu, and that nothing short of actual realization of the deht due should give righte of priority (3)

Save and except in the two classes of cases mentioned in rr 9 and 10, the intention of the Legislature was that an attachment before judgment should be fully operative. The effect of euch an attachment, whether made before or after a decree, is the same, provided that in the former case a decree is made for the plaintiff at whose-instance the attachment takes place. Therefore though there is no distinct provision such as that which is to be found in sect. 64, any private altenation of property attached before judgment during the continuance of the attachment is void as against all claims enforceable under the attachment (4). An attachment does not affect rights of strangers. See r. 10, post. Where an attachment under the former section, issued by a Court at the instance of a third party, prohibited the creditor from recovering and the debtor from paying the debt, it was held that an order on those terms was not an order staying the inetitution of a cuit within the meaning of sect. 15 of the Lamitation Act. (5)

7 Save us otherwise expressly provided, the attachment shall be made in the manner provided for the attachment of property in execution of a decree.

Mode of attachment—This section corresponds with sect 85 of the Code of 1859 As to attachment of property in execution, see O XXI, ante See also Forms in Sched I, the concluding words of the former section, "for money," have been omitted

⁽¹⁾ Anand Chandra Pal v Panchilal Sarma, 5 B L R 691, I' B (1870), s c, 14 W R (I' B) 33, Aga Maliomed t Judab, 7 B L R

^{50 (1871),} a.c., 17 W R 234
(2) Miller v Mon Mohan Roy, 7 C 213
(1881), Peacock v Madan Gopal, 20 C 428
(1302) [overrulin, Miller v Lukhimani Debi, 25 C 13 (1301)], Soubul Chinder Law;

Russick Lall Mitter, 15 C 202 (1888)
 (3) Kristnasawmy v Official Assignce, 26
 M 673, 680 (1903)

⁽⁴⁾ Ganu Singh v Jangi Lal, 26 C 531 (1899), Sarkies v Bundhoo Baco, 1 A 11 C R 172, 186 (1863)

⁽⁵⁾ Betl Maharam v Collector of Ltawali, 17 1 138 (1834), 14 1 162 (1834)

Distributed and the statement of the sta

8 Where any claim is preferred to property attached introduction of calculations at calculations before judgment, such claim shall be investigated in the immuner hereinbefore provided for the investigation of claims to property attached in execution of a decree for the judgment of money

Claims to attached property -This rule of responds with act 50 of the Code of 1501(1). The erect dealing with the investigation of claims is O AM ir 55-63, which must therefore be applied to cases of attachment belo e julgment (2). In the last mentioned ease it was said that this section, which presents the manner of investigation is elent as to the result, the Co rt apparents e a cleary that the sections following wet 278 of the last Code had not been applied. But however this may be, if the defendant has ce seed to have any interest in the property, as where excesting order in insolvenes has been made, it is clear that the attachment ought to be raised, for when the law directs the claim to be investigated it init has that if the claim is mide and the attachment, which was intended merely to preserve the defendant a interest from the effect of private alternations, shall come to an end (3). The o ms a n to object to the validity of the attachment on the ground that property a night to be attached is not transferable at the time when the at phration is made for attachment before pullim int does not operate as a bor to the investigation of the objection when an application has been made for execution of the decree made in the suit (1)

9. Where an order is made for attachment before judg- in ment, the Court shall order the attachment to be utilidraum when the defendant furnishes the security required, together with security for the costs of the attachment, or when the suit is dismissed.

Removal of attachment — This rule, which corresponds to sect 87 of the Code of 1801, indicates that in the event of the suit not being dismissed but decreed, the attachment shall subsist, and save in the case mentioned in this rule and in the next, the intention of the Legislature was that an ittachment before judgment should be fully operative (5). For the former words "the Court which passed the order shall remote, have been substituted the words italicized.

See Goor, o F. Ram Ruttun 3 Agra,
 Ram Ruttun v Gobind, 2 Agra, 141;
 Rammanik Shaw v Sochram Pantool, 2
 Hyde, 22

⁽²⁾ Turner v Pestonji ... 0 B 403 (1895) Hashmat Bibi v Bhagwan Das, 36 1 65 (1913)

²¹ B 273 (1895) it was contended, though unsuccessfully, that the liquidators solo remedy was under this section.

⁽⁴⁾ Basıram v hattyayanı, 38 C 448 (1911)

⁽⁵⁾ Ganu Singh v Jaugi Lall, 26 C 531, 334 (1899)

^{(3) 1}b , p 407 In Mir Mr : Behari Lal,

Attachment before judgment not to affect rights of strangers, nor bar decree-holder from applying for sale

10 Attachment before judgment shall not affect the lights, existing prior to the attachment, of persons not parties to the suit, nor bar any person holding a decree against the defendant from applying for the sale of the property under attachment in execution of such decree

Rights of third parties - The attachment does not by this rule (1) affect the rights of persons not parties to the suit. Therefore the rights of rival creditors cannot be affected by it (2) But these rights must now exist prior to the attachment (3) The attachment does not prevent the property being sold in execution of another decree, whether that decree has been obtained before or after the attachment (4) The main object of the attachment before judgment being to prevent the defendant from disposing of or removing his property from the jurisdiction, this rule, it has been said proves that this prevention is not intended merely for the benefit of the attaching creditor, but may enure also to the benefit of other persons (5) Though one person may have secured the goods, another decree holder may apply for the sale of them (6) In a recent case in the Bombay High Court, where the plaintiff had obtained a money-decree against a Mitalshara coparcener, after having obtained attach ment before judgment of certain joint-property, and the debtor had died before execution, it was held on appeal that a subsequent application to execute the ducree had been nightly dismissed, since an attachment before judgment is inciely precautionary and creates no charge, and so could not defeat another co parcener's title by survivorship (7) As to insolvency, see notes to r 6, anic

11. Where property is under attachment by virtue of the provisions of this Order and a decree is Property attached before subsequently passed in favour of the plaintiff, judgment not to be reattached in execution of it shall not be necessary upon an application decree. for execution of such decree to apply for a re-attachment of the property.

"Re attachment "-It has already been pointed out that the rules of which this is one differ in their respective objects and consequence (8) Their

⁽¹⁾ As to the object of the introduction of this provision, which corresponds with a. 89 of the Code of 1853, see Sarkies r Bundhoo

Bacc, I A H C R 172, at p 185 (1869) (2) hri Rammanik t Tincowri Rai, 4

B L R (F B) at v 63 (1863) (3) See Gamble v Bholastr, 2 B H. C R 147, 160 (1866), Shib Kristo r Miller, 10 C ut 1 165 (1853)

⁽⁴⁾ Inferral Case, 6 3L IL C B 135 (1571)

⁽⁵⁾ Gamble v. Bloligir, . B H C. R. st

n. 160 (18ff) (6) Sandut Roy t Sree Canto Maty 33 C. 639, 643 (1900)

⁽⁷⁾ Subra Mangosh Clan lavark rt Maha devi Lom Many I hatta, 35 B 105 (1913) , Ramanavya t Ramapayya 17 M 144 (1693) , Pall nji Shapurji Mistry e Jordan

¹² B 400 (1888) (6) lide ante net stor 6

object is to ensure to a plaintiff payment of his decree. Although they do not ensure this in any event, they do so only so far as that is ensured by preventing the defendant making away with property (1) In other words, the attachment does not of necessity ensure the property to the person who attaches it, provided only he eventually gets a decree Tho plaintiff must not only wait until he has obtained a decree, but he is not competent to proceed against the property attached until he has taken the prelmunary steps the law requires for its enforce ment (2) Ho must, in other words, apply for execution just like any other creditor (3) This is now made clear by the addition of the words "upon an application for execution of such decree" When, however, an application for execution is made, by the terms of this rule no application for attachment is necessary, the attachment before judgment enuring and becoming upon and hy virtue of the application for execution an attachment in execution (1) And upon principle it would seem that the date to be assigned to the attachment as an attachment in execution is that on which application for execution is made (5) It has been held that an attachment before judgment cannot be regarded as the inception of an execution, or as hinding the goods in such a manner as to exclude the right of a third party (such as the Official Assignce) accruing after such attachment, but before judgment and warrant for execution (6)

12. Nothing in this Order shall be deemed to authorize the plaintiff to apply for the attachment of any agricultural produce in the possession of any agriculturist, or to empower the Court to order the attachment or production of such produce

"Agricultural produce "-The exemption of a portion of growing crops

case)

⁽¹⁾ Sri Rammanik v Tincowii Rai, 4 B L R (F B) 63, 75 (1869)

⁽²⁾ Ih, at p 68, namely, proceedings in execution, which are proceedings by which the judgment creditor seeks to establish a right to have his money paid out of the property of the judgment dehter Aga Mahomod v Judah, 7 B L R at pp 52 51 (1871), and which though preserved by the attachment before judgment remains his until it is taken in execution for satisfaction of the decree.

⁽³⁾ Pallonji v Jordan, 12 B 400 (1888), foll in Scwdut Roy v Srec Canto Mati, 33 C 639, 644 (1906) It is to be observed that the rule does not say that execution is dispensed with, but that it is not necessary to re-attach in execution, that is, when execution is applied for and granted. Further, execution is necessary if it desired to control

the rights of rival decree holders. (See Sri Rammand o Tunouvir Rat, 4 B L R at p 67, F B (1869), though it is not now necessary to re attach, as was held in that

^{(4) 1}b., Bhagwan Chandra v Chandra Mala, 1 C L J 97 (1092), in this respect the law is now settled, it being previously a matter of doubt whether a new attachment was Sri Rammanak v Tincovri Rai, B L R (F B) 63 (1859), or was not, Sarkics c Bundhoo Bace, 1 A H C R 172, 186 (1869).

necessary

(5) See as to this, remarks in last care at
p 63, though the point of date has not the
same importance now that rateable distribu

tu n is allowed under s 73

(6) Gamble v Bholagir, 2 B H C R 146, at p 159 (1866)

try the suit (1) As to this, "Equity acts in personam," that is, the Court's directions are addressed to the defendant personally, and they are not regarded as directly affecting the subject matter in dispute. The application of the maxim in India is subject to the statute The Code (2) has given to Mofussil Courts the power to act in personam The Presidency High Courts under their Charters have a similar, but in terms less restricted, jurisdiction (3) Injunctions may he granted by all Civil Courts with the exception of Presidency and Provincial Small Cause Courts The jurisdiction may be exercised either by a Court of first instance, or of appeal (4) The Court of first instance has, before appeal, no jurisdiction to grant an injunction after the claim is dismissed, and it has no jurisdiction after the appeal has been adoutted to issue an injunction during the pendency of the appeal Nor a fortion when a suit for an injunction is dismissed, can the Court which dismisses such suit take upon itself to stay by injunction the execution of a decree passed in another suit (5) The Appellate Court has the same power in respect of the grant of an injunction as the first Court had (6) The Court may also interfere in revision (7)

The High Courts may enforce these orders by proceedings for contempt, (8) and the Code (r 2) invests Courts with power to compel obedience (9) The Code has also provided for the enforcement of deerces granting permanent injunctions (10) An injunction operates from the date of the order being made and not from the time of the sealing of the writ or even from the time of its heing drawn up, and a party who has notice of an order is bound by it from the time it is pronounced. An injunction must, however erroneous it may be, he oheyed until it is discharged. It has, however, no effect in altering the

rights of property (11)

Though the issue of an improction is a matter of discretion, the latter is governed by certain general indicial principles (12) As an injunction is not to he arhitrarily refused where a proper case for its issue is made out, so it is not to be granted merely on the ground that it can do no harm (13) The subject-

⁽¹⁾ Woodroffe, 30-49, et ib casas

⁽²⁾ S 16, ante, Crisp v Watson, 20 C 689 (1893), Vithalrao i Vaghoji, 17 B 570, 572 (1892)

⁽³⁾ Letters Patent, s 19, 24 & 25 Viet e 101, s 9, H H Holker v Dadabhas, 14 B 353 (1890), Rajmohun Bose v Past Indran Ry Co, 10 B L R 241, 248 (1872), East Indian Ry v Bengal Coal Co , 1 C 95, 100 (1875), Della and London Bank : Wordie, 1 (* 249, 251, 263 (1876)

⁽⁴⁾ Woodroffe, 51 et seq , as to the power of the Court of first instance, see in particular Yamın ud Doulah t Ahmed Alt Khan, 21 C 561 (1831)

⁽⁵⁾ Gossam Money Pureo t Guru Pershad Singh, 11 C 146 (1854)

⁽ii) Shaikh Mohecoo Ideen r Shaikh Umed How in 14 W R 384, Jr5 (1870), Gossain M n y Purco v Guru Pershad Singh, supra,

Kurpa Dayal v Rami Kishore, 10 A 80 (1887), Kanahi Ram v Biddya Ram, 549, 551 n (1878), see s 102, O \\II r 11, s 109

O XLV r 13, O XLIV r 1 (7) Chandidhat Jha v Padmanand Singh Bahadur, 22 C 450 (1895), Gossam Money Purce v Guru Pershad Snigh, 11 C 146 (1884), Luis t Luis, 12 M 186 (1888), Isrul , Shamser Rahman, 41 C 437, 19

C I J 47 (1913) (8) See notes, post, Woodroffe, 71 et seq

^{(9) 1}b

⁽¹⁰⁾ Tb

⁽¹¹⁾ Woodroffe, 82

⁽¹²⁾ See Woodroffe, 80 et seq, where the

subject is more fully discussed (13) Dunn : Bryan, 7 R R P1 143, Yoyn Visser t Rupikun, 9 C. 509, 611 (1552)

matter of a temporary injunction is the protection of legal rights pending litigation. Its object is to prevent future injury, leaving matters as far as possible
in statu quo until the suit in all its bearings can be heard and determined (1)
In exercising jurisdiction the Court does not pretend to determine the legal
rights, but merely keeps the property in its actual condition until the legal
title can be established. It interferes on the assumption that the party who
seeks its interference has the legal right which he asserts, but needs the aid
of the Court for the protection of the legal right or of the property in question
until the legal right can be ascertained. The Court upon an application for
a temporary injunction will deal with the injunction upon the evidence hefore
it, and will confine itself strictly to the immediate object sought, and as far as
possible abstain from prejudging the question in the cause (2). A temporary
injunction is thus not decisive upon the merits, whilst a perpetual injunction,
height of feets a decree, is conclusive upon all parties in interest

nowing in once a decree, is commissive upon an parties in interest.

The general rules governing the grant of fellof are (a) the applicant must show a fair prima facie case in support of the right claimed, (3) (b) and an actual or threatened violation of that right, (4) (c) productive of irreparable or at least serious damage (3). So a temporary injunction will not be granted to restrain a wrong which is a mere technical invasion of the plaintiff sights and does not threaten serious injury (6). As has been concisely said the Court will not grant an injunction unless real injury is apprehended (7) (d) The applicant's conduct should be such as not to discrittle him to assistance, it should he fair and honest, and free from acquescence or delay (8). A less degree of acquiescence or delay will har relief on an interlocutory application than at the final hearing. Apart from the fact that delay is calculated to throw doubt upon the reality of the alleged injury, it is not really material unless it has prejudiced the defendant (9). (c) There must be a greater convenience in grant ing their in refusing the injunction (10). Where, however there is a right it

- Stephens: Trustees Port of Bombay,
 B 145 (1876)
- (2) Gopcenath Mookerjoo & Kally Does Mullick, 10 C 225, 231 (1883), Chandidat Jha v Padmanand Singh Bahadur 22 C 549 466 (1895), Moran v River Stevm Navigation Co. 14 B 1 R 3-7 (1875)
- (3) Woodroffe, 82 * 1 seq and cases there cited, and in particular the Indian cases Woran v River Steam Navigation Co. 14 B L R 352, 357 (1875). Gomes v Carter 1 Ind Jur N S 411, 412 (1866). Chandidat Jl a v Padmanand Singh Bahadur, 22 C 459, 404 405 (1865).
- (4) lb., 101, cf Act 1 of 1877, s 54 [mvades or threaters to mvade 1 Benode Coomarce Dossee v Soudaminey Dossee 18 C 257 (1889), Bindu Basim Chowdhram v Jahnabi Chowdhram, 24 C 260 (1896) Kalidas Jirram v Gor Parjaram Hirj. 15 B 309 (1890), Chabbldas v Municipal Commissioners, Bombay, 8 B H C R 85 (1871),

- Arishna Ayyan v Vencatachella Mudali, 7 M H C R 60, 71 (1872), Ghanashani Milkant Nadkarni i Moroha Ramchandra
- Fu 18 B 488 (1894)
- (5) Woodroffe 82 (6) Spelling s Lxtraordinary Relief s 19
- (7) Ibiliard Inj s 14 The term inc parable injury must be considered with reference to the cureumstances peculiar to the country Anantnath Doy: Mackintosh.
- 6 B L R 571 (1871) (8) Woodroffe 96 et and
 - (9) 1b at p 103, Lindsay Petroleum Co
- v Hurd, L R 5 P C 239
 (10) 1b 104 Gomes v Carter 1 Ind Jur
- N S 411, 412 (1866), Anantnath Dey v Mackinteah 6 B L R 571, 573 (1871), Ruphul Khettry v Mahima Chandra Roy, 5 B I R 254, 257 (1870), Subba Naidu v Haji Badsha Saheb, 20 M 168, 175 (1902), Shamnuggur Jute Factory Co v Ram Variui

Chatterree 14 C 189 200 (1886)

cannot, it has been said, be limited by the religious prejudices of ueighbours (1) (f) Lastly, equally efficacious rehef must not be obtainable by any other usual remedy except in case of breach of trust (2). In a recent case it was held that in deciding whether to grant a temporary injunction the Court should consider whether there was a substantial question pending decision as to the rights of the parties, and whether the nature of that question was such that it was proper that an injunction should meanwhile he granted and whether there would be a greater convenience in granting it (3)

With certain exceptions the aforementioned principles apply equally to perpetual as well as to temporary injunctions. These exceptions are that whereas upon an application for a temporary injunction the plaintiff is required merely to show a clear prima face case, in order to obtain a grant of a perpetual injunction, the legal right must have been established as well as the fact of its actual or threatened violation productive of serious damage (4). In the case of alleged acquiescence a stronger case must be made than would be a bar upon an interlocutory application

A mundatory injunction, that is, an order compelling a defendant to restore things to the condition in which they were at the time when the plaintiff's complaint was made may be either temporary or perpetual, and, generally speaking, the principles regulating its grant are those which are applicable to preventive injunctions, temporary or perpetual as the case may be (5). It has, however been doubted by one of the Judges in a recent case in the Bombay High Court whether a mandatory injunction can in strictness be considered as a temporary injunction under this rule (6). Prompt action is essential if a mandatory injunction is the desired remedy (7)

Practice as to issue of injunctions —See notes to rr 3, 4, post

Breach of injunction —As already stated an injunction has operation from the time it is pronounced. With whatever irregularities the proceedings may be affected, or however erroneously the Court may have acted in granting the injunction, it must be obeyed until it is properly dissolved. In order

note but one

- (1) Behari Dal v Ghisa I al 24 A 499 (1902)
- (2) Woo hoffe, 105
- (3) Israil v Shumser Rahman, 41 C 437 (1913) Cf Dwijendra Narain Roy a Purnandu Narain Roy, 11 C L J 189 (1910), Walker v Jones (1805), L R I P C 59
- (4) Ib , 130 , Krishna Ayyan v Vencata chella Mudali 7 M H C R 60, 71 (1872) , Akilandammal v Venkatachella Mudali 6
- M H C R 112, 116 (1871)
 (5) Woodroffe, 110, see kadarbbai v
 Rohimbhai, 13 B 674 (1889) Chandra Nath
 Pal v Sree toobind Chewdhuri, 6 C W N
 308 (1990), Jairmadas Shankarlali timaram
 Harjiwan 2 B 137, 139 (1877), Shannanggur
 jute Factory r Ram Varaun chatterge 14 C

18) ... 00 (1856) , Ma anial : Chhotalal, 26 B

- 136 (1901), Nandkishor Balgovan v Bhagub hai Pranvalabhdas, 8 B 98 (1883), Navroji v Dastur, 28 B 20 (1903) and cases in next
- (6) Basul Kaum v Purubhai Amurbhai 39 B 381 (1914) In this case plannif had ob tained pending suit a mandatory injunction compelling defendant to remove a screen blocking up an opening which plaintiff had mile in his wall and the High Court held that the grant of such injunction was a material irregularity But see Woodrolfe
- on Injunctions, 3rd cd., pp. 188, 189
 (7) Gbanasham Nilkant Nadkarni v
 Vloroba Rambandra Pai, 18 B 492 (1891),
 Benede Coomarce Dosso v Sou lammy,
 Dossot, 10 C 252 (1883), Haji Syed Mahrimed v Calab Rai, 20 A 315 (1894)

to see whether the operation of an injunction has been interfered with, regard must be had to the terms of the injunction itself. If it has been disobeved. then proceedings in the matter of the contempt will be against those in active disohedience and those who ahet them The High Courts have all the powers of a Court of Equity in England for enforcing these decrees in personam This turisdiction has not been affected by the Code (1) It has been held that a District Court is not a Court of Record, and as such has no inherent power to commit for contempt (2) However this may be, the Code gives powers which according to the last cited case are only exerciseable when the Court is put in motion by a party who deems himself aggreeved. Suh rule (3) has been remodelled See Bomhay decision, cited (3) The Code, while providing a specific penalty for the breach of an injunction, does not provide that one of the penalties which result from infringement is that any dealing with property the subject of an injunction contrary to its terms is illegal and void. The words of the rule are not to he read as providing for any other penalty than that which is therein specially mentioned (1) Sect 188 of the Penal Code does not opply to an order made by woy of injunction in a civil suit between party and party (5)

As an injunction operates from the date of the order heing made, a party may be committed for the disobedience of an order heinesen the date it is made and the date of its issue, the reason heing that it the rule were otherwise the party against whom the order was made would have all that time during which he might defeat it (6). A pirty, therefore, who has notice of an order, is hound by it from the time it is prenounced, and any incans of information whereby notice is actually received is sufficient it not heing requisite that a defendant should be officially apprised of the injunction or he served with process in order to render him hable for contempt (7)

In order to decide whether there has been an actual breach of the injunction, it is important to observe the objects for which the reliat was granted as well as the circumstances attending it. The violation of the spirit of an injunc it is even though its strict letter may not have been disrigarded, is a breach of the Court's orders (8). On the other hand, when the conduct complained of a literally a breach of the injunction, is not so in spirit, and when the conduction part to violate the order, they will be hid guilt. (4) I have a for a defendant to say that be his acted only read a spans whom in injunction is issued may be to the person who with knowledge of an injunction.

⁽¹⁾ Hasoublov (towas) John (7 June)
walla " B 1 (1851) | Navival at 2 June
das C, edas 7 B 5 (1854); | H | H |
Ashburier 14 B 3.3 June (1874)
Lawret v 1 C tox (1874)
(2) Korsappa (2614)

⁽³⁾ Advocate General, 3- - Akhai 13 B 102, 1 , (

⁽⁴⁾ Delhi & L.

^{9 1. 497, 423 (12 / -}

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and assists that person to commit a breach of the injunction may hinself be committed for contempt though not for breach of the injunction (1) As regards permanent injunctions, they are decrees, and are enforceable as such (2)

Appeal, Review, Revision—An appeal lies from an order under rr 1, 2, 1 See O XLIII r 1 (r) And it has been held that since an order under 1 Imeans any order passed under r 1, and since under that rule a Court lias the power of refusing an injunction, an appeal lies against an order refusing an injunction (3) It is essential to prove a wrong exercise of discretion (4) But in the under mentioned cases (5) a second appeal was held not to lie It has been held that no appeal hes from an order refusing to grant an injunction without notice (6) A permanent injunction is appealable as a decree (7) The Court may, under sect 114, revise an order, (8) or under sect 114 review (9) Where on an application for the issue of a temporary injunction the Court ordered the defendants to futural security, it was held that this was not an order under r 1 of this rule, and was not appealable under O XLIII 1 (10)

Damage or alienation, waste.—Sometimes an injunction, whether temporary or perpetual, is the instrument by which the Court specifically enfoaces the obligation if arising on contract, or specifically restrains the violation of those other obligations which are the subjects of the law of tort. In other cases a temporary injunction is merely incident or ancillary to the general iclied in this sense that it seeks merely to preserve the status quo, enjoining interference pendente lite by waste, damage or alienation with the subject of litigation or the fraudulent disposition of his property by a party defendant to a suit. Those two rules regulate the grant of temporary injunctions, the latter relating to temporary injunctions against interference with the subject of litigation here spoken of as muunctions sendente lite.

In the case of injunctions in matters of contract and tort, it is not necessary to separately consider temporary and perpetual injunctions in cases of contract for the kinds of cases, whether of contract or tort, in which an injunction, either temporary or perpetual, may be granted, do not differ from each other. If the case, as alleged, be such that at the hearing a perpetual injunction would not be granted, then clearly a temporary injunction ought not to be granted before the hearing, though, of course, it does not follow that a temporary injunction

⁽¹⁾ Woodroffe, 76

⁽²⁾ See O XIA. r 32, Woodroffe, 65, Bhoobun Mohun Mundal : Nobin Chunder Bullub, 10 B L. R app 12 (187.), Protap Chunder Doss : Peary Chowdhram, 8 C 171

<sup>(1881)
(3)</sup> Harr Lal : Proyag Ram, 17 C W X 950, 18 C L J 39 (1913), and see Lachma

Naram t Ram Charan Das, 30 A 120 (1913)
(1) Umtsh Chandra t Nibaran Chendri,

¹³ C. L. J. 335 (1313)
(a) Ramchan Ira a Janardhan, I. Bom

L R 138 (1902), Venkatapathi Naidu v

Firumalai Chetti, 24 M 447 (1901) (6) Luis v Luis, 12 M 186 (1888)

⁽⁷⁾ As to application for execution, see Sadagopa v Krishnamachari, 12 M 364 (1589)

 ⁽⁸⁾ See last case, Gossain Money Purce
 Gour Pershad Singh, 11 C 146 (1881)
 (J) See Dhuron thur Sen v Agra Bank, 5

⁽J) See Dhurom thur Sen v Agra Bank, 5 (L S6 (197J)

⁽¹⁰⁾ Sito Maliton v Christian 17 C W N J18 (1512)

will be griuted before the hearing, in every case in which a perpetual injunction might fitly be griuted at the hearing, for to justify a temporary injunction, not only must the case be such that an injunction is the appropriate relat, but there must be the further ingredient that, unless the defendant is at once restrained by injunction, irreparable injury or inconvenience may result to the plaintiff before the suit can be decided upon its ments.

In the limited class of cases which are now to be considered, the injunctions are always from the nature of the case of a temporary character, and must thus

be separately considered

Injunctions may thus be roughly divided into (A) injunctions whether temporary or perpetual in eases of (a) contract or (b) torf (r 2), and (B) temporary injunctions against (a) interference with the subject-matter of hitigation, or (b) fraudulent disposition of property pending hitigation (r 1)

The power given by r. 1, clause (a), is substantially the same as that long exercised by English Courts of Equity The object is to restrain the defendant from doing mything which may prevent the property remaining in statu quo during the pendency of a suit, upon the principle that when the plaintiff seeks to recover property in specie the defendant shall not be allowed to decide the question in his own favour by dealing or making away with the property, the right to which is the question in dispute. So the Court will restrain not only waste or damage to the subject of higation whether moveable or immoveable property but may also restrain the mere alicuation of property whether movethis or immoveable. For in every case the plaintiff might be put to the expense of making the vendor a party to the proceeding, and at all events his title, if he prevails in the action, may be embarrassed by such new outstanding title under the transfer (1) The Court, even though it acts on the doctrine of his pendens, will prevent, if possible, the necessity of proceeding on such a principle and will not in a proper case deprive a suitor of the more effective protection of au injunction (2) This clause deals with suits in which a claim is made for specific property in the hauds of the defendants, and it is only in such suits that any question can arise of waste, damage or alienation. The object of the exercise of the jurisdiction is to secure the safety of that specific property which is in dispute in the suit pending the litigation, as also at its close to secure that any decree which may be made with reference thereto shall not prove unfructuous (3)

The power, however, of issuing an injunction pendente lite ought to be most cautiously everused. It is only in cases where property, which it is essential should be kept in its existing condition during the pendency of the suit, is in danger of being destroyed, damaged, or put beyond the power of the Court, that the latter ought to interfere so as to restrain persons who may turn out in the final event of the litigation to be the retual owners of the property

from proper enjoyment and possession of it (4)

⁽¹⁾ See Collett's Specific Performance, 265-273, Story, Eq Jur, 906-908, 2nd English Edition.

⁽²⁾ Hood v Aston, I Russ 4t2, one of the large number of cases dealing with Injunctions restraining the negotiation of negotiable

instruments and the transfer of stock, scourtties and other like indica of property.

⁽³⁾ Goluck Chunder Goobo t. Mohim Chunder Ghose, t3 W R 95, 96 (1870)

⁽⁴⁾ Mun Mohinee Dossee r Ichamoyee Dassee, 13 W R. 60 (1870), per Phear, J.

Immoveable property should always, if possible, be retained in statu quo, until the suit which is to determine the title to it shall have been decided (1)

The restraint imposed need not necessarily be absolute, but should be such is the circumstances require. So where the subject-matter of the minnetion comprised mortgage bonds and Government promissory notes the order of injunction while prohibiting my alienation of or dealing with the bonds or notes by the defendant, permitted him to sue upon the mortgage bond and take steps to realize the amount covered thereby, and ordered the money when iculized to be kept in Court until the disposal of the suit, and as regards the promissory notes permitted him to draw the interest as it fell due from time to time (2)

In granting a temporary injunction restraining the alienation of property, the subject of suit, the Court will, as in the case of other injunctions, first see that there is a bona fule contention between the parties, and then on which side, in the event of obtaming a successful result to the suit, will be the balance of inconvenience (3) if the injunction do not issue, bearing in mind the principle (alread) illuded to) of ict uning immoveable property in statu quo (4)

The wrongful sale of property in execution of a decree is only one form of ulicination which may be restrained pendente lite (5). Even a judicial sale if wrongful, will be restrained upon principles and circumst ruces which are hereafter dealt with

In order to obtain in injunction under the rule there must be (a) I suit in which the injunction may be granted, (6) and (6) the threatened danger of wiste, damane or alienation must be alleged and proved, (7) (c) in respect of property which is in dispute in that suit (8)

"Wrongfully sold in execution "-This is one of several forms of injunction in restraint of judicial proceedings (9) Prior to the Specific Relief Act the High Court restrained by injunction proceedings to be instituted and pending, as ilso proceedings not instituted but threatened, and prohibited the execution of decrees which had been or might be obtained (10) The matter is now is icourds permanent injunctions governed by the Specific Rehef Act and as regards temporary injunctions in part by the Code An opinion has been typic sed that temporary injunctions are limited to matters mentioned in sects 192 and 493 (now ir I and 2) of the Code And on this ground the Court iclused in interlocutory injunction restraining the defendant proceeding with sait filed by the defendant against the plaintiff in the Small Cause Court until the hearing of a suit in the High Court in which an application for an injunction was in the (11) But this case has been dissented from (12) It seems anomalous

(7) 1b , Prosumo Voyce Dessee v Wooms Moyeo Dorseo 11 W 1 103 (18 0)

(8) R. I tide; wit & lick Chinder Goobo

t Moh a Chun I r Chist, 13 W R 95, 0

⁽¹⁾ Gomes : Carter, I Ind. Jur , V S 411 (15 0)

⁽_) Chandrist Jha t Ladn mar I Sin, h li hadur, ... (153, 167 (1535) (3) Goluca Chun ler Gooli r Mohim

Chunder Chose, 13 W R Jo, Jo (18-0) (1) Gomes e Carter I Ir I Jur , N S,

^{111 (1500)} per 1 hear 1 (5) Collett s op- cil 0.111

⁽¹⁵ U) Woodniff 162 et sej 19 (lol

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^{1 1 (} N N 148 (1505),

that a perpetual improction may be granted, but not an interlocutory one, where to refuse it may be to make the proposed decree unfructuous. An in junction in respect of civil judicial proceedings may have reference to an action or to proceedings taken in execution of a decree obtained therein R 1 deals with the particular case of wrongful sale in execution, a provision which was not contained in the Code of 1859 Sect 56 of the Specific Relief Act was not intended to and does not affect temporary injunctions applied for under seet 492 (now r 1) against the wrongful sale of property in execution of a decree Therefore a subordinate Court may issue an injunction restraining proceedings in execution pending before a superior Court (1)

The law does not say that a property is, or is about, to be wrongfully sold, but that it is in danger of being wrongfully sold (2) These words are wide enough to include.(3) and the section is, in fact, most commonly applicable to claims in execution made under O XXI r 58 If a claimant under that rule, whose claim has been disallowed, institutes a regular suit against the decree holder, the Court has power to grant an injunction staying the sale pending the decision of the suit (4) And the Code having been amended so as to admit of the grant of an interlocutory injunction in such a case, the procedure indicated by the rule should be followed, and a sale should in ease of applications by third parties, be restrained by injunction in the suit brought to try the title, and not by the order of the Court executing the decree (5) And in the execution of a decree ordering the sale of property, it is not competent for a Court to refuso to sell it because a stranger who is in possession of such property impeaches the decree, the course open to him if he wishes a stay of execution being to file a suit and obtain an injunction for that purpose (6) But though where property is in danger of wrongful sale the Court may issue an injunction restraining the defendant from enforcing his decree against the property, yet when the Court dismisses the suit in which the injunction is sought and has been granted, it has no right to further restrain the defendant from executing upon the mere possi bility of the Appellate Court reversing its decree Oneo the suit is dismissed the Court has, in point of law, no power at all te deal with the proceedings in the suit in which execution has issued (7) Upon the dismissal of a suit for an mjunction restraining the sale, the Appellate Court may issue a temporary miunction restraining the decree holder from proceeding with execution pending the appeal, (8) and the application may be granted subject to the terms of the

Rash Behary Dey : Bhowani Churn Bhose 34 C 97 (1906) where it was also pointed out that the High Court has a general Equity

jurisdiction independent of the Code (1) Amir Dulhin v Administrator General of Bengal, 23 C 351 (1895)

(3) Brojendra Kumar Rai Choudhury :

Rup Lall Dass, 12 C 515 (1886)

(4) Ib , Abdullah v Banke Lal F B 33 A 79 (1910)

(5) Ib , a case which clearly emphasizes the difference between the former and the present law

(6) Purshottom Vithal v Purshottom

Iswar, 8 B 532 (1884)

(7) Gossam Money Purce : Gour Pershad Singh, 11 C 146 (1884), referred to in Yamin ul Dowlah v Ahmed Alı hhan, 21 C 501

(8) Karpa Dayal t Rani Kishori 10 4 S0

(1887)

⁽²⁾ Brojendra Kumar Rai Chowdbury v Rup Lall Dass, 12 C 515 517, 518 (1886) . see Fulkumar v Ghanshyam Misra, 31 C 511 (1903), and as to an injunction being conse quential relief as held in the latter case, see Kunj Behari t Keshav Lall, 28 B 567 (1904)

applicant giving such security as the Court thinks fit (1) This decision has, however, recently been dissented from, the Court holding that in a case like this it was impossible to say that the property was in danger of being wrongfully sold . that sect 492 of the last Code required that it must be "proved" that the property was in such danger, and that to hold in such an application this was proved would be to decide an appeal which was not before the Court (2) It is submitted that the question is rather one of fact than of law, though no doubt dealing with the matter as one of fact the decree appealed from would, unless it was clearly erroneous, prove a serious obstacle to the grant of an in junction. The Code directs that ordinarily before granting an injunction notice of the application should be given to the opposite party (3) Where a Court made an order granting a temporary injunction without directing notice of the application for an injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed ex parte without the other side being given an opportunity to show cause, it was held that the order was irregular (4) The application should be made without unnecessary delay.(5) and should on the face of it disclose a sufficient ground to warrant an order heing made as prayed (6) The meaning of the word "wrongfully certain cases, be open to doubt (7) It is, however, clear that the property is not in danger of being wrongfully sold, when the plaintiff has no title to or interest in it, or if he has an alleged interest, when such interest is not the subject of sale in execution (8) So where ancestral property was attached in execution of a decree and a son of the judgment debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, it was held that, masinuch as what was advertised to be sold was the right and interest of the plaintiff's father in the property, it could not be said that the property was being wrong fully sold in execution of a decree and the temporary injunction ought not to have been granted (9) It has been said that in interpreting this portion of the Code a Judge cannot be too eareful as to the mode in which he permits the machinery of the Courts to be used for the purpose of enabling a plaintiff in one suit to delay a decree holder in another from obtaining the fruit of his judg ment by executing his decree in ordinary course against the property of his judgment dehtor At the same time, it is of course, most desirable to guard as far as possible, against a multiplicity of suits, which was one of the objects the Legislature had in view in enacting the provision in its present shape Courts will, therefore amongst other things, consider whether the refusal to grant the application for an injunction will result in further higgation, and whether any practical injury will result to any one if the injunction be allowed (10) It has

⁽¹⁾ Kirpa Dayal t Rani Kisheri, 10 A 80 (1887)

⁽²⁾ In re Chan lo Bibi, 26 \ 311 (1904)

⁽¹⁾ R 3 (4) Amolak Ram : Salub Surgli, 7 A 150

⁽⁵⁾ Ib , 752 (0) 1b

⁽⁷⁾ Kirpa Dayal v Rani Kishoti, 10 A 46, 92 (1887) Soo In re Chando Bibi, 26 A 311 (1904), supra

^{(8) \}molal Ram t Sahih Singh, 7 A 5'0 (1855)

⁽¹⁰⁾ Per Straight, 1, in Kirja Dayal v Raul Kishorl, 10 A 50, 82 (1887)

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been held by the Allahabad High Court that the term 'decree as used in the Code (1) does not include the decree of a Court of Revenue and that therefore an application for stay of sale in execution of a decree of a Court of Revenue in a suit in let seet 93 of let AII of 1881 cannot be entertained by a Civil Court (2)

Fraudulent disposition of property - This provision differs from that enacted by clause (a) in that the property dealt with by the injunction is not the property in dispute in the suit namely that to which both parties lay claim and the title to which has to be decided but is property whether moveable or immoveable (3) the title to which is admittedly in the defendant and therefore, not in dispute in the suit. It presupposes a general intention on the part of the defendant to defeat and defraud his creditors and permits of an injunction analogous to the remedy of attachment before judgment (4) The ordinary rule is that pending a suit to enforce a general claim against a person there cannot be an injunction to restrain him from parting or dealing with his property not being projectly specifically in dispute in the suit (5) When however such intended parting and dealing with property is not dono in the bond fide exercise of ownership but with an intent to defraud persons who being creditors of the owner, have or mught have the right to resort to such property in satis faction of their claim, there arises in their behalf an equity to restrain such threatened dealing with the property even as against its legal owner attachment unler O XXXVIII r 6 and an injunction under this clause have as their subject matter not the property in suit but the property of the defen dant therefore applications under these provisions are clearly distinguishable from an application for an injunction under clause (a) against the waste damage and alienation of property which is in dispute in the suit. And as applications under that Order and clause (b) are both distinguishable from an application under clause (a) so also applications under that Order and clause (b) respectively are clearly distinguishable from each other O XXXIII r 6 is applicable only to cases where it is probable that the defendant is about to make away with his property so as to make it impossible for the plaintiff to execute any possible decree against hun and empowers the Court in such a case to make an order calling upon the defendant for security and in default thereof to attach the property. It has no application where the property is the property in suit which must if necessary be followed under the provisions of r 1 clause (a) The latter provision applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to damage and make away with any property in dispute in the suit and empowers the Court in such a case to issue an injunction to the defendant to refrain from the particular act complained of (6) But though O XXXVIII r 6 and r 1 clause (b) of this Order have both this in common that the property to be dealt with hy the Court is not that in dispute in the suit the following important differences exist between

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⁽²⁾ Onkar S ngh v Bhub Singh 16 A 496 (1894)

⁸⁹⁴⁾ (3) Collett op c t 26s

⁽a) Bahamber Sahai v Sukhdev 16 \\
186 187 (1897)

⁽⁶⁾ Joynaram Geeree v Sh bpersad Geeree

⁽⁴⁾ See Rob nson v Pickering 16 Ch D 6 W R Misc 1 (1866)

applicant giving such security as the Court thinks fit (1) This decision has, however, recently been dissented from, the Court holding that in a case like this it was impossible to say that the property was in danger of being wrongfully that sect 492 of the last Code required that it must be "proved ' that the property was in such danger, and that to hold in such an application this was proved would he to decide an appeal which was not before the Court (2) It is submitted that the question is rather one of fact than of law, though no doubt dealing with the matter as one of fact the decree appealed from would, unless it was clearly erroneous, prove a serious obstacle to the grant of an in junction. The Code directs that ordinarily before granting an injunction notice of the application should be given to the opposite party (3) Where a Court made an order granting a temporary injunction without directing notice of the application for an injunction to be issued to the other side, and its order directing stay of sale of property in execution was passed ex parte without the other side being given an opportunity to show cause, it was held that the order was irregular (4) The application should be made without unnecessary delay, (5) and should on the face of it disclose a sufficient ground to warrant in order hemg made as prayed (6) The meaning of the word "wrongfully certain cases, be open to doubt (7) It is, however, clear that the property is not in danger of heing wrongfully sold, when the plaintiff has no title to or interest in it, or if he has an alleged interest, when such interest is not the subject of sale in execution (8) So where ancestral property was attached in execution of a decree and a son of the judgment debtor instituted a suit to establish his right to the property and made an application for a temporary injunction directing stay of sale pending the decision of the suit, it was held that, masmuch as what was advertised to be sold was the right and interest of the plaintiff's father in the property, it could not be said that the property was being wrong fully sold in execution of a decree, and the temporary injunction ought not to have been granted (9) It has been said that in interpreting this portion of the Code a Judge cannot be too careful as to the mode in which he permits the machinery of the Courts to be used for the purpose of enabling a plaintiff in one suit to delay a decree holder in another from obtaining the fruit of his judg ment by executing his decree in ordinary course against the property of his judgment debtor At the same time, it is, of course, most desirable to guard, as far as possible, against a multiplicity of suits, which was one of the objects the Legislature had in view in enacting the provision in its present shape Courts will, therefore, amongst other things, consider whether the refusal to grant the application for an injunction will result in further litigation, and whether any practical mury will result to any one if the munction be allowed (10) It has

⁽¹⁾ Kirpa Dayal : Rani Kishori, 10 A 80

⁽²⁾ In re Chan to Bibi, 26 \ 311 (1904)

⁽J) R 3
(4) Amolak Ram + Salub Suigh, 7 \ f 9

⁽¹⁶⁸⁵⁾ (5) 15,752

⁽c) Ib

⁽⁷⁾ Kirpa Dayalı Ranı Kishon, 10 4 407 82 (1887) Soo In re Chando Bibi, 26 A 311

^{(1904),} supra (8) Amelak Ram (Sahih Single, 7 A 5 0

⁽¹⁸⁵⁵⁾ (9) 1b

⁽¹⁰⁾ Per Straight, I, in Kuja Dayal v Rani Kushori, 10 A 80, 82 (1897)

been held by the Allahabad High Court that the term "decree, as used in the Code (1) does not include the decree of a Court of Revenue, and that therefore in application for stay of sale in execution of a decree of a Court of Revenue in a suit under sect 93 of Act XII of 1881 cannot be entertained by a Civil Court (2)

Fraudulent disposition of property.-This provision differs from that cuacted by clause (a), in that the property dealt with by the injunction is not the property in dispute in the suit, namely, that to which both parties law claim and the title to which has to be decided, but is property whether moveable or immoveable.(3) the title to which is admittedly in the defendant, and, therefore. not in dispute in the suit. It presupposes a general intention on the part of the defendant to defeat and defraud his creditors and permits of an injunction analogous to the remedy of attachment before judgment (4) The ordinary rule is that, pending a suit to enforce a general claim against a person there cannot be an injunction to restrain him from parting or dealing with his property, not being property specifically in dispute in the suit (5) When, however, such intended parting and dealing with property is not done in the bond fide exercise of ownership but with an intent to defraud persons who being creditors of the owner, have, or might have, the right to resort to such property in satisfaction of their claim, there arises in their behalf an equity to restrain such threatened dealing with the property even as against its legal owner. Both an attachment under O XXXVIII r 6 and an injunction under this clause have as their subject matter not the property in suit but the property of the defen dant, therefore applications under these provisions are clearly distinguishable from an application for an injunction under clause (a) against the waste damage and alienation of property which is in dispute in the suit. And as applications under that Order and clause (b) are both distinguishable from an application under clause (a) so also applications under that Order and clause (b) respectively. are clearly distinguishable from each other O XXXVIII r 6 is applicable only to cases where it is probable that the defendant is about to make away with his property so as to make it impossible for the plaintiff to execute any possible decree against him, and empowers the Court in such a case to make an order calling upon the defendant for security and in default thereof to attach the property. It has no application where the property is the property in suit, which must if necessary, be followed under the provisions of 1 clause (a) The latter provision applies to a case where it is shown to the satisfaction of the Court that the defendant in possession is likely to damage and make away with any property in dispute in the suit, and empowers the Court in such a case to issue an injunction to the defendant to refrain from the particular act complained of (6) But though O XXXVIII r 6 and r 1 clause (b) of this Order have both this in common that the property to be dealt with by the Court is not that in di pute in the suit the following important differences exist between

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⁽¹⁾ S 2

⁽²⁾ Onkar Singh r Bhub Singh, to 4 4 6 (5) Bahamber Sahai r Sukhder, to 4 (1894) 150, 187 (1897)

⁽³⁾ C liett, op et 265

⁽⁴⁾ See Robinson r Pickering, 16 Ch D 6 W R, Misc, 1 (1860).

<sup>150, 187 (1837)
(6)</sup> Joynaram Geereer 42 thersal Geeree,

these provisions. In the first place, the property is actually attached in the one case, while in the other the property is left in the owner's hands, subject only to the prohibition enjoined by the impunction. Secondly, the provisions as to attachment are generally limited to property sufficient to satisfy the decree which may be passed in the suits in which the application for attachment is made. Thirdly, questions have arisen as to the possibility of attachment where the property is beyond the jurisdiction of the Court in which the suit is pending, (1) whereas an injunction, in so far as its action is in personam, is not so limited Lastly, any private alienation made subsequent to attachment is null and void, but such is not the case with alienations made subsequent to the issue of an injunction either under clause (a) or (b) of the first rule (2)

"Breach of contract."-See Woodroffe on Injunctions, Ch. VI., where the subject is fully considered. Whether or not there has been a breach of contract in any particular case depends on the facts of that case, and the suh stantive law governing it The ordinary remedy for such breach is damages Extraordinary remedies are specific performance, rescission, cancellation, receiver and injunction With this last relief in its temporary form, the Order alone deals The Court will interfere by injunction, to prevent the violation of contracts, and to compel parties to perform their covenants and agreements hy injunction, temporary or perpetual, mandatory or otherwise Certain common conditions are essential to the grant of this relief, viz (a) the Court must be one of competent jurisdiction (3) to grant the relief prayed, (b) the agreement must constitute a contract (4) (c) such contract must not be one the performance of which would not be specifically enforced, (5) for injunctions respecting contracts must be governed by rules relating to specific perform ance (6) Where an agreement is of an affirmative character, the remedy lie in specific performance, and an injunction may also be granted both for the enforcement of negative terms, if any, and also in aid of and ancillary to the relief sought by way of specific performance of the contract If, howell an agreement, though of an affirmative character, is such that the Court wolfu not specifically enforce it, no impinction will be issued to prevent the breel thereof, (7) except in certain cases of negative agreements coupled with affirmative

⁽¹⁾ See notes to rules dealing with attach ment before judgment

⁽²⁾ Delhi & London Bank, v. Rain Narain, 9 \ 197, 490 (1887). [In this case the Lower Court-swed an injunction unders 402, cl. (b), but the facts proved do not appear to have warranted the order. The clause requires not only proof of aftern ted alienation, but of untent to defraud. The High Court appears to have considered that the injunction was not 1 g, 4lly issued, 1 at disposed of the case upon another point, foll in Vlannolar Das 1 Law 1942 Pau le 27 \ 191 (1903).

⁽³⁾ Woodroffe 190-191

⁽i) Ib. 101 104 Sano injunction can be aranted in rapicet of a voil agreement

Bhhaji Sahajo t Bapu Sayer, 1 B 55 (1877) In the cross of voidable agreements a injunction may be granted when the persor at whose unstance the contract is voidable he elected to ratify it, provided that ratification is not (as in the case of a minor) impossible.

⁽⁵⁾ Woodroffe, 195

⁽a) Seo Act I of 1877, as 51 56 (I), Joyeos Doctrines, 201 x to contract, which cannot be specifically enforced, see a 21 Act I of 1877, Woodroffe, 197, for whom contracts may be specifically enforced th 237, against whom contracts may be so enforced, in 241.

⁽⁷⁾ Act I of 1877 # 56 cl (b)

agreements not specifically enforceable (1) (d) The grant of rebel must not affect the operation of the Indian Remstration Act (2)

Particular principles are applicable in certain particular cases of contract or transfer of property such as injunctions between partners (3) against companies (4) clubs, societies, castes (5) between mortgagor and mortgame. (6) lessor and lessee. (7) in eases of trust or other fiduciary relations. (8) against executors and administrators. (9) and against corporations (10)

"Or other minry."-That is, any legal mury other than that arising from breach of contract, as in the ease of obligations arising from transfer of property or trust.(11) or in cases of tort (12) As an improcion will only be granted to prevent the breach of an obligation that is duly enforceable by law, there must be in the first place a legal right and an invasion or threatened invasion of that right. This is a question which must be decided according to the particular facts of the case, and the substantive law of torts governing those facts While it is not necessary in this or in any other case that actual injury should have been suffered, the Court should be satisfied that the apprehended injury will he either continuous or frequently repeated or serious (13) In particular, an immedian will not be granted to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance (14) The applicant must have a personal interest in the matter. (15) and he must not have acquiesced in the wrong complained of (16) The conduct of the applicant and his agent will be considered.(17) and an injunction will not be granted when equally efficacious relief can otherwise be obtained, except in ease of breach of trust (18) The halance of convenience will be considered (19) and in the exercise of the wide discretion with which the Court is vested the whole of the circumstances of the particular case (20) Injunctions have been granted in cases of defamation. malicious words, and slander of title (2f) against trespass and waste (22) against nuisances , (23) such as those in respect of air, light, water support, way , against infringement of copyright, trademarks and patents (24) and any other wrongful act, whatever may be its nature (25) This is now made clear, though it ought not to have been ever doubtful, (26) by the addition of the words "of any Lind "

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(1) Act I of 1877, s 57 Astoaffirmative and
negative covenants, see Woodroffe, 209-224
  (2) Act I of 1877, s 4, cl (c). Woodroffe.
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of trespass, is clearly erroneous,

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⁽³⁾ Woodroffe 243-247 (4) Ib , 249-250

⁽⁵⁾ Ib 251-256

⁽n) 1b. 257-259

⁽⁷⁾ Ib. 261

^{(8) 1}b. 262-271 (9) Jb, 269

⁽¹⁰⁾ Ib , 271 275

⁽¹¹⁾ Ib, Ch V1

^{(12) 1}b, Ch VIL

⁽¹³⁾ Ib , 283 , as to threatened but in complete acts, see Bindu Basini Chowdhrani v Jahnab Chowdhram, 24 C 260 (1896)

⁽¹⁴⁾ Act I of 1877, s 56 cl (a) (15) Ib, s 56 cl (1)

⁽¹⁶⁾ Ib . cl (f)

⁽¹⁷⁾ lb, cl (2)

⁽¹⁸⁾ Ib. cl (a)

⁽¹⁹⁾ See Clerk and Lindsell, Torts, 681

⁽²⁰⁾ Woodroffe, Ch VII p 287 Act I of 1877, a 54

^{(21) 1}b, Ch VIII

⁽²²⁾ Ib. Ch IX

⁽²³⁾ Ib, Ch. X

⁽²⁴⁾ Ib, Ch X1

⁽²⁵⁾ Ib Ch. XII

⁽²⁶⁾ The decision in Darab Kuar r Gomti huar, 22 A 449 (1900), that the section does not apply to cases of injury in tort and acts

3 Before granting injunction Court to direct notice to opposite party,

The Court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct notice of the application for the same to be given to the opposite party.

Order for injunction may be discharged, varied or set aside.

4. Any order for an injunction may be discharged, or varied, or set aside by the Court, on application made thereto by any party dissatisfied with such order.

Practice. Notice -The present Order contains the practice as regards temporary injunctions The practice as regards perpetual injunctions is the same as that which governs the making of decrees generally (1) Injunctions are granted upon suit, and should as a rule be specifically prayed for when the obtaining of this form of relief is a substantial object of the action. In urgent cases application for an injunction may be made ex parte without notice and before or after appearance As, bowever, enacted by r 3, notice as a general rulo must be given to the opposite party The power to issue an ex parte in junction no doubt exists, but the greatest care should be employed in its exercise, and only in cases where considerable mischief might ensue if the issue of the process were delayed until notice was given (2) If the Court be of opinion, upon an application ex parte, that the case is not so urgent as to require its immediate interference, it will either grant a rule nist or order notice of the application to be served on the defendant Where an injunction is granted without notice the party aggreeved may apply either to bave it discharged under r 4 or he may appeal, (3) though the former appears to be the more proper course appeal lies from an order refusing to issue an injunction without notice to the opposite party (4) In other than urgent cases application is generally made by motion for a rule ness or upon notice before or after appearance of the defendant

Instead of issuing an injunction in the first instance the Court may grant an interim order,(b) which is really an order in the nature of an injunction granted when the plaintiff, not showing quite a case for in ex parte injunction without more, shows a case for giving short notice of motion for an injunction and for

protection in the meantime

An interim order and a rule nisi may be, and ordinarily are, granted at the In the case of every application it must be proved either (18 is

⁽¹⁾ Woodroffe, 129 et seq

^{(2) 1}b, 130, Harre Secretary of State, 27 B 424, 451 (1903) , Preeman : McArthur, 2 Tayl & Bell, 10, 25 (1851), see Schochurry Douce t Hurree Kisto Roy, 2 Bouln 62 (1859), Amalak Ram & Sahib Singh 7 A "70 (166J)

^{552 (1885)}

⁽⁴⁾ Luis : Inis, 12 M 156 (1885)

⁽⁵⁾ By which the defendant is restraine ! until after a particular day named, liberty being given to the plaintiff to serve notice of metion for an injunction for the day before such das

⁽³⁾ Amalak Ram : Sahib Singh, 7 A 550,

usually the ease) by affidavit, or otherwise, that sufficient grounds exist for the grant of the relief claimed (1) The defendant's admission may, of course, be sufficient (3) Particular care must be taken to state all material facts fully aud fairly in applications for an exparte injunction, (3) such as injury, (4) defendant's intention to waste, damage, alienate, or to commit some other threatened injury (5)

If sufficient prima facio evidence is given the Court may either grant an injunction absolutely or as provided for in r 2 on terms. It may require the plaintiff or defendant to enter into terms as a condition of withholding an injunction. The most usual undertaking is to require a plaintiff as a condition of the Court's interference in his favour to abide hy any order which it may make as to damages (6). The undertaking is ordinarily given by Counsel or pleader on hehalf of the party for whom he appears, or h; the party appearing in person, and forms part of the order of injunction.

In some cases the motion for a temporary injunction is treated as a trial of the action, and the hearing of the cause is not proceeded with, the injunction heing by consent made perpetual on the motion. In eases, however, where relief, additional to that hy injunction, is sought, such a course is not feasible, and the trial proceeds, when upon judgment the injunction is made permanent or dissolved. If upon judgment the action is dismissed, any injunction which may have been greated goes as a matter of course. An injunction which has been granted upon an interlocutory application is superseded by the judgment is the action. If it is intended that it should remain in force it must be expressly continued.

Discharge, Variance and Dissolution A marked feature of temporary injunctions, as distinguished from those which are find or perpetual, is that the former are liable to be dissolved on notice upon sufficient cause shown at any stage of the proceedings after, or perhaps even before, the coming in of the answer (7) The application should be made on motion at any time before the hearing of the cause in which it was granted (8) and before the Court by which

See Jagjoran Nauabhai i Shridhar Balkrishna Nagarkar 2 B 250 (1877)

⁽²⁾ Goluck, Chunder Goolio t. Mchim Chunder Ghose 13 W. R. 95 (1870). Appay Pattle 13a, 20 B 735 (1902). or it may go a long way to remedy defects in the Hant Kung Behari t. Keshay Lall, 25 B 567, 772 (1904).

<sup>(1904)
(3)</sup> Preeman : McArthur, 2 Tayl & Bell, 10, 25, Joyce, Inj., 1203

⁽⁴⁾ Woodroffe, 137. Spelling, \$5.931, 9.33, High, Inj. a. 138. but see hung lehari r. Koshav Lall, 28 B. 567, 572 (1-94), against 100 africt construction of Motiosil pleasings.

⁽⁵⁾ Woodreffe, ib., Clabidia Edilubhair Municipal Commissioner of Bombay, 5 B. H. C. R., 55 (1871), Prosimo Moyee Dissice v. Wooma Meyre Dossee, 14 W. R.

^{409 (}Br0), Roy Tuchmput Singh 5
Secretary of State, H B L R app 27
28 (IS*3) Chandidat Jha 1 Padmanun I Singh
Bahadur, 22 (1970, 460 (18.55), Woran 1 Birer
Steam Navigation Co. 14 B L R 322 (1875)
(6) See as to injunctions on terms Amain
anta Deep whacking the Jo B L R 521 574
(1871), Moran w River Steam Navigation
Ca, 14 B L R 322, 361, 366 (1879). Pattang
Hormany E Neith walls v Lably - Hormany E.

Hormasje Bottk walls * J.Anje Hormasje Bottk walls 8 B. H. C. R. 181, 184 (1871). Clandra Nath Pal e Sree Gob all Chowthury, 6 C. W. N. 202 (1800). Madras Radway Go e Ruat, 14 M. 18 22 (1830). Ke pa Dayal e

Bara Kuhori, 10 A. 50, 83 (1887).
(7) Woodroffe, 142.

⁽⁸⁾ J vec, Inj., 12/5., 1 rec., a. r. Mc briller, 2 Tayl. & Bell, 25 (1851); Sm

the structure of was flowed, (I) and us the come has been translated, when are applied on may be made to that Court to which the come has become are self. The same rules of planing and evidence apply both to applications for the grant and disclution of injunction. The injunction will either be contained or disclosed according to the norms as disclosed by the planings and the preponderates of the studence.

If an injureir n obtained as parts is set a do on the ground of concellin n of r abstral fact (2) so an injunction granted on notice it is tailed as having been 1 and on resulting one grounds (3) the planning may apply assume the con-

make out a uffirment case

In app all to under 0 XLIH r 1 (r) from an order under this rule the appeal not being limited to an affirmative but including also a negative order (1)

Compensation for issue of injunction.—This in the last Cide was the lit with m sect 197, which is not incorporated in sect 195, which ex

5. An injunction directed to a corporation is binding not injunction to corporation only on the corporation itself, but also on all members and officers of the corporation whose personal action it seeks to restrain.

Interlocutory Orders

6. The Court may, on the application of any party to a suit, order the sale, by any percel named in such order, and in such many around on such terms as it thinks fit, of any moveable preserve heavy the suit, which is subject to speedy and natural decks or on an for any other just and sufficient cause it may be desorted. Suit and sufficient cause it may be desorted.

Sale of perishable articles—The beacht of the proving a consected of the last Code should plainly be claimable in the case of a code of the last code of the code

at once.

⁵ lochurry Dosses v. Hurrie Kisto Roy 2 Le ila is' Rep. (2 (18. i) Kerr, Inj. 631

⁽¹⁾ Woodreff , 142 (2) Fetch v Local et 18 L. J. Ch. 4 S. Prieman v McArtlur 2 Tayl S. Joll, 26 (b. 1)

⁽³⁾ Jaguvan r Shrathar 2 B and and

^{(1577).} See a fixtured are belief, so

⁽⁴⁾ Zabada Jan e. Mahammad. Parah, 17 A. S. (1802). Hari Iad e. Pravag. hari, 17 C. W. S. 99 (1913). La himi Vara ve. ham Charan Das, 35. V. 425 (1913).

tion inspection etc of subject matter of suit

7 (1) The Court may, on the application of any party to is

property which is the subject-matter of such suit, or as to which any question may arise therein;
(b) for all or any of the purposes aforesaid authorize any

(b) for all or any of the purposes aforesaid authorize any person to enter upon or into any land or building in the possession of any other party to such smt, and

(a) make an order for the detention,

preservation or inspection of any

(c) for all or any of the purposes aforesaid authorize any samples to be taken, or any observation to be made or experiment to be tried, which may seem necessary or expedient for the purpose of obtaining full inforniation or evidence

(2) The provisions as to execution of process shall apply, mutatis mutandis, to persons authorized to enter under this rule.

"Application"—The application can only be made after summons has been served and after reasonable notice of the intention to apply for the order his been given in writing to the defendant (1). See next rule

Inspection —The principle upon which the right of inspection is justified is another which curned to another which curned be measured without inspection of the subject or property, the Court is competent to compel the proprietor to permit such inspection as indispensable for administering justice (2). Under this rule the Court has jurisdiction to make an order for preparation of an inventory (3).

Detention, etc —An order for investment is not an order for detention, custody or preservation under this rule (4)

"Subject matter of such suit"—The words of the Lingbish rule or as to which any question may arise therein 'were originally omitted because it was thought that the words marginally noted were sufficiently comprish reside to cover all matters in issue in the suit, (5) but they have now been missited

8 (1) An application by the plaintiff for an order under is application for such rule ", or rule"; may be inide after notice orders to be after notice to the defendant at any time after institution of the suit

(2) An application by the defendant for a like order may be made after notice to the plaintiff at any time after appearance.

⁽¹⁾ Sengotha t Ramasamr, 7 M. 241 (1883) (2) Dhuronev Dhur Ghoso r Radha (4) (4) In Gobind Kur, 2 C, 117, at pr. 1-1, 122 (6) Drammoham t Vyravan, 1 V L J 404 (1913)

9. Where land paying revenue to Government, or a tenurc

When party may be put in immediate possession of land the subject-matter of suit. hable to sale, is the subject-matter of a surt, if the party in possession of such land of tenure neglects to pay the Government revenue, or the rent due to the proprietor of

the tenuie, as the case may be, and such land or tenuire is consequently ordered to be sold, any other party to the suit claiming to have an interest in such land or tenure may, upon payment of the revenue or rent due previously to the sale (and with or without security at the discretion of the Court), be put in immediate possession of the land or tenuire,

and the Court in its decree may award against the defaulter the amount so paid, with interest thereon at such rate as the Court thinks fit, or may charge the amount so paid, with interest thereon at such rate as the Court orders, in any adjustment of accounts which may be directed in the decree passed in the suit.

Decree not containing order for adjustment—It was held in the under-mentioned case (I) that a separate suit was not necessary, and that where a decree does not expressly direct an adjustment of accounts such idjustment can be ordered in execution if it be shown from the nature of the decree that it could and should have contained such an order and is imperfect without it.

10. Where the subject-matter of a surt is money or some Deposit of money, etc., other thing capable of delivery and any party thereto admits that he holds such money or is due to another party, the Court may order the same to be deposited in Court or delivered to such last-named party, with or without security, subject to the further direction of the Court.

Deposit.—The rule applies only when the party making the admission holds the property or other thing which the party in whose favour the order is made seeks to have delivered to him. But even if this rule is intended to apply to a case where the property is not so held by the party making the admissions, it would not cover the case where the money was held by another Court to the credit of another suit (2)

⁽¹⁾ Radhey Singh t Mangni Rain, 6 C W N 710 (1902)

⁽²⁾ Rajah Partha Saradhi Appa Row t Rajah Rengiah Appa Row, 27 M. 168 (1903)

[[]Subrahmana Ayyar, J, diss], as to hability for interest for money not deposited, aco Ram Dass Gossanice i Prosunno Moyce Dossee, 16 W R 297 (1871)

ORDER XL.

Appointment of Receivers.

1. (1) Where it appears to the Court to be just and contenent, the Court may by order-Affordment of teceivers. (a) appoint a receiver of any property,

whither before or after decree,

(b) remove any person from the possession or custody of the property ,

(c) commit the same to the possession custody or manage-

ment of the receiver, and

(d) confer upon the receiver all such powers as to bring-ing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the Court thinks fit

(2) Nothing in this rule shall anthorize the Court to remove from the possession or custody of property any person whom any party to the suit has not a present right so to remove

The Court may by general or special order fix the amount to be paul as remuneration for the services Remuneration. of the receiver.

3. Every receiver so appointed shall-

(a) furnish such security (if any) as the Duties Court thinks fit, duly to account for what he shall receive in respect of the property,

(b) submit his accounts at such periods and in such form as the Court directs.

(c) pay the amount due from him as the Court directs, and (d) be responsible for any loss occasioned to the property

by his wilful default or gross negligence.

4. Where a receiver—

Enforcement of recenters duties.

(a) fails to submit his accounts at such periods and in such form as the

Court directs, or

(b) fails to pay the amount due from him as the Court directs, or (c) occasions loss to the property by his wilful default or gross

negligence, the Court may direct his property to be attached and may sell such property, and may apply the proceeds to make good any amount found to be due from him or any loss occasioned by him, and shall pay the balonce (if any) to the receiver.

5. Where the property is land paying revenue to the Governwhen collector may be ment, or land of which the revenue has been assigned or redeemed, and the Court considers that the interests of those concerned will be promoted by the management of the Collector, the Court may, with the consent of the Collector, appoint him to be receiver of such property.

Amendments.—The former Chapter XXXVI, dealing with R. Cautas, contained three sections, 503, 504, and 505. Sect. 503 has (subject to the amendments itshicized) been incorporated in rr. 1-3. R. 1 curresponds with the first half and the last paragraph of sect. 503. R. 2 curresponds with the first portion of clause (d), the rest of that clause being rittain d in r. 1. R. 3 is the second half of sect. 503, less the last paragraph, which has been put in r. 1. R. 4 is new. R. 5 is sect. 504. Sect. 505 has been omitted. This is the most important change effected, as the former restriction of power to High Courts and Dilitate Courts has been removed. Other amendments of former provisions appear to be of a virbal character.

Just and convenient.—These words are derived from the English Judgeture Act which greatly calarged the powers which the Court of Chancery former!* exercised, and the Courts in Linda have the fullest jurisdiction to appoint, a will as for move desceiver in the exercise of judicial description.(1)

Definition and nature of the Office of Receiver.—A receiver as an addifferent person to the parties to a cause appeared by the Court to receive and preserve the property of find in largation produce like when it does not seem reasonable to the Court that either party should hold in (2) or where a justy is monipolent to do so, as in the case of an infant (5). A receiver as a mainternal officer, originally of the Court of Chincery, and as a general ratio

⁽¹⁾ Semman Machara in Samulayal, 14 U.W.N. 2004 by . Ram from a Saligram, 14 C.W.N. 18 (1) *). W. 69 Hen on Feeners, seek 1. Kerr on (2) Raya it, with record to this defining a Rayal Rought, and that the Court sometimes

^{- (}not us ommonly in particular one of the parties to be received by Restrictly Westroffe's Law relatives of Receivers in B- it h India

⁽³⁾ Aerr. 2.

a mere custodian having no powers except those conferred by the order of his appointment, though with the growth of Equity jurisdiction it has become usual to clothe them with much larger powers than were formerly conferred (1) I receiver is an officer of the Court through whom Equity takes possession of the property which is the subject of a higation, preserves it from waste and destruction secures and collects the proceeds and ultimately disposes of them secording to the rights and priorities of those entitled thereto whether regular parties in the cause, or only coming before the Court in a reasonable time and in the due course of procedure to assert and establish their claims representative of the Court he is subject to its orders accountable in such manner and to such persons as the Court may direct and has in his character as receiver uo personal interest save that arising out of his fiduciary capacity and responsi hility for the correct and futhful discharge of his duties. He is not the representative of a party or parties but the representative of the Court (2) A receiver can only be properly granted for the purpose of getting in and securing funds which the Court at the hearing or in the course of the cause will have the means of distributing among the persons entitled to those funds (3). The receiver appointed in a particular suit is nothing more than the hand of the Court so to speak for the purpose of holding the property of the litigants whenever it is necessary that it should be kept in the grasp of the Court in order to preserve the subject matter of the suit pendente life and the po se sion of the receiver is simply the possession of the Court To such an extent is this the case that any attempt to disturb that possession without the leave of the Court is a contempt The receiver has no personal rights in the property and he cannot take any steps even for the purpose of defending his possession without the sanction of the Court Also as a rule so little personal interest of any kind has ho in the matter that he is not justified himself in making any application what ever to the Court If it is necessary that he should take action of any sort it is for the parties to the suit, or one of them to come to the Court to put him in motion and whatever the receiver rightly does with re_ard to the property. be does it simply in the character of agent for the owners of the property or the persons interested in it and with certain exceptions in no ense is principal (4) Although ordinarily a receiver does not himself apply for commencing proceedings for contempt, and although generally speaking the action is taken by the parties beneficially interested in the property there is nothing to prohibit his doing Receivers have on occasions taken action themselves without the parties coming forward in the matter (5). A receiver has a progrectary rights or interest whatever. Notwithstanding his appointment the proprietary right in the estate remains in the persons who are by law entitled to the estate (6) The receiver's posses iou is not a possession by any personal right

⁽¹⁾ Beach on Receivers seet I Ho does not represent the estate but is merely an officer of the Court Miller i Ram Raman Chakravarti 10 C. 1014 (1884)

⁽a) Gluck and Becker Law of Receivers of Corporations, sect. !

⁽³⁾ Praise Coventry J Drew, 90

⁽⁴⁾ Wilkin on r Gun, adhar Sirkl ar 6 B L R 456 at 1 p. 457 458 (1571) () Gravi Worgen Mohun Phakur -5 C

^{33 (1901)} Mohamad ka im r landapa kesa, 35 M. 58 (1911)

⁽c) Ram Lochun Swarr H , 10 W 1 170, 131 (IS S).

possession of the Com t, and he is totally devoid of any interest in the property (1) A receiver should not be appointed in supersession of a bona fide possessor of the property in dispute unless there is some substantial ground for interference (2)

The general objects sought by the appointment of a receiver may be described to be to provide for the safety of property pending a litigation, and until the hearing of the cause, (3) or during the minority of infants—to preserve property in danger of being dissipated or destroyed by those to whose care it is by law entrusted, or by persons having immediate but partial interest therein (4). A neceiver duly appointed is from the moment of his appointment to be considered as an officer of the Court itself—the will be protected by it in the proper discharge of the necessary duties of his office, the possession of the receiver not being permitted to be disturbed without the special leave of the Court (5) and it will be troated as a contempt of the Court if any such interference takes place (6) the reason being as explained by Lord Eldon (7) that their possession is the possession of the Court, (8) and the Court being competent to examine the title will not permit itself to be made a suitor in a Court of law, but will itself examine the title, the mode being by permitting the party to come in to be examined pro interesse suo (9)

The receiver's functions are to obey the orders of the Court, collect and account for the rents, and manage the estate, and the Court will see that this is done and protect the agent appointed under its order (10). Under the last Code a receiver might have been appointed of any property moveable or immoveable, the subject of a suit or under attachment (11). The words of the present rule are "any property," without either of these qualifications, which however doubtless still subsist. Where a receiver is required for the purpose not only of receiving rents and profits, or of getting in outstanding property but of carrying on or superintending a trade or business, he is usually called a manager, or a receiver and manager, (12) though the terms are synonymous (13). The appointment of a manager implies that he has power to deal with the property over which he is appointed manager, and to appropriate the proceeds in a proper

⁽¹⁾ Wilkinson v Gungadhur Sirkhar, 6 B L R 486, 493, 494 (1871)

⁽²⁾ Srimati Mathura v Shibdayal, 14 C W. N 252 (1909)

⁽³⁾ Julict v Armstrong, 1 Keen, 428, Owen v Homan, 4 H L 1032, Woodroffe, 4 (4) Bennet on Receivers, 2

⁽⁵⁾ Brooks : Greathead 1 J & W 178,

Angel t Smith, 9 Ves 335 (6) Broad t Wickham, 1 Sim 571,

Johnes & Claughton, Jac 573, Doulat Koer & Pameswari Koerl, 26 C 625, 629 (1899) (7) Angel & Smith, sugra, in this case

the rule was spiken of as applicable to equestrators, which rule equally applies to receivers (9) So where a receiver is appointed to

⁽⁸⁾ So where a receiver is appointed to receive rents and profits of immoveable

property, the tenants in possession become virtually pro has were tenants of the Court their landford. Or v Minha Chetri 18 M 501, 503 (1893) See also Doulat Koer t Kameswar Koeri, 26 C 625, 629 (1899) The Court is not concerned with any clause of or note; in the court which may have accrued to any third party by reason of any assignment or transfer during the predictioney of the suit

⁽⁹⁾ As to the practice with regard to an examination pro observe suo, see I J & W

⁽¹⁰⁾ Dinomath Section of the gg, 2 Hav.

³J5, 397 (1863) (11) Sect 503

⁽¹²⁾ Korr, 216, Woodroffe, 5

⁽¹³⁾ Orr : Muthia Chetti, 17 M 201, 301

⁽¹⁸⁴⁾

manner. He is bound to carry on in accordance with the general course of hances all 1 ted by the Carticular trade, and is the servant and other of the Court and must, up on any question arising as to the character or details of the tians, ment be directed by the Court, which on announting a mina er of a business or un lertaking in effect, assumes the managing of into its own lightly Mana its are remonal le to the Court which amounts them, and no order of any of the parties interested in the business ever which they are appointed managers can interfere with this responsibility. The Court will in no case as ame the mana-cment of a business or undertaking except with a view to the win ling up and side of the business or undertaking. The management is an interim mana-ement. its necessity and its purisdiction spring out of the purosliction to homolate and sell, the business or undertaking is managed and continued in order that it may be sold as a come concern and with the sale the mana-chient ends. A manager may be appointed to carry on a private trade or business so is to wind it im for the benefit of the parties interested (1) The Court, if it can appoint a receiver has amide power to provide for the minage ment of the property and can deal with property which is under its control just as completely as the owner of the property can deal with it (2). In cases where the manager of the estate must necessarily tested in the country where the estate is situated, it is usual in Lughsh practice to add to the erder directing the ai pointment of a manager, in order for the appointment of one or more consignees (who are the paid agents of the Court to manage the estate which is in the hands of the Court) resident in England to whom the produce of the property in question may be remitted and by whom it may be disposed of (3)

The possession of the receiver is on lechalf and for the length of all the parties to the suit in which he is appointed (1). His possession is the possession of all the parties to the proceeding according to their titles. The property in his hands is in cu today le pa for the person who can make a title to it. It does not follow that because wide powers are conferred upon receivers including a power to remove the property in possession his relation either to the Court of to the parties interested in the proceeding undergoes in change in proportion to the extruct of his powers (5). The appointment though it may operate to change possession has no effect itself upon the title to the property in any way and determines no right is between the parties (6). Although a receiver is an other to hold property for the bonds of the party ultimately entitled to it.

(1) here 240, in Short v Pickering C M
138 (1852), in which the Court directed a
receiver to manage the business of a
millioners shop attached in execution of
decrees it was held that the servant of a firm,
the business of which was being managed by
a receiver a pointed uniter sect 503 of the
nat Coole had no preferential claim over the
attaching creditor on the assets of the firm
for wages due before the appointment of the
receiver, in Orr v Muthia Chetti 17 M. 501
(1833) a receiver of attached property was
appointed to superintent the harvest and to

recover the release
(2) Poreshnath Mukerjee t O nerto Nith
Mitter 17 C 611 615 (1850)

(3) Kerr 253 As to the position and hen of consignees see Moran v Mittu Bibee 2 C as (18 6). Woodroffy, 7

(4) Kartick Nath Pandey v I udmanun I Singh 11 C 496, 498 (1885) Orr i Muthia Chetti 17 M .01, 506 (1893)

(5) Orr v Muthia Chetti 17 M 501 503 (1833)

(6) Beach, cet 1, Orr v Muthia Chetti,

yet when such property is ascertained, the receiver is considered as his receiver (1) He is not appointed for the benefit of strangers to the suit, but he is not to be regarded in any sense as the agent or representative of either party to the action, (2) though the ordinary law of principal and agent applies to this extent, that what the receiver rightly does he does in the character of agent for the owner (whoever be be) of the property, and this is so even in the case of parties who opposed his appointment or objected to his receiving particular powers (3) It was held under the Code of 1859, which contained less extensive provisions than those of the last and present Code, that his duties as officer of the Court were confined in the case of property the subject of attachment to realizing, preserving, or managing the property for the collection of the moneys and money profits due to the debtors (4) Where, however, the receiver of attached property acts in the exercise of powers conferred upon him by the Court, it is erroneous to regard him as the judgment creditor's agent because on his application the appointment is made. The appointment is the act of the Court, and once made he is au officer of the Court and subject to its orders (5) A receiver is frequently spoken of as the "band of the Court," and the expression very aptly designates his functions as well as the relation which be sustains to the Court and property in his hands are as much in the custody of the law as if levied upon under an execution or attachment, it being beld that the appointment of a receiver is in effect an equitable execution by means of which the Court makes a general appropriation thereof, leaving the question of who may finally be entitled to be determined thereafter (6) When a party is declared entitled to the property by the final decree in a suit the Court has no option but to give that party possession of it. The Court having been in possession of the property on hehalf of the parties to the suit is bound to give possession to the successful party in that suit Any one clse entering into possession would be a trespasser (7) He has no estate or interest himself, and his power to manage is created snuply by the order of the Court appointing him and is binding only upon the persons

⁽¹⁾ Orr : Muthia Chetti, 503 principle is applicable in the case of a suit in which title to property is decreed, and not to attached property the title to which continues to yest in the judgment debtor also Appasami Naickan i Jotha Naul an 22 M 148, 151 (1893), Kerr, 156, 157, but see Beach sect 223, High sect 135, the person who has the title to the property must be deemed to be in posses ion. I'm him in Sundar Koer & Sri Varain Singh, 20 1 341, 311 (1838)

⁽²⁾ Beach sect 2, he exercises he functions in the interest of neither plaintiff n r defendant, but for the common benefit of all parts a m interest, High, sect 1, on whise behalf he is appointed. Prem Lall Mullick c Said begrath Rev. 22 C 260, 273 (1515)

⁽i) I a finath Makey + 1 Om et nath

Mitter, 17 C 614, 616 (1890), referring to Williamson : Gungadhar Sirear, 6 B L R 156, as the leading case in this country a the position of a receiver Woodroffe, 8 The uppointment ordinarily sixes no advan tage or priority to the person at who-e instruce the appointment is made, over other puties in interest High, sect 5

⁽⁴⁾ Inl: Abdool Hye, 19 W R 37 (1872) distinguished in Orr : Mathia Chetti, 17 M 501, 502, 503 (1893) See post, Leceiver of attached property

⁽⁵⁾ Orr 1 Matha: Chetta, 17 M 501, 503 (1593)

⁽t) High, sects 2, 5 See Administrator General of Bengal : Prem Lall Mulliel , 22 C 1015, 1016 (1535)

⁽⁷⁾ Doulat Korr : Ramesware Korn, 26 C (25,125,130 (153))

First Schid O 40, r 5

before the Court (1) This powers at best are no more than those which the parties to the suit turn out to be possessed of when the case is finally decided, but if he takes possession of property under colour of his appointment his conduct cannot be disputed by a motion to discharge or get rid of the attachment (2). As the servant of the Court and not of the parties he has only such power as the Court may choose to give him and it is a contempt for any of the parties to enter into an agreement with him restricting and controlling his powers (3)

Appointment of receiver is a form of specific relief-The appointment of a receiver pending a suit is a form of specific rehef (4) The last Cod () further provided for the appointment of a receiver of projects under attachment (6) This can still be done by virtue of the words property and before or after decree Rehef by specific performance injune tion and receiver belong to the same branch of the law Moreover the appoint ment of a receiver operates as an injunction against the parties their agents and persons claimin, under them restraining them from interfering with the possession of the receiver except by permission of the Court (7) and an order for an injunction is always more or less included in an order for a receiver - it is not necessary if a receiver be appointed to go on and grant an injunction in terms (8) All three forms of rehef are dealt with by the Specific Rehef Act The issue of temporary injunctions and the appointment of receivers together with the subject of arrest and attachment before judgment and interlocutory orders were dealt with by the last Code under the single heading of Provisional Remedics (9) Relief granted by appointment of a receiver gendente life bears in many respects a close analogy to that by temporary injunction Both are extraordinary equitable remedies as distinguished from the ordinary modes of administering relief. Both are essentially preventive in their nature, being property used only for the prevention of future mury rather than for the redress of past grievances Both have one common object in so far as they seek to preserve the res or subject matter of the litigation unimpaired to be disposed of in accordance with the future decree or order of the Court (10)

Whether I owever the negative duty or duty to abstain be contractual or general the injunction which enforces it is the same in nature and form. The general grounds of similarity between relief by receiver and by injunction have been a liverted to. Perhaps the principal element of difference between these two important remedies lies in this. that an injunction is strictly a conservative remedy, merely restraining action and preserving matter in statu quo without affecting the possession of the property or fund in controversy, while the appointment of a receiver is usually a more active remedy since it clarges.

⁽¹⁾ A lmadhub Voi lul 2 G llan lers 2 Sev 951 (1863)

⁽²⁾ Bissessuree Debit i Soolram Doss Mohunt L. W. R. 34" (18 1) 1:1 i blood Hye LJ W. R. 37 (18 2) as to tle frst case i le no l.

⁽³⁾ Man ck Lall S al 2 Surret Co mary Dassec, 22 C, 648 656 (189)

⁽⁴⁾ let I of 18 seet 5

⁽a) Sect 503 Woodroffe 9

⁽f) See from 168 in the fourth Sel edule of the last Code () Mahome 1 Zol uruddeen t Mahon ed

[\]oorooddeen 21 C 85 91 (1893)
(8) herr 10 \woodroffe 10

⁽⁹⁾ Civil Procedure Code Part IV (10) Story Eq Jur, sect 800 High Inj

^{1 23} Unodroffe II

the possession as well as the subsequent control and management of the property The Court by an injunction ties up the hands of the defendants, and preserves unchanged not only the property itself but the relations of all parties thereto But in appointing a receiver the Court goes still further, since it wrests the possession from the defendant, and assumes and maintains the entire manage ment of the property or fund, frequently changing its form, and retaining posses sion through its officer, the receiver until the rights of all parties in interest are satisfactorily determined

From the point of resemblance already indicated, it is not to be inferred that the appointment of a recence necessarily follows from the granting of an injunction or that the two remedies are necessarily inseparable. And while it frequently happens that the Comits are called upon to administer both species of relief in the same action and at one and the same time yet it by no means follows that because an injunction is granted a receiver must be appointed and the two are to be treated as distinct and independent matters. The Court, therefore, may refuse a receiver although the case presented is a fitting one for an injunction, and although an injunction has already been granted (1) A distinction exists between the ease in which an injunction and that in which a receiver will be issued and appointed respectively "That distinction seems to be that, while in either case it must be shown that the property should be preserved from waste or alienation, in the former case it would be sufficient if it bo shown that the plaintiff in the suit has a fair question to raise as to the existence of the right alleged, while in the latter case a good prima facie title has to be made out "(2)

Relief, whether it be given by the issue of an injunction or the appointment of a receiver, is grauted generally upon the principle quia timet, that is, the Court assists the party who seeks its aid, because he fears (quia timet) some future probable injury to his rights or interests, and not because an injury has already occurred which requires any compensation or other relief

Law relating to receivers -The lin relating to the appointment of receivers in Civil suits (3) in British India (4) is contained in this Code (5) and in the Specific Relief Act, (6) which merely declares that the appointment of a receiver pending a suit rests in the discretion of the Court, and refers to the Code of Civil Procedure for the mode and effect of their appointment and for their rights powers, duties, and liabilities Both the earlier Codes (Act VIII of 1859, and X of 1877) dealt with the subject (7) Act X of 1877, however contained provisions of a more complete character and which were in fact

⁽¹⁾ High 1", 18, Welreffe, 12 and see Hall : Hall, 3 Vac G St, where it was sul that the rights to the so different reruch a are essentially distinct and depend (jon stally different groun Is an I cire imitan &

^{1 (2)} Clandilat that Palminar I Single (for loor, 22 C 1), 10, (189) which the Criminal Procedure (ed. in s. 4s. Muffick (1994), dolor with the arminist in t. f. A(INJ) (2) d als with the appeints at I

⁽³⁾ I if affect I properly Specific

n t be granted lor, the mere parte e of cu I rong a jenal law Act I of 1977, sect 7 (4) I r definition of these words see let

I of 1508, sect 2 (8) as arrent 111 1ct M of 1841

^() Or ler XL. As to the appeniment of receivers of property under all a limit le po t

⁽t) A t.I f 1877, s ct 14

^{(*) 5} A L VIII | f | S | 1 meth. 102 | 191

⁻¹³ A C \ [1877 + cls | All | Ab.

th some minor discretions in the sections relating to receivers, the same as use of the mic ent Code. Sect. 92 of Act VIII of 1859 analyted the Court appoint a receiver or manager in all cases in which it much appear to the ourt to be necessary for the preservation of the better management or the isteds of any property " which is in dispute in a suit," and sect 243 enabled ie Court to appoint a manager to realize debts or rents and receipts of landed concity where the debts or land were attached in execution of decree Chanter XXVI. of the Code of 1877 which with some minor alterations (f) was deutical with the same Chapter of the fast Code, simpled the place of both of hese provisions, and one further case the Court very central powers as to he appointment of receiver (2) Further, orders made under sect 92 of Act VIII if 1859, were appealable only at the instance of the defendant (3) but orders made under sect 503 of the Codes of 1877 (f) or 1882 (5) were annealable at the instance of either parts. Prior to the establishment of the High Courts, the Sunreme Courts of the Presidencies appointed receivers following the principles and prictice of the Court of Chancers in England (b). The provisions of the present Code are (with one unportant exception) the same as those of the list. with certain omissions which have been noted and additions which have been italicized, and the principal of which will be found in rr. 1, 2, and 4. The execution is the omi sion of sect 505 of the last Code as to which see post

Jurisdiction to appoint a receiver —The jurisdiction of the Civil Courts in this country to grant relief by injunction or receiver is determined by the Code and Specific Relief Act. Certain common conditions are necessary to the existence of jurisdiction to grant either of these forms of relief. Shortly stated (7) these conditions are as follows —

(4) In the first place specific relief whether given by the issue of an

⁽¹⁾ In sect 503, el. (d), the words as the Court thinks fit were inserted after the word renuncration. In Act 311 of 1888, sect 12. In sect 591, let N of 1877 the opening words of the section were of the property. It the same section Act 311 of 1888, sect, 43, substituted the words the Court may writh the consert of the Collector appoint the Collector in Act N of 1877, so as to render the Collector's consent incressary to his appointment as receiver.

⁽²⁾ Sects 503-05 of tet X of 1877 were except as to the points mentioned in the last note, identical with the same sections of the last Code. As to see 504, see Act MH of 1859, seed 22. Sect 505 was first inserted in the Code by Yet X. of 1887. Y Mofussil Court of Small Causes could not appoint a receiver under the Code of 1877, as Ch XXXVI was not extended to those Courts, but it is otherwise under the pre-sect Code Nursancials as Tuberiam. 2 B 578 (1978)

⁽³⁾ Act VIII of Ibid, sect 94

^{(4) 1}ct A of 1877, sect 588 (e)

⁽⁵⁾ let XIV of 1552, sect 458 (24)

⁽⁶⁾ See Austonumilo Bismas i Prawn hasen Bawas (1829) Clark's Rules and Orders, 1829 Votes of decided cases, 52 the charter establishing the Supreme Court of Judicature, 26th March, 1774 cl 18, given in Vol. 1 of Smoult and Ryan a Rules and Orders, it is ordained that the Supreme Court be a Court of Fourty with full power and authority to administer justice as nearly as may be according to the rules and proceed mes of the Courts of Chancery As to the High Courts, see High Courts Act, 1861, cls 9-tt, and Letters Patent, sect 19 As to the former powers of District Courts to appoint receivers, see John Tiel v Abdul Hye, 19 W R 37, 39 (1872), Joynaram Gecree t Shibpersad Geerce, 6 W R Misc 1 (1866) (Jurisdiction of Sudder Ameen) As to Mofussil Small Cause Courts, vide ante.

⁽⁷⁾ Woodroffe 16 et seq

injunction or the appointment of a receiver, cannot be granted for the mere purpose of enforcing a penal law,(1) that is, such enforcement must not be the sole object of requiring specific rehef, but the real object must be the protection of some civil rights or the prevention of a tort or civil wrong Though, however, the Court cannot interfere for the purpose of giving a better remedy in the case of a criminal offence, yet if an act which is criminal touches also the enjoyment of the property, the Court has purisdiction (2) So the fact that an act complained of amounts to the criminal offence of inisappropriation rather than to simple waste, is no ground for refusing relief by way of appointment of a receiver (3)

(B) Secondly, assuming the matter to be of a civil nature, it is ordinarily a necessary condition to the grant of either form of relief that there should be a suit pending in which either of these reliefs may be granted (4) Under the last Code, however, a receiver might have been appointed not merely of property the "subject of a suit," but also of property "under attachment ' And though these words are omitted this is doubtless so now (5) The suit must be pending in the Court from which either of these reliefs is sought Thus, a District Court has no jurisdiction to appoint a receiver or manager in respect of property in dispute in a suit pending in a Subordurate Court, (6) and where a Court has thus no jurisdiction to make an order it can have no jurisdiction to modify such order (7) R 1 gives power only to the Court in which the suit is brought or by which the property has been attached A Court cannot appoint a receiver except it has seism of the property either by a suit being pending or by proccedings in execution of deeree made in a suit being pending, and attachment having been made. It is only the Court in which a proceeding is pending, and which has thereby the property under its control, that can appoint a receiver It was formerly only where the procedure contained in sect 505 of the last Code had been adopted that a District Court could appoint a receiver in suits pending before or attachments made by subordinato Courts (8) As to this now, ride post

(C) Thirdly, not only must the matter be of a civil, as opposed to a eriminal, nature and subject to what is above stated a suit be pending, but such suit must disclose a cause of action, and the Court must have general jurisdiction If it has not such purediction it will plainly have no power to to entertam it grant rehef The Court must not be barred by the Code or any other enactment from taking cognizance of the suit, which must further be not only of a civil

nature generally, but within the meaning of that Code (9)

(D) Lastly, the Court to which application for the relief prayed for is male, must be one which, assuming all the preceding conditions to have been fulfilled,

⁽¹⁾ Act I of 1877, met 7

⁽²⁾ See Woodcaffe's Injunctions, 35

⁽³⁾ Hanningya + Venkatasubbiyya, Is V. 23 (1591)

⁽⁴⁾ A Court has no purediction to appoint a receiver unless a cause be depending. Fr.

parts Whitield, Bennet, J., Woodroffest Law of Injunctions, p. 36

⁽⁵⁾ Bil Jamabu (mre) 16 B _0 (1911), the cparation of the rule is a too of fined to a

Santukrum i Chimba (6) Dhundiram Nabat, 2 Bom H C R 103, 2a1 1 1, 98 (1865). Latalat Howem: Amot Chowdley,

²³ C 517 (1835) (7) Dhundersto & Chan la, s q r t

⁽⁸⁾ Latafut Hossim : Amust Chowdhey, 21 (517, 519-520 (15 ()

⁽⁹⁾ So. Wasdroffes Law of Injunctions pp. 17, 38

has otherwise jurisdiction to try the suit in which that relief is sought. With regard to this, the extensive power of the Court of Chancery to act in personam must be considered with reference to the limitation on part diction imposed by the Charter and by the Code The Courts of this country have ordinarily no jurisdiction to try suits for numoveable property where such property is situate without the local limits of their jurisdiction and it would appear to be doubtful whether the equitable jurisdiction of the High Courts in India is of the same extent as that which has been claimed by the Court of Chancery, namely, to take cognizance of any equity between persons residing within the jurisdiction respecting lands outside it. But whatever may be the precise extent of the jurisdiction the Civil Procedure Code has given to the Mofassil Courts the power to act in personam when the person against whom relief is sought resides within the jurisdiction. The Presidency High Court under their Charter have a similar, but in terms less restrictive, jurisdiction (1) In the case of receivers it is not necessary in all cases to nuthorize the Court to make un appointment that the property in respect of which the receiver is to be appointed should be within the local limits of its jury diction (2)

The Presidency High Courts possess the same powers with regard to the appointment of a receiver as are possessed and exercised by the Courts in England under the Judicature Act of 1873, and the practice in respect of these matters should be the same (3) Formerly while all Civil Courts with certain exceptions had jurisdiction to issue injunctions on the other hand the powers conferred by the Code in respect of the appointment of receiver could be exercised by the High Courts and District Courts only provided that whenever the Judge of a Court subordinate to a District Court (4) considered it expedient that a receiver should be appointed in any suit before him, he nominated such person as he considered fit for such appointment and submitted such person's name with the grounds for the nomination to the District Court and the District Court authorized such Judge to appoint the person so nominated or passed such orders as it thought fit (5) The first step taken by the Subordinate Judge was to nonmaste, and from this proceeding there was no appeal the Judge then approved and authorized the appointment and from this also there was no appeal then the Subordinate Judge appointed the receiver previously monumeted and from his order there was an appeal (6) The Judge of the Lower Subordinate Court had first to satisfy himself that it was expedient that a receiver should be appointed in a

⁽¹⁾ See the subject fully discussed and cases cited in Woodroffe a Law of finjunctions pp 38-54

⁽²⁾ Juggodumba Dossee (Pudd mone) Dossee L. B. L. R. 318, 324, 3.5, 330 (1875) (3) Jaikisson las Gangadas r. Zenabai, 14 R. 431, 434 (18.00)

⁽⁴⁾ is to the meaning of District

⁽⁵⁾ Sect. 50 s, Act XIV of 1552. Sect. 503 extended to the Presidency Small Cause Gurts (Act XV of 1552, sect. 22, Sched. 11 fut see also the terms of sect. 201, and sects. 2015-30 s applied to Provincial Courts.

of Small Causes (Act IX of 1887 rect. In Select. In the eals) the terms of neet of Act IX of 1887. It was otherwise under the Godo of 1877. See Norming lass Hagdunath lase in Fubicam his Deulatram, in B. 533 (1878). The Godo is as pheal to be under the Lengal Tenancy. Set (Afficial Pass) related neet to 1885 related neet t

⁽b) hangarja r hiribacasa 21 ll 75 11 (1529)

suit before him, for this purpose he had to inquire judicially, and satisfy himself upon evidence that the appointment of a receiver was necessary and recommend n proper person He did this under sect 503 of the last Code If he refused to do it his order refusing the application was an order under the same section, and as such was appealable (1) In the first of the last mentioned cases, it was held that an order by a Subordinate Judge dismissing an application for the appointment of a receiver after obtaining sanction from the District Judge was appealable But it was recently held that a Subordinate Judge when cou sidering the expediency of the appointment of a receiver, was also acting under sect 503, and whether he appointed or whether he refused to take the necessary steps picliminary to the appointment, he was equally acting under sect 503 and an appeal lay (2) After such inquiry he was to nominate such person as he considered fit to be nominated, and submit such person's name with the grounds for the nomination to the District Court then, if the District Court authorized such Judgo to appoint the person so nominated, but not etherwise he was to appoint him But the Judge of the District Court might decline to authorize the Judge of the Lower Court to make the appointment of the person so nominated, and might himself pass—such other order as he thinks fit 1(3) These words in the last Code gave the Judge of the District Ceurt full control over the matter of the appeintment of a receiver. His duty was not only to approve or disapprove of the particular person nonmated, but alse to take into consideration the necessity for the appointment of a receiver at all (4) These werds gave full discretion to the District Judge to pass such order as the encum stances of the case, considered in all their bearings, required He might give the proper directions to the Subordinate Court Nomination in sect 505 secued to be equivalent to the conditional appointment of a receiver which the District Court could necept or reject or modify (5) In the latter case the District Judge made an ex parte order for the appointment of a receiver under sect 503 Subsc quently, the District Court made an order admitting a review The plaintiff appealed to the High Court Without deeiding whether an appeal would be against the order of the District Judge, the High Court dismissed the appeal, holding that the order of the District Judge having been in the first instance ex parte, he had clearly the power to review it (6) But these words, it was held, must be read as controlled by the words preceding them and did not confer upon the District Court the power itself to appoint a receiver not nominated by the Subordinate Court (7) The Judge of the Lower Court, in making his inquiry had all the power conferred upon him that might be necessary for such

⁽¹⁾ Ges un Dulmir Puri v Tel ait Heins run, 6 C I R 467, 468 (1886), Venkata samı Strilavanıma, 10 W 179 (1886), Bedys Nath Adya r Makhan Lali Adya,

¹⁷ C (50 (18 to) (2) Sungarina r Shirbasawa, 24 B 33

⁽³⁾ C sam Dalmir Puri 1 Tckart Hetna run, s pra, 118 Ho Siber linato Julge n at n minste, bit lec ulln tgifurther a laprent a receiver Latafut II sem e

Anunt Chowdhry, 23 C 517, 519 520 (1890) (4) Birajan Kooer t Ram Churn Lall Mahata 7 C 719, 721 (1881) [see Appeal against Order 115 of 1885, cite 1 in note to 10

ML 180, 181], followed by case in next note Bat Mant t Khimchan I, 33 B 161 (1908)

⁽⁵⁾ Chumlal v Sonabar, 21 B 328 (1895)

⁽il) Chunilal : Sonabal, sigra

⁽⁷⁾ Amar Nath 1 Raj Nath, 18 1 1.03

⁽¹⁹⁹⁶⁾

inquiry. He might adjourn the case from time to time, and he might hear fix headence at any time before he made the appointment. He might even abstrain from appointing when he had received the necessary authority, if he had good grounds for so doing otherwise he might be appointing an unfit person when he had facts before hun to show that the appointment would be most improper. Sect 503 of the former Code we not important e. It merely enabled the Judge of the Lower Court to appoint when authorized by the District Court to do so (1). Is already stated sect 505 of the former Code has now been ountful. It was considered that its effect in precise was often to defeat the purpose for which an application was made and that having regard to their standard of efficiency there was no longer any reason to withhold from Sub-onlinate Judges the nower to appoint receivers.

The jurisdiction to appoint a receiver may be exercised either by a Court of first instance or by a Court of Appeal (2) In order to give the Court juris diction there must be a pending suit, (3) and the Court cannot in so far as its power to appoint a receiver extends only to the better management or enstody of any property which is the subject of a suit appoint or continue the previous appointment of a receiver when the suit comes to an end by its dismi al (4) but when a suit is decreed, there is nothing in the Code of Civil Procedure which limits the power of the Court to appoint a receiver after the decree when this course is necessary or proper. This is now expressly stated. As long as the order appointing a receiver remains unreserved and as lon_ as the suit remains a lis pendens, the functions of the receiver continue until he is discharged by order of the Court (5) Although the dismissal of a suit may operate as a discharge of the receiver appointed in it (6) vet the Court has ample jurisdiction without the aid of a pending process to require accounts from its own officer, to permit parties interested to intervene in the examination of these accounts, to make just allowances to its officers for his administration and to deal with all questions of costs connected with the investigation of his recounts as between him and any parties interested who may be allowed to appear and take part in it (7)

The Court of it can appoint a receiver has a uple powers to provide for the management of the property—and can deal with property which is under its control just as completely as the owner of the property can deal with it (9). The subject matter of the appointment was in terms of the last Code (tude now arte) property moveable or immoveable which was 't the subject of the suit (9).

⁽¹⁾ Gos am Dulmir Puri v Teksit Hetna man supra, 469

⁽²⁾ Jahkissondas Gangadas v Zenabar 14 B 431 (1890) See al o Shaik Mohreood been v Shaikh Ahmed Rossen 14 W R 384 385 (1870)

⁽³⁾ Vide ante.
(4) Shaik Mohecood leen v Shaik Ahmed
Hossein, supro

⁽a) Denonath Sreemonce i C S Hogg, 2 Hav. 39a 398 (1863)

⁽f) Prem Lall Mullick + Simbhoo Nath Ray 22 C, 960 973 (1895)

⁽⁷⁾ Advunistrator General of Bengal v Prem Lall Mullick 22 C 1011 1015 1016 (1895)

⁽⁸⁾ Poreshnath Mookejee : Omirto Nath Mitter, 17 C 614 615 (1890)

⁽⁹⁾ Seet "03 See Sundaram v Sankara 9 M. 334 (1886), Javaaram Geree e Shid persad Geree 6 W. R. Mise 7 (1864) Kartie halb Pandy i Palmanund Smeb, 11 C 490 (1884) Yeshwan Bhagwant Phatarpakar t hankar Ram Chan Ira Phatarpakar 17

B 353 (1892) Poreshnath Mooketjee t Omirto Nath Vitter 17 C 614 (1890)

or "under attachment," which latter words applied to property taken for the first time in execution of any decree (1) Where the property to be managed is not the subject of the suit no manager can be appointed before attachment (2) Where, owing to the value of the subject matter of a suit, the Court has no power to try the same, any order made therein by way of appointment of a receiver is passed without jurisdiction (3) The fact that the acts complained of, and which form the ground of an application for a receiver, amount to a criminal offence rather than to a civil wrong, will not deprive the Court of jurisdiction, if such acts affect a right to property (4) It was held by the Allahabad High Court that the fact that there exists, in respect of any immoveable property an order of a Magistrate passed under sect 145 of the Code of Criminal Procedure, is no bar to the exercise by a civil Court of the power conferred on it by r I of appointing a receiver in respect of the same property, for the Magistrate's order under sect 145 is only intended to control any period up to the time when the Civil Court takes seism of the matter, and passes such order as may be necessary for the protection of the property (5) But it has been recently held by the Calcutta High Court that the appointment of a receiver by a Civil Court under r 1 of this order cannot supersede an appointment by a Magistrate, and that the Court should either appoint as its receiver the person appointed by the Magistrate or should make a conditional appointment and inform the Magistrate of it so that he may have an opportunity to withdraw his attachment (6)

The appointment may be made either by a Court of first instance or by a Court of Appellate or revisional jurisdiction. Where a Court of first instance dismisses a suit it becomes functus office save that it may stay execution of its own decree or order for costs. An application, therefore, made to a Court of first instance after dismissal of the suit, but before appeal filed, asking that a receiver might be restrained from parting with funds in his hands, pending an appeal, was held to be one which the Court had no jurisdiction to grant. The Court's jurisdiction extends no further in regard to a suit which has ceased to be

n pending suit (7)

As Appellete Court may also appoint a securer II, therefore, a party whose suit has been dismissed desires to have any measure taken for the reliar tion, preservation, better custody or management of property claimed by huile he is at liberty after filing his appeal to apply to the Appellate Court which has authority to make or continue the appointment pending the determination of the appeal II a receiver has been appointed, but the facts proved only warrant the issue of an injunction, the Appellate Court will set aside the order appointing a receiver, and in lieu thereof will issue an injunction (8) When a receiver of a property has been appointed by an Appellate Court pending an

⁽¹⁾ See form No 168 in the f mith Schedule

of the last Code Woodroffe 27

⁽²⁾ Bunwaree Lall Sahoo t Ba Gordharee Singh 16 W R 273 (1871)

⁽³⁾ Budya Nath Adya e Mikhan Lal Alya 17 (680 (1880)

⁽⁴⁾ Hammayya r Venkatasul bayya 18 M -3 (1504)

^(*) Bukatan Nessa i Abdul Azur, -2 A

^{(0001) 115}

⁽⁶⁾ Bilya Prasa I Narum Singh t Ashrafi Singh, 10 C 8(2 (1913) 17 C W N 1070 (7) Yanin ud Dodah t Vhined Ah Khin

²¹ C 561 (1841), We stroffes Injunctions

⁽⁸⁾ Chan h lat Blace Palmanunt Singh

⁽⁸⁾ Chan helat The c Pathianum (Labolur, 22 C 45) (1896)

¹ th thur, 22 C 177 (1070

appeal to the Court, he must, even when the appeal is no longer pending, be regarded as the receiver of the property of which he has been put in possession until he is finally discharged, and the Appellate Court has jurisdiction to deal with matters relating to the receiver, including proceedings for contempt, until he has had his accounts passed by t (1)

The grant of preventive or protective relief is purely discretionary—The exercise of the jurisdiction to appoint a receiver or issue an injunction (2) is not a matter ex debito justitue, but one which is purely within the discretion of the Court. The latter is not bound to grant such relief merely because it is lawful to do so. But the discretion of the Court is not arbitrary but sound and reasonable, guided by judicial principles and capable of correction by a Court of Apperl (3). All questions of discretion are usually questions of degree (4). Where there is a discretion exercisable the Court is bound to look at all the circumstances of the case (5). The jurisdiction of the Court to interfere being equitable is governed on equitable principles. And, therefore, the Court will amongst other things look to the conduct of the prison who makes the application (6). Where in appeal attacks the exercise of discretion, before the Appellate Court will interfere on this ground in favour of the appellant, the latter must vitish such Court that the discretion has been improped to exercised (7).

The appointment as well as the removal of a receiver is also a matter which itself in the sound discretion of the Court (8). In exercising its discretion the Court should proceed with caution (9) and be governed by a view of the whole creumstances of the case (10). The power conferred by the Code to appoint a receiver is not to be exercised as a matter of course, and it is not a reason for illowing an application for the appointment of a receiver, that it can do no harm to appoint one (11). The discretion given by the Code is one that should be used with the greatest care and caution (12) and the appointment of a receiver is a step which should not be taken without special reasons particularly in the

⁽¹⁾ Grey + Woogra Mohun Thakur, 28 C 790 (1901)

⁽²⁾ Act 1 of 1877 sects 44 o2 Woodroffo 31

⁽³⁾ Ib, sect 22 Descrition where all field to a Court of law means discretion guided by law It must be governed by rule and not by humour. It must not be arbitrary, vague and fancial but legal and regular, ' per Lord Mansfield in Walker scase, 4 Burr. 2.33, cited in Harbins Schair. Pharm Persbad Singh, 5 C. ω³ ω(1672), we also remarks in Queen Empres r. Chegan Davaram, 11 B. 331, 344, 322 (1890), per Jackine, J.

⁽⁴⁾ Ghanashan Nilkant Nadkarni r Moroba Ramchandra Pai, 15 B. (1831) at p. 433

⁽⁵⁾ Ib., p. 484. Bhupendra Nath basu r Kanjil Singh, 41 C. 381 (1913)

⁽i) Act L of 1577, wet & (3), herr, \

<sup>195 (1911)

(9)</sup> Mun Monthey Dassee r Ichamoyce
Dassee, 13 W. R. (0 (1870), Prosonomoyo
De bir Bem Madhub Roy 5 A. 556 (1883)

⁽¹⁰⁾ Owen r Homan 4 H. L. 1033. Si leswari Debi r Abbojeawari Debi, sapra Chandidat Jha r Padmanund Singh Isabadur, saprat.

⁽¹¹⁾ Proson moye Debi e Jam Madhab Rare, 5 A. 550 (1883)

^{(12) 11}

case of a bon i fide possessor with legal title (1) The main principles upon which such discretion should be exercised have been laid down in the case of Owen v Homan, (2) and those principles have been held to be as equally applicable in this country as in England (3) In that case Lord Cranworth said -" The receiver, if appointed in this case, must be appointed on the principle on which the Court of Chancery acts of preserving property pending the hitigation which 15 to decide the right of the litigant parties In such cases the Court must of necessity exercise a discretion as to whether it will or will not interfere by this kind of interim protection of the property Where indeed, the property is as it were in medio, in the enjoyment of no one, the Court can hardly do wrong in taking possession It is the common interest of all parties that the Court should Such is the case when a receiver of a property of a deccased prevent a scramble person is appointed pending a litigation in the Ecclesiastical Court as to the right of probate or administration (4) No one is in the actual lawful enjoyment of property so circumstanced, and no wrong can be done to any one by taking it and preserving it for the benefit of the successful litigant. But where the object of the plaintiff is to assert a right to property of which the defendant is in the culoyment the case is necessarily involved in further questions. The Court by taking possession at the instance of the plaintiff may be doing a wrong to the defendant, in some cases an irreparable wrong. If the plaintiff should eventu ally fail in establishing his right against the defendant, the Court may by its interim interference have caused mischief to the defendant for which the subse quent restoration (

all cases, therefore

in the possession of _

by decree, it exercises a discretion to be governed by all the circumstances of the case " (5)

As in the case of injunctions the Court will always look to the conduct of the party who makes the application for a receiver and will not interfere unless his conduct has been free from blame, (6) and parties who have acquiesced in property being enjoyed against their own alleged rights cannot come to the Court for this form of relief (7) A stronger case is generally required for the appointment of a receiver than for the issue of an injunction It may well be that encumstances which will warrant the issue of an injunction will not warrant the appointment of a receiver Accordingly, while the Court may in its dis cretion refuse to appoint a receiver, it may yet consider the case to be one which calls for an injunction The opinion of the Court of first instance is, in these matters, of great weight. It has all the facts and the parties before it, and is probably the best tribunal to decide whether it is necessary or expedient, having

⁽¹⁾ Gossam Dulmir Puri : fekait Helna rain, 6 C L. R 467, 469 (1850)

^{(2) 4} H L, 1032 1033

⁽³⁾ Sidoswari Debi t Abhoveswari Debi. 14 ra . Chan lidat Jha t Ladmanund Singh Bahalur, supra, Rampram t Salaram 11 C L J _15 (1303)

⁽¹⁾ See Joy Kally Debi & Shib Nath Clattery e Burk lest o (15 o), Yeshwant

Bhagwant Thatarpakur v Shanlar Rain chandra I hatarpakar 17 B 388 (1632)

⁽a) Owen v Homan surr: 1032, 1033 (t) herr, 8, see Baxter v West _8 L. J Ch 163, of Wood: Hitchings 2 Bew -37 (7) 1b , Gray : Chaplan, _ Russ 117,

Skinner's Society i Irish Society I W C Cr 16.

regard to the circumstances of the case, that a receiver should be appointed (1) And a party who in appeal attacks the exercise of this discretion should show that the discretion has been improperly so exercised (2). The exercise of the power being thus discretionary it would be difficult, even if it were possible, with any precision to make out the limits within which it is ordinarily circumseribed; but some of the principles which govern the discretion of the Court in such appointment will be found considered more fully and in detail in the work cited (3) in those Chapters which specially treat of the cases in which a receiver may be appointed.

The hest guides in the matter of interference by way of injunction and receiver have heen judicially stated to be the principles which determine the action of Courts of Equity in England (4) It is, in fact, on these principles that the rehef given in Indian Courts by injunction and receiver is in the main founded

A judgment of the Court which is an personam may be enforced by process in personam, that is, by attachment of the person when the person is within the jurisdiction or by sequestration of the goods or lands of the defendant when these are within the jurisdiction of the Court until the defendant do comply with the judgment or order of the Court (5) Under the authority conferred hy the Charters of the Supreme Courts and continued by their own Letters Patent, the High Courts in India possess the power of enforcing obcdience to their orders hy attachment for contempt,(6) and they have all the powers of a Court of Equity in England for enforcing their decices in personam (7) The jurisdiction of the High Court to imprison for contempt is a jurisdiction that it has inherited from the old Supreme Court, and was conferred upon that Court by the Charters of the Crown, which invested it with all the powers and authority of the then Court of Chancery in Great Britain, and this jurisdiction has not been removed or affected by the Code (8) The power of the Mofussil Courts to commit for contempt, otherwise than under the authority of special statutory enactments conferring, or of case law recognizing, that power, is a matter of doubt (9)

(1900)

⁽¹⁾ The Oriental Bank Corporation it Gobin Laff Seal, 10 C 715, 737 (1884), per Garth, CJ See also Ram Sunder Dass i kamal Jha 32 C 741 (1904), where it was also held that in considering an application for a receiver it was madvisable to go into the general ments of the case

⁽²⁾ See Shadi t Anup Singh, 12 4 438 (1859)

⁽³⁾ Woodroffe's Receivers.

⁽⁴⁾ Seo Nusserwanji Merwanji Panday v Gordon, 6 B 260, 284, 279, Sudsahwari Deb. t Abhojiswari Debi, 15 C 818, 822, 823 (1888), Chandidat Jha r Padmanund Singh Bahadur, 22 C 459, 464, 465 (1893), and cases cited in Woodroffe a Law of Injunctions,

⁽⁵⁾ Penn v Lord Baltimore, I Ve. 444, vide ante Woodroffe, 39

⁽b) Hassonbhoy τ Cowasji Johan_oir Jassawaffa, 7 B I (1831), Navivañoo τ Naratam Das Candas, 7 B 5 (1852)

⁽⁷⁾ H. H. Shrimant Maharaj Yashiyantrai Holkar τ Dadabbai Curstin Ashburner, 14 B 333 359 (1890), ρer Sargent, CJ, citing Martin τ Lawrence, 4 C 6-5 (1879), Hassoubhoy r Cowasji Jehangir Jassawalla 7 B 1 (1831).

⁽⁸⁾ Martin t Lawrence 4 C 655 (1879), per White, J., Hassonbhoy t Cowasii Jehangu Jassawalla, supra, 1, Navisabo v Naratam Das Candas, supra, 12, 13; R v Timnal Roddi, 24 M 523, 548, Note

⁽⁹⁾ See Hassonbhoy r Cowasji Jehangir Jassawalla, supro, at p. 3, Navivahoo t Naratam Das Candas supro, at pp. 13, 14

A receiver may be appointed of any property, whether moveable or in moveable, provided it is the subject matter of a suit or under attachment, and probably though the talicized words have now been omitted the appointment will be limited to such cases. In however, suits for partition of joint estates the Court has jurisdiction to place the whole of the estate out of which the plaintiff seeks to have his share partitioned in the hands of a receiver, and to order that the latter shall be at hiberty to raise money on the security of the whole of such joint estate (1) Receivers have been appointed of undivided shares, though Equity is generally averse to extending the aid of a receiver, as between joint owners or tenants in common (2)

Time when receiver may be appointed -Arcceiver may be appointed during the pendency of the litigation at any time before decree tion for a receiver may be made at any stage of the action according as the urgency of the caso requires it Where proceedings are already pending in order for a receiver may be made in these proceedings without any fresh suit being instituted. If the appointment of a receiver is a substantial object of the action the plaint should contain such a prayer and if it does not upon unendment a receiver may be obtained (3) A receiver may also be appointed or continued (4) by the decree, or the appointment may be made after the decree (5) even though it had been previously refused if a state of facts en titling the party to a receiver were made to appear in the proceedings in the cause (6) Under r 1 a receiver may be appointed of any property after its sale in execution of a mortgage decree and before the confirmation of the sale (7) The provisions of this rule are not controlled by sect 95 of the Bengal Tenancy Act (8) A receiver will be appointed at the instance of a mortgageo when the interest pavable under the security is in arrear (9)

Time from which appointment takes place—Where an order is made that a certain pirson upon his giving security be appointed receiver the order appoints the receiver conditionally upon his giving security only a receiver becomes such on giving security. When he has done that he can take possession He is not legally clothed with the character of receiver, nor able to perform its duties until he has given security and his recognizances are perfected. It has been held that the appointment of a receiver as far as it affects the not from the completion of the security required to be given by the order and accordingly, until the appointment has been completed a judgment creditor is not

⁽¹⁾ Lorestram M. Lerjee : Omert > Nath Mitter 1" C 614 (1890)

⁽²⁾ High sect 606 Woolroff 30 Joy nara n G erco i Slubpersa I Geerice, 6 W R

Vi +c 1 (1866) (3) Kerr, 1-5, 1f : 11 | Ch D = 6

⁽¹⁾ M trahu : Ir mal : It B | 11 | 1-

⁽¹⁸⁷⁴⁾ Muthusii Una ta Boyi Sail s i Matti ii Diju Us Biyi Sula 17 M 140 (18) Fair de Liu Arts 14 M 140

⁽¹⁸J0)
(a) Shunmugan t Mo J n 8 M 2_9 _43

⁽¹⁸⁸¹⁾ Kerr 131 (6) Mt. Gen. t Mayor of Galvay 1 M M

^{9) 101} Kerr 13.

⁽¹⁾ Madaneswar t Mohamaya 13 C. la J. 187 (1911) 1. C. W. N. 6

^{(5) 11}

⁽J) Eastern Mortgage and Ag nos (O 4) Rak a Klalua 10 C W \ 111 (1312)

debarred from proceeding to execution (1) But in a later case it has been hold that the appointment of a recener is complete on the entry of an order of appointment, although he may not be able to take actual possession of the property until the security is approved (2) If no security is required (which should appear upon the face of the order) the appointment is complete upon possession being taken under the order (3) When as will be done in urgent cases, an interim receiver is appointed for a limited time without security, he becomes an officer of the Court and is legally clothed with that character from the date of his appointment (4) The receiver's hability, however, to account in respect of monies received and expended by him as receiver at once arises whether the security has been completed or not (5). As far as respects parties to the action, the rents and profits of the estate over which a receiver has been appointed are bound from the date of the order for the appointment (6) but the latter does not date back to the date of the application (7). Though outsiders may not be affected until the completion of the security the parties to the suit may, before such time, he restrained from touching the property (8)

Duration of receivership -Except (according to English practice) in the case of managers there is often no limit of time fixed (9). When this is the case, and the suit is dismissed, the dismissal of the suit will in general operate as a discharge of the receiver But if the suit is decreed and no limit is fixed in the appointment of a receiver, it is not necessary for the judgment to direct that he be continued (10) Sometimes the receiver is only appointed until judgment, that is during the pendency of the suit or until further orders When this is the case, if he is to continue receiver the judgment must so direct, and as this is practically a new appointment, further security must be given unless. as is usually the case the security originally given is made applicable to any continuation of the appointment (11) It is within the discretion of a Court appointing a receiver in a suit to order that the office should continue permanently after the decree when such continuance is necessary or for so long as it may be so (12)

⁽I) I dwards 1 Edwards L. R 2 Ch D 291, 296 In Defries t Creed, 34 L. J Ch 607, it was held that there was no con tempt, possession having been taken after the receiver was nominated, but before he had passed his recognizances and before he had been actually appointed, and see Ex parte Evans, Re Wathins, 13 Ch D 252, 255. High, sect 121 A contrary rule generally revails in the American Courts, in which it is held that upon the filing of the bond the receiver a title has relation back to the date of his appointment, and such title has been upheld against creditors levying upon the property between the date of the appointment and the filing of the bend High, sect. 121A., and see Beach, sect. 168.

⁽²⁾ Rowland Hudson t John Pierpont Morgan 13 C W N 654 (1909)

⁽³⁾ Morrison & Skerne Iron Works Co. 60 L 1 588 1s to f rms of appointment. see Seton 760

⁽⁴⁾ Taylor v Lohersley 2 Ch D 302. 5

Ch D 741

⁽a) Smart v Flood 49 L 7 457 (6) Lloyd t Mason, 2 M. & C 487, Lod rington t Johnston, I Bear 5.0 See Wickens t Townshend I R & M 361 . Re

Bort 22 Ch. D 604 (7) Re Clarke, 1893, I Ch. 339

⁽⁸⁾ See Defries : Creed, 34 L. J. Ch. 607 (9) herr, 146, Woodroffe, v9 ct ser

⁽¹⁰⁾ Kerr. 146.

⁽¹¹⁾ Ib In Motivahu t Premvahu, 16 B 511, 512 (1892), the receiver who had been received appointed was continued by the

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⁽¹⁾ Pereshram M of crice v Omerto Nath Mitter 17 C 014 (1890)

⁽²⁾ High, sect 606 Woodroffe, 50, Joy naram Geeree i Shibpersad Geeree, 6 W R

Misc 1 (1860) (3) Kerr, 128, 11 e 11, 1 Ch D _-e,

⁽³⁾ Kerr, 128, 11 e 11, 1 Ch 15 = 4, Seton Decr 152 (1) Motivahu e Pretivahu 16 ll 311, *12

^(15) 1) Author: Umanto Boyi Sail a a Mathor: Dipanto Boyi Sail a, 13 M 140 (15)) Ix parte lipar Sail a 13 M 300

⁽¹⁸⁹⁰⁾

⁽⁵⁾ Shunmugan v Mordin 8 M 2-9, 213

^{(1881),} Kerr, 131 (6) Att Gen : Mayor of Galway, 1 M II

^{95, 101,} Kerr, 132

⁽⁷⁾ Wadanesuar v Mohamaya, 13 C 1. 1 487 (1911), 15 G W V 672

⁽b) 1b

⁽³⁾ Lastern Mertgago and Agency Co + Rak a Khatun, 10 C W N 937 (1912)

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⁽¹⁾ Pdwards : Edwards, L. R 2 Ch D 291, 296 In Defries t Creed, 34 L. J Ch 607, it was held that there was no con tempt, possession having been taken after the receiver was nominated, but before he had passed his recognizances and before he had been actually appointed, and see Ex parte Evans, Re Watkins, 13 Ch D 252, 255, High, sect 121 \ contrary rule generally prevails in the American Courts, in which it is held that upon the filing of the bond the receiver s title has relation back to the date of his appointment, and such title has been upheld against creditors levying upon the preperty between the date of the appointment and the filing of the bond High, sect. 121A., and see Beach, sect. 163.

⁽²⁾ Rowland Hudson t John Pierpont Morgan, 13 C. W N 654 (1909)

⁽³⁾ Morrison v Sherne Iron Works Co, 60 L. T 688 As to ferms of a pointment,

⁽⁴⁾ Taylor : Lokersley 2 Ch D 302, 5 Ch D 741

⁽a) Smart v Flood, 43 L T 457

⁽⁶⁾ Lloyd v Mason, 2 M. & C 487, Cod rangton t Johnston, 1 Beav 520 Sco Wickens t Townshend, 1 R & M 361, Re Birt, 22 Ch. D 604

⁽⁷⁾ Re Clarke, 1893, 1 Ch 339

⁽⁸⁾ See Defrica v Creed, 34 L. J. Ch. 607 (9) Kerr, 146, Woodroffe, 59 et ser

⁽¹⁰⁾ Kerr. 146, Woodrone, 59 et a

⁽¹¹⁾ Ib In Motivahu t Premyahu, 16 B 511, 512 (1892), the receiver who had been previously appointed was continued by the decree.

⁽¹²⁾ Mathuri Umamba Boyi Saibs r

plaintiff merely, but for all other persons who may establish right in the cause He is not the particular agent of any party but an officer of the Court (1) With regard to the limitations on his title, it is to be observed that his possession is subject to all valid and existing liens upon the property at the time of his appoint ment, and it does not divest a hen previously acquired in good faith (2) The rights of the parties to an action are not interfered with by the appointment (3) It is not averse to either party (4) If at the time a receiver is appointed a party claiming a right in the same subject matter under a title paramount to that under which the receiver is appointed is in possession of the right which he claims, the appointment of the receiver leaves him in possession (5) The appointment of a receiver is a matter which does not concern mortgagees or prior incumbrancers, for a receiver in the exercise of his authority will be obliged to respect former orders of the Court, and prior incumbrancers are at liberty to take such proceedings in behalf of their own interests as they may think fit (6) The appointment operates as an injunction against the parties, their agents and persons clauming under them, restraining them from interfering with the possession of the receiver except by permission of the Court (7) The order does not, however, create a charge, but it operates as an injunction to restrain the defendant from himself receiving the proceeds of sale (8) A receiver of land never takes actual possession, he only receives the rent, nor does he receive such tent and profits hy virtuo of an estate or title vested in him, but he collects the same merely as an officer of the Court upon the title of some persons parties to the action (9)

Possession and interference with possession of receiver-The receiver heing the officer of the Court from which he derives his appointment, his possession is exclusively the possession of the Court, the property being regarded as in the custody of the law, in grenno legis for the benefit of whoever may be ultimately determined to be entitled thereto. The possession being therefore that of the Court may not be disturbed without the leave of the Court, and any person who disturbs such possession is guilty of a contempt and hable to punishment therefor No one is entitled to interfere with the possession whether he claims under, or paramount to, the right which the receiver was appointed to protect (10) Thus an attachment of money in the hands of the receiver is an interference with the Court's possession and may not, therefore, be made without the Court's leave first obtained (11) When the Court appoints

⁽¹⁾ Kerr, 153

⁽²⁾ High, sect 138, Brach, sect 202

⁽³⁾ Kerr, 151

⁽⁴⁾ Beach sect 222

⁽⁵⁾ kerr, 149, 164, I velynt Lewis, 3 Ha 472, Bryant : Bull, 10 Ch D 155

⁽b) Bryant : Bull, supra the appoint ment of a receiver is for the lair fit of incum brancers only so for as expressed to be fir th ir benefit, and as they choese to avail themselves of it Kerr, bol 154 156

⁽⁷⁾ Lost re Townsheit, 2 MI N C ...J. to (Am r), Back wet 211

⁽⁸⁾ Mahommed Zohuruddeenv Mahommed

Noorooddeen, 21 Cal, 91 (1893) (9) Px parte Lyans, 13 Ch D 255, Vine

Raleigh, 24 Ch D 243

⁽¹⁰⁾ High, sect 134, herr, 158-160, Kahn t Ah Mahomed Hap Umer, 16 B 577,

^{579 (1832),} Woodroife, 71 (11) Kalin : MI Mahomed Haji Unicr,

¹⁶ B 577 (1892), followed in Mahammed Johnradden : Mahommed Noorood hen, 21 C 55 (1833) 1 judgment crediter cannot with at have excente nomest property in the hands of the receiver Jesendry Nath

a receiver it requires the parties to the action to give up the possession to the receiver of all property comprised in the ord r, and treats them as guilty of contempt if they refuse to do so (1)

As a general rule appointment of more than one receiver whether by the same or a different Court except in ease of joint receivers, is not allowable (2). If at the time a receiver is appointed a party claiming a right in the same subject matter is in possession of the right which he claims the appointment of the receiver leaves him in possession of the right and does not interfere with the excepts of it (3). If, on the other hand, the claimant is out of possession he must apply to the Court before he institutes any $\log_2 1$ proceedings affecting the possession which the receiver has acquired (1) exen where the receiver has been appointed without prejudice to the rights of persons having prior charges (5), too, where a receiver has been appointed over the extent of a tennit in possession, though the appointment does not affect the rights of the Lindlord, the latter will not be permitted to excrebe these rights, if or example the right of distring without preparation to distingt the leave of the Court (6).

Parties who e rights are interfered with by having a receiver put in their wix may, on making a proper application to the Court, obtain all that they may justly require. The Court has the power and will always take care to give a party who applies in a regular manner for the protection of his rights tho means of obtaining justice, and will even a sist him in ascerting that right and laying the benefit of it (7). The course of a party, who elimis a right paramount to that of the receiver, or rather to that of the party obtaining the receiver, is either to apply on notice in the action in which the receiver was impointed and to come in and be examined prointeresse suo, or to apply for leave to proceed by action intwithstanding the receivers possession (8). The application in the suit is usually framed in the alternative that the receiver do accede to the plautiff's demand or that the latter may be illowed to proceed (9). In most instances a party a greeved may have ample reflect by application on motion to the Court appointing the receiver. In most cases of claims against a receiver the

Gossain v Debendro Nath Gossain, 20 C 127, 124 (1898). Hem Chunder v Prankristo, 1 C 403 (1876) and first two cases, Sarat v purbs, 15 C W \ (1911), 14 C L J 55 (and each creditor must obtain leave)

- (t) Woodroffe, 76
- (2) lb, 78
- (3) Evelyn v Lews, 3 Ha 472, Wells v kelpin, 18 Eq 238, Underhay v Read, 20 Q B D 209, Kerr, 164
- (4) Evelyn v Lowis sugra 4 5, herr to4, 159
- (5) Bryan (Cormick 1 Cox 422, Langton 1 Langton, 7 D M and G 30, Kerr 165 (6) Sutton v Recs, 9 Jur N S 456, Kerr
- t60 See also as to distraint, 15, 168 169
- (8) Kerr, to6 As to form of notice of motion or summons for examination pro

enteresse and see Dan Ch Forms 1698. with respect to the practice on examination pro interesse and, see Brooks i Greathead 1 J & W 179, Hamlin t Lee 1 Dick 94, Gomine: West, 2 Dick 4"2, Hunt v Prist, ib 5t0 , Anon., 6 Vts 287 The effect of such an examination may generally be obtained on motion or petition when a refer ence to inquire into the claim will if requisite be ordered Walker v Bell 2 Mad. 21, Dixon v Smith, 1 Suan, 457 Dickinson 1 Smith 4 Mad 1"7 Dan Ch. Pr 921, 1696 Basessuree Debi z Sookram Das Mohunt, 15 W P 347 (187t) at pears to have been a case of this kind but the report is so meagre that it is not clear why the application was refused.

(9) herr, t67

nemedy by motion is adequate, and any person having such a claim may resort to this summary remedy. The more common practice and that which has been generally commended by the Court, is to hear and determine all rights of action and demands against a receiver by petition in the cause in which he was appointed without remitting the parties to a new and independent suit. And it rests wholly within the discretion of the Court to grant leave to bring an independent action against its receiver or to determine the controversy upon petition in the original cause (1)

Suits and applications against receiver .- It would be inconsistent with the main purpose of a receivership (to preserve property in controversy pendente lue) which devolves upon the Court the duty of protecting its possession, as well as incompatible with the dignity and authority of the Court, to allow its officer to be summoned before any tribunal in respect to the property in his hands, at the will of any and every person who has, or imagines he has, a just cause of action, or who for simister purposes might institute a fictitious suit against him On the other haud, to deny to those having just causes of action or claims which call for the adjudication of the Courts of Law or Equity, all opportunity for investigation and all right to a proper remedy, simply because the property to which they must look for reparation has been seized by the Court and is in its keeping, would violate the fundamental principles of personal rights The difficulty thus presented has been overcome by requiring all those who desire to bring suit against a receiver first to obtain leave to do so from the Court which appointed him The Court usually grants such leave unless it appears clearly from the application of the claimant that his demand has no legal foundation, the petition should therefore show a probable cause of action one demanding adjudication by proceedings in Court (2) If a receiver duly appointed an leave of the may be subje

leave of the may be subje

The proceedings in a suit so brought will generally be restrained by injunction, or stayed or set aside on motion. Whether the party proceeding at law did or did not know that a receiver has been appointed over the property, or however clear his right may be, the Court will restrain the prosecution of the claim if it be instituted without leave (3). It has even been held that the consent of the Court to an action against a receiver is a condition precedent to the right to sur, and cannot be rectified by a subsequent application for permission to continue the action brought without such permission (4). But several later cases have dis agreed with this (5).

⁽¹⁾ See Woodroffe, St. Hi₂b, seets 251 251B, Kerr, 108 170, Mahomed Mehdi Galistana i Zoharra Be₅um 27 C 285 (1884)

⁽²⁾ Beach sect (52), Viller 1 Ram Raman Chackravarty, 10 C 1014 fa receiver cannot be such except with the permission of the Court! herr, 170. It is not the course

⁽³⁾ Is a furth unless it is perfectly clear that (3) Is a further in for the clum to refuse to (Anar),

liberty in any case to try a right which is claimed a unst its receiver. Randfield: Randfield: 3 Do G. P. C.J. 7c t, but the rightenion should ishow a probable ground of recovery. High, sect. 251. Worder ff., S5.

 ⁽³⁾ Beach, seet 6.3, Kerr, LoS, 172
 (4) Pramatha Nath Gangooly i Khetles
 Aith Bann rice 32 (270 (1991) sel pr
 (5) Sarat i Murba, 17 C W N 92.1

⁽IJII), Banku : Haren lr : 1 C W \ 1

It reads in the discretion of the Court to allow a party claiming rights against its receiver to bring an independent action regainst him or to compel such party to proceed against him by petition in the action in which he is receiver (1). When a Court is whed to give leave to site its receiver, it may, and usually must, examine into the merits of the claim to ascertain whether is suit is necessary or proper for its adjudication, but such examination and the order made upon it cannot be used by either party as in any way affecting the merits of the case. The order samply permits a judical investigation to be made, the examination is not itself a trial, nor is the decision an adjudication upon the merits (2)

Generally a receiver cannot be held personally hable in an action brought against him in his official capacity, the judgment being entered only so as to affect the funds in his hinds (3). An action cannot be brought against a receiver by a person it whose instance he was appointed (4). If a special case be made out, the Court will allow a party to continue an action, notwithstanding that it has been commenced without leave (5)

An application for leave to such receiver may be made exparte at the time of persenting the plaint and not in the suit in which the receiver has been appointed or on notice to the parties, (6) though it would appear that the latter course of applying in the suit has sometimes been followed (7). Any order declaring that leave to such so not necessary will not bind the parties who are not present (8).

"Any property."—A considerable portion of the text books is occupied with a discussion of the cases or instances in which receivers will be appointed, and references are given to all the decisions in which receivers have, in fact, been appointed or refused. This mode of treatment had its origin in the fact

(1910), Maharaja of Burdwan t Apurba, 15 C W \ S72 (1911), and see Satya krusal Banerjee t Satya Bhupal Banerjee 19 C L J 191 (1913) (Court after dealing with the contempt may give have to pro

(1) Beach, sects 654, 703, High, seets 254, 254B, 255 It is common practice instead of asking have to bring action to intervene in the original suit by petition, and some cases are more conveniently so tried than by separate action Beach sect 654. Woodroffe, 86 In the suit of Suttya Sunkur Ghosal v Ram Golap Monce Dussee, an application was made (3 Sept , 1900, cor Ameer Ah, J) for an order that the receiver who had put up property of the parties for lease and who had subsequently refused to grant a lease to the highest bulder, should grant a kase to the applicant or return his deposit money or be discharged as to ith share of applicant In the affidavit filed against the application objection was taken that the matter was properly one for a suit, but the objection was not pressed at the hearing, and the Court disposed of the

(2) Beach, sect 557

(3) Ib, sects, 715, 718

(4) Kerr, 160-161

(5) Ib, 167 Gower : Bennett, 0 L. F, 310 See Aslon v Heron, 2 M. & K 397

If an action has been brought or the possus son interfered with without leave, the order restraining these acts will also give leave or direct that the party be trainined provideress suo Johnes v Claughton, Jac 573, as to whether leave to suo is jurisdictional,

sce High, sect 254A (6) Ib

(7) See Kumar Suttva Suttya Chosal t Rani Golapmoni Debi, 5 C W N 27 (1897), Woodroffe, 89

(8) Chartered Banl. of India, Australia and Chmar: Hurish Chunder Neogy, supra Sco abo as to suits against recenter, Kumar-Suttya Ghosal v Gelapmoni Dehi, 5 C W N 27 (1897), Surender Keshub Ray 1 Doorga soondry Dossec, 15 C 20, (1888)

It is, of course, no ground for refusing to appoint a receiver that the acts complained of amount to a criminal offence and that a criminal prosecution is available to the petitioner

Nextly, the situation of the property and parties must be considered

The crees may be dealt with in the following classes —(a) where the property is in modio, (b) where the plaintiff possesses an admitted interest, (c) where the plaintiff is title is disputed by the defendant claiming under legal title, (d) miscellaneous cases (1)

Where the property is, as it were, in media in the enjoyment of no one the Court can hardly do wrong in taking passession. It is the common interest of all parties that the Court should prevent a scrimble, as where their is litigation

as to the right to probate or administration (2)

The second case where plaintiff possesses an admitted interest is that of junt tenants and tenants in common in which the Courts are generally verse to interfere, (3) partition suits in which receivers are frequently appointed, (1) cases of tenant for life, remainderman. Hindu widow (5) partnership where such a state of freets is shown by the party compluing as if proven at the herring will entitle him to a dissolution (6) cases of trust where there are substantial grounds for the excreise of the jurisdiction, (7) infancy the property and interests of infants being under the pecidiar and exclusive care of the Court of Chancer. (8) and lumrot (9)

Thirdly, there are the cases of disputed title. If a right is asserted to property in the possession of the defendant claiming to hold under a legal title generally, a strong case is required to be made out. There must be some equity, danger of waste fraud abuse of trust or the like or want of reasonable appearance.

of title (10)

Then lastly there are muscellaneous cases (11) on contract covenant convoluce, lease debtor and creditor mortgages (12) and other cases (13) in which

nd W N celar (1901)
(3) Woodroffe, 112 See Kumara Tiru
malare Bangaru Tirumalar, 21 M. 310 (1838)

(4) Woodroffe 113 Beach sect 432, 11 gh sect. 607 Pereshnath Mookerjee v On erto Nauth M tter 17 C 614 (1830)

On erto Nauth M tter 17 C 014 (1830)
(5) Woodroffe, 125 Beach, seet 488, kerr, 75, 76, Mt Maharani r Nan la Lal

Misser, 1 B L. L. C J 27 (1865)
(6) Woodroffe 126 where subject is densed, Kerr 80 S1, and as to attachnent

of property of a partnership see Damodar e Panalal J Bom. L. R. 510 (1 m⁻¹) (7) Woodroffe, 133, Beach sect of The saire principles apply where a receiver is sought against an executer or administrator (8) Bennet 26 Woodroffe 141 (9) Kerr 63-96

(10) Woodroffe 142 et seq. The kading In han deesi n. is. St. Brawari. Dabi. it. Ubbojeswar. Dabi. 15 et 818 (1538). foll Chandidat Jhar. Pandmanand Singh Bahadur. 22 C. 433 411.455 (1833). see ako Sric. Ram Dasi. V. Instir Dasi. 2 C. 279 (1833). Prosonomoyo Bart. Ben Madhub Rai. 5 4. at p. 361 (1853). Gossain Dultur Puri. it.

Tekait II tnaram 6 C. L. R. 467 469 (1880) (II) See Woodr ffe 143

(L.) Pribhovan e Jariuna B io P J 184 (1883) Latafut Hossinie Arus Chantel 23 C 57 (1890) Jakkissondas e Anabai 14 B 431 (1888), Missami Nankan e Jotha Var kan L2 M 448 (1899) Woodroffe, 1.5 stay

(13) Noothed , les et a 7

⁽¹⁾ Woodroffe, 101

⁽²⁾ See Owen t Houan 4 H C 1032 1033, herr 3 25 27 29 High seet 46 Beach, seet Ci Yeshwant Bhagwant t "Shankar Ramchandra 17 B 330 392 (1892) ment the Gools of Luchminaram Bogla 5

Woodroffe 137 Hafizabai τ Kazı Abdul Karım 19 B 83 85 (1893) High 664 665 , Bennet 33

general principles may receive some modification from the peculiar circumstances of the ease

Hitherto property the subject of a suit has been considered, but a receiver may also be appointed of property under attachment The appointment of a receiver at the instance of a judgment creditor is known in English practice as equitable execution (1) A proceeding under the Code has nothing in common (beyond the fact that a receiver is appointed) with "equitable execution" (2) The application for a receiver may be made either by the judgment creditor or debtor, and in some cases it is as much to the interest of the first as of the second (3) Attachments are not superseded by the appointment of a manager (4) The proceeding does not change the property in the subject which is attached and affected by it (5) The fact that property under attachment is in the hands of a acceiver does not protect it from attachment of all other creditors (6) A receiver may be appointed without the consent of the decree holder (7) The scope of the powers and duties of receivers of attached property are wider than those of managers under the Code of 1859 (8) "Powers of the owner,' referred to m r 1, must be read in connection with other provisions of the Code (9) When a debt due from a third person to the judgment debtor is attached in the hands of the person who owes it, the Court may, if necessary, appoint a manager to sue for it (10) A receiver appointed in execution may sue for any debts attached, (11) in the term, however, only of the order appointing him, (12) or for contribution on contract , (13) or for the property of the judgment debtor (14) A receiver cannot waive a right to recover without the sanction of the Court (15) A receiver does not represent the estate for all purposes He has none of the powers which

- (1) Fink t Mahara; Bahadur Singh, 26 C 772 (1899)
- (2) Woodroffe, 174
- (3) See generally ib 175 Hurce Suukur Mukerico i Josendro Coomar Mooferico, 19 W R 86 (1873) Din Dyat Lah : Rain Ruttan Neoger, 16 W R 46 (1871), Bro jender Narain Roy i hunwer Roy, I W R Mise 15 (1861) Doorga Dutt Singh & Bun warce Lall Sahoo 25 W R 33 (1876) Bun waree Lall Sahoo : Girdharee Singh, 16 W R 273 274 (1871), Mohabir Pershad Singh : Collector of Tirhoot, 13 W R 423 (1870), Bunwari Lall Sahu & Mohabir Persad, 12 B L. R 297 (1873), Rednum Atchutara . Khaja Mahomed, 5 M. H. C R 272 (1870) Mohunt Ram Rucha e Doorga Dutt Mis er 13 W I: 153 (1570), Ootum Smalt e Ram Suron Lall, 23 W R 287 (1575) Mohmee Mohun Dass : Ram Kant Chowdhry 15 W R 322 (1871). Umbrea
- Churn Sarnakar i Meik, 5 C. W. N. xxii (1) Mchabeer Pershad Singher Collector of int at 13 W L. 123 (1870), Bunwari Lall Sahu r M habir Persad 12 B la R 237 (1573)

- (5) John Tiel: Abdool Hye, 19 W R 17, 38 (1873)
 - (6) Ib
- (7) Thakoor Chunder & Chowdhry Chotec Singh, Marsh, 261 (1863), as to what must be shown, see Dinoboundhoo Sorgh & Macongliten, 2 C L R 185 (1878), Debkumarı Bibi t Ramlal Mukerjee, 3 B L R app 107 (1863)
- (8) Is to that Code, sec John Inl . Abdool Hye, 19 W R 37, 38 (1572), Moran
- Muttu Bibce, 2 C 72 (1876) (9) Gopulusum v Sankara, 8 M 118
- (10) Rambutty Koper : Ramessur Pershad 22 W R 36 (1874), Reasat Hossem t Jugganath Singh, 21 W R 119 (1874), is to order on garmshee, see looks Goold r Bombay Framway Co . 11 B 148 (1557) (11) 16
 - (12) Benode Behary Mo kerj er Rajna an
- Mitter, 30 C 639 (1903) (13) Sundaram r Sankari,) V 131(1551)
 - (11) Mirza Mahoined i Willowef Bilmu
- Lund, 3 f A 241 215 (15) Gopalasanii i Sankara, 8 V 118, 1-0 (1845)

may be conferred under r I in respect of property belonging to the judgment debtor not attached in the suit in which the order was made (I) If grounds be shown for such a course the receiver may, on the application of the parties, be removed (2)

Rights and powers (a) General —It may be said in a general way that a receiver has no powers except such as are conferred upon hun by the order by which he is appointed and by the practice and usage of the Court. He is merely an officer of the Court his holding is the holding of the Court he is but a minister, and therefore has not the discretionary power of a person acting in a fiduciary character. In theory the Court itself has the care of the property in his hands. He can do nothing likely to seriously diminish the fund without the special leave of the Court He is not however increly the assignce of him whose property is placed in his care, but he may exercise such power in dealing with the property as belong to a receiver according to the practice of the Court and as are particularly conferred upon him by the order of his appointment (3) Under the Code the Court may grant to the receiver all such powers as to bring ing and defending suits and for the realization management protection preserva tion and improvement of the property the collection of the rents and profits thereof the application and disposal of such rents and profits and the execution of instruments in writing as the owner himself I as or such of those powers as the Court thinks fit (4) A receiver is at all times subject to the control of the Court which possesses the power to make all necessary orders for the control of receivers appointed by it (a) He has a right to the protection of the Court and his possession will not be allowed to be disturbed (6) The Court will see that he carries out his functions and will protect the agent appointed under its orders (7) The scope of the receivership may be extended

- (b) Discretion—In many matters of eare and management recurvers are allowed to use their own discretion subject to the control and approval of the Court—But in all important matters a receiver should apply for and obtain the direction of the Court which appoints him (8)
- (c) Application for instructions—A receiver has a right to apply to the Court for instructions when a question arise as to what may be in duty under its orders (9)
- (d) Delegation 1 receiver is not justified in delegating or entriesting to mother a duit entriested to him by the Court. If he does so and thereby causes loss to the estate he is bound to make it good (10)
 - (1) Sun larum: Sankara 9 M 334 (1886) as to general position of receiver sec Orr :
 - Muthia Chetti 17 M 501 (1893)
 (2) See Huree Sunkur t Jogendro Coomar
 19 W R 66 (1873) Bunwaree Lall Sahoo
 - r G rdharce Jingh 16 W R 2 3 =74 (1871) Hurco Sunkur r J gendro Coomar 22 W R 20 (1874)
 - (3) Beach sect 249 Woodresse 204
 - (4) Sect 30

- (a) Beach sect. 200
- (6) Ib sect 266
- (7) Duro Nath Sreemoneo v Hogg 2 Hay 395 397 (1863)
- (8) Balan \arayan : I amel andra Govin i 19 B 660 662 (1831)
- (9) Woodroffe, 205 Beach, sect. J
- (19) Balan \arayan r Ramchandra Go
- vind 19 B 660 (1894) Woodroffe, 205-210

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(I) Finh (Malou i) II di idar Slogh, 26 C 772 (189n)

(2) Wnodrodk, 171

(3) So a needly ib 175, Huice bunker Muferper du fin juli et jegana Mankerico, 19 W R Bu (1875) Din Dyal Lull i Ram Ruttin Nos, c, 15 W. R. 16 (1871). But jetider Nia un Ray i Kinister Ray I W It Misc 15 (1861) Dong a Dutt Smight wine Lill Sile v. 25 W. R. 13 (1870) - Bun warre ball Sule + Corthuce Singh, 16 W. R. 174, 274 (1871); M. Indor. Pershol. Single i Collector of Lithort, LLAV JE 121 (1870), Danwari Lall Salar + Maladie Persol, 12 H. J. R. 247 (1874), Redmin Michael C. Khapa Mahemed, S.M. H. C. R. 272 (1870), Mehant Ran Ruche e Doinga Dair Misser 11 W R 151 (1879), Octum Single i Rita Spring Latt _1 W 10 287 (1875) M. lenca Melian Briss r. Hum Kant Chewellery 15 W R 122 (1871), Unity a Churchan that i Mick 50 W N xxu

(1) M habeer Pershad Smales Cellect r f Intage 11 W. R. 421 (1850); Bunwart Laff Californ Milator Person 12 ft 1 ft 247 Ob to

(5) John 1 al + Abdud Hye, 19 W R 37, 38 (18**7**.))

(6) Ib

(7) Hinkoor Cloudler - Chowdlay Chote Singh, Maish, 261 (1861), as to what must be shown, se a timolandhaa baigh e Macnighten, 2 C L B 185 (1878) Delikumurl Bila t Ramf d Makerje , 1 H J. R app 107 (1863) (8) Va 1, that Cod, so John Lel :

Abdord Hye, 13 W. 1t 17, 18 (1874), Mor w Mutte Ilibee, 2 (* 72 (1876))

(9) Gold as and or Sankara, 8 M 118 (1885)

(10) Rambutty Koorr Runessur Pershad 22 W R 3B (1871), Read Hoseine ! Inggamath Singh, 21 W. R 119 (1871). 16 to order on gumsha, see to but to lil : Hambay Lianuay (5, 11 B 118 (1887)

(11) (11) (12) Ben He Belerry Meel ery ee Repier on

Mater, 10 C 6 Pt (1 10 H) 114) Sand nam i Sankar (, 9 M 131 (1981) 111) Wars Mah nacd c Will well Bilmi

kno.l, 11 \ 211, 215 (16) Or palment of Bucking S M. 114, 1-1

(1845)

may be conferred under r 1 m respect of property belonging to the judgment debtor not attached in the suit in which the order was made (1) If grounds be shown for such a course the receiver may, on the application of the parties. be removed (2)

Rights and powers (a) General -It may be said in a general way that a receiver has no powers except such as are conferred upon hun by the order by which he is appointed, and by the practice and usage of the Court merely an officer of the Court, his holding is the holding of the Court he is but a minister, and therefore has not the discretionary power of a person acting in a fiduciary character. In theory the Court itself has the care of the property in his hands. He can do nothing likely to seriously diminish the fund without the special leave of the Court He is not however, merely the assignee of him whose property is placed in his care, but he may exercise such power in dealing with the property as belong to a receiver according to the practice of the Court and as are particularly conferred upon him by the order of his appointment (3) Under the Code the Court may grant to the receiver all such powers as to lam, ing and defending suits and for the realization inanagement protection process. tion and improvement of the property the collection of the rents and pr fits thereof the application and disposal of such rents and profits and the execution of instruments in writing as the owner himself has or such of the e powers as the Court thinks fit (4) A receiver is at all times subject to the control of the Court which possesses the power to make ill necessary orders for the control of receivers appointed by it (5). He has a right to the protection of the Court and his posse, sion will not be allowed to be disturbed (6). The Court will see that he earnes out his functions and will protect the agent oppointed under its orders (7) The scope of the receiver hip may be extended

- (b) Discretion -In many matter of our and manufement received are illowed to use their own discretion sulject to the control and uprovided the Court But in all important matters a receiver healt apply for and oft im the direction of the Court which appoints him (8)
- (c) Application for instructions. An centre a relationally all Court for in tru tion when a que tam arress to what may be be buty in br ard 18 (9)
- (1) Delegation A tecers ris not justified to 11 atms. to a there dut corru ted to him by th Curt If is incoc uses less to the elate he is bound to make it a sel (L)
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- 12 12 1 000 1
- (1) Set 3 v

- (e) Possession -It is both the receiver's power and duty to take possession of the property whether moveable or immoveable over which he is appointed Where a receiver is appointed by the Court to get in outstanding personal property, it is his duty to collect all he can get in The power of a receiver to take property implies a correlative duty on the part of any one having it in his possession to deliver it to him, and such holder violates the law in resisting the exercise of the lawful authority of the receiver (1)
- (f) Leases —If tenants in possession of property over which a receiver is appointed are directed by the order to attorn to him, the receiver should, as soon as his appointment is complete call on them to attorn accordingly, and if they refuse, application should be made to the Court The receiver is entitled to all the rents in arrear at the date of his appointment and to all the rents which acerue during the continuance of his receivership, and an order will, if necessary, be made for payment (2) As to power to serve notice to quit and sue see below (3) As regards the power of leasing, it is created by the order appointing the receiver who has no estate or interest in himself which enables him to lease. It is common to grant such powers of lease for a limited period, usually three years but whenever it is desired to lease for a longer term, the Function of the Court must be obtained (1)
- (g) Sales As to the practice of the High Court in assisting purchasers of receiver a sales (5) and sale by receiver during administration (6) see eases cited Liens upon property held by a receiver are not divested by virtue of sale made by him (7) A sale by the receiver made under the order of Court, cannot in the absence of fraud be attacked collaterally by persons who were parties to the proceedings of their representatives (8) When a suit bas been dismissed the Court has no purisdiction to give the receiver any fresh power, as for instance, liberty to sell (9)
- (1) Borrowing If a receiver requires money to discharge his duties the Court will give him leave to borrow upon the security of the property in his

⁽¹⁾ W clr if 211

^{(2) 15 212} (1) Dioleman Gujta + Dv + 11 (321 (1883) dist in Hari Dis lant Lis Micgrey 7,

¹⁸ C 177 (15)1) see in ther more fully disiss I in W. slr flc of cit 213-213

⁽⁴⁾ Index the general permission the recon r may in his he retion let out property but not for any period executing three years without I taming special perinssion lambers R andO \ to to R =0 Krishna thun ir those i Krishnosokha Ghoe or he lat Lanth May 15"8 (Cal H Cl World fe ald and Chunke Dass i li 31 ako Nath Lawas Suit 234 ef 1881, Cal H C O O C J at March, 1997 So le Kistul bay e Darga Sartery

Desce Tet +3 (1888), Sullya Sunkur Chisalit Chip Willy Daber Suit 18 cf 1871. Cil. H. C. Ndory Halb Man II va Gillamkes 2 Set 1 80

⁽⁵⁾ Murito messa Bibec i Khatoone s Bilice 21 C 179 (18)1), disscrited from th

tolam Ho sem Ariff i Lalima Besum 16 C W N 3 B (1310)

⁽⁶⁾ Sciai Chan I Chu & rbutty : Ashutosh

Chuck rbulty 5 C W N 104 (1901) (7) Washrolle 231 See (ra Chan I I irki t Makhan Lal Chakravarti d C L. J. 101,

^{403 (1 #)&}quot;) (8) Gra Chaul Lurkt i Makhan Lal

⁽ lakravaiti B C L. 1 104 | 114 (1 107) (4) Pala! ha c Smith 31 € 3° 1 (1 207)

hauds (1) Where a receiver of joint property mortgaged that property to another after a money decree had been obtuned against the owners, but had executed the mortgage previous to the attachment, held that the attaching creditors were not entitled to priority over the mortgagee (2)

- (i) Payment -As to payments out by receiver, see note (3)
- (i) Suits by or defended by receiver With regard to suits by a receiver, two questions require consideration, namely, as to his right to sue in general and as to the name in which he should sue One of the most important functions exercised by receivers in the discharge of their official duties is that of bringing such actions as may be necessary to the proper discharge of their trust, as well as to secure and protect the assets and funds to whose control they are entitled by virtue of their appointment (4) As a general rule all rights of action which belong to the party whose property is put into the bands of a receiver are trans forred to the latter by virtue of his appointment (5) The appointment does not affect existing contracts or rights of action between the party whose property is placed in the hands of a receiver and others, he has no greater rights or advantages than those possessed by his principal (6) A receiver therefore, cannot maintain an action upon a note or obligation running to the original party which he himself could not have maintained (7) His right of action relates back to the beginning of the title in the party for whose property he is if substituted in place of the owners of the property he acquires all their rights by subrogation (8) Inasmuch as for the purpose of actions and suits connected with the receivership receivers occupy substantially the same relation which was occupied by the original parties against whom or over whose estate they were appointed any defence which a defendant might have made to an action brought by the original party in interest is equally available, and nine be made with like effect when the action is instituted by the receiver (9) The fact that a person is an officer of the Court entitles him to no privileges not accorded to other suitors and in seeking relief he must commence his actions by the same process that other suitors are required to employ (10) A receiver's hability for costs in an action instituted by him on behalf of the estate is similar to that of any other trustee-is of an executor or administrator-who sues for the interest of an estate but being in other of the Court he usually receives special con ideration (11) Should be fail in his action he will of course be directed to pay the costs of the defendant. Lut as between himself and the

⁽¹⁾ Woodroffe, 31, Poreshnath Wook rice t Omerto Nauth Mitter 17 (014 013 (18 0) Wohari Bibeo + Sha a B bee 7 (W N

cclavi i. (1903)

(a) Herumbo Nath Ban rice e Saish
(d an Ira Mukerjee, 33 C. 1175 (1905)

⁽³⁾ Motivahu r Premvahu 16 B 511 (1832), Kujijusami Chetti r Rathnavelu Chetti 11 M 511 (1801) In the goods of 6 pal Lal val. (al. H. C. sa.t. 11, 11 82 Order J March, 1803 (advance, 1 m ney for

d fen wed suit).

(4) II ah seek 200 die ji. II wan Le 200

^{1.7}

⁽a) Brach sect. 663 (b) Br sect. 664 Halt sect. 204

^(*) Williams e Babcock - Barb. 109 (Am r) Bell e Shibles 33 Barb 610 (Amer)

⁽⁵⁾ Brach seek 60°

⁽⁹⁾ High, sect 205. Beach sect one on (10) Leach, with books ministed of paint by receiver a Militear is probably authority. Drob as vi Cujta's Passa 14 (233/(1857)).
(11) Howert 6-3.

estate he represents, he will if be has acted properly, with care and in good faith he allowed his costs out of any funds which are in, or may come to his hands (1) Such an order in favour of a receiver will, however, generally, only he made in the suit in which he has been appointed, and not in the suit brought by him, unless in such latter suit the estate which he represents is fully before the Court Since, however, a receiver sues in a representative capacity and not in his personal right, it is necessary that be should not only set out in his pleading the right of the party whom be represents but also the authority under which he assumes to act Courts are inclined to the exercise of a strict control over their receivers in the matter of allowing them to bring suits concerning their receivership and an action brought by a receiver is considered as brought under the order of the Court itself If, therefore a suit is instituted without authority the parties are entitled to the protection of the Court against such unauthorized proceedings on the part of the receiver, who will be directed to discontinue the action (2) The usual practice both in England and America (3) and in this country before instituting actions by a receiver in matters connected with his trust is to apply to the Court, from which he derives his appointment, for leave to hring such action And, although it is frequently the case that the order of appointment in general terms authorizes the receiver to sue for and collect all demands due yet it is a common and a safe practice to first obtain special leave of Court before beginning the action. In order to word the necessity of frequent application to the Court for liberty to sue it has become customary to give to the receiver in the order by which he is appointed general leave, but as the authority to sue conferred by the order of appointment is confined to such suits as are contemplated by the order (4) and doubt may arise whether the particular suit brought is within the terms of the anthority it is customary as above stated to obtain special leave in each case. Proof of the appointment of the accesser and of leave to sue is generally given by the pro durtim of a certified copy of the respective orders. It seems to he established that the regularity propriety or necessity of the appointment of a receiver is men to be questioned in a merely collateral action at least by practice or percess to the action in which the appointment was made. As to the rights of other partus in this respect there seems to be a difference of opinion. It has been said to be probable that those who were entire strangers to the original proceedings should be allowed in a collateral action where their interests are affected by the appointment to attack the order on the ground that it was procined through frond collusion or deception practised on the Court but for no other reason (5) The general doctrim recognizing a receiver as the officer of the Court is not to

⁽¹⁾ See 1b Set n 4th Ed 112 5 Sunon (20 2 I h llips

⁽a) Beach sect C33 H mb sects 401 402 as t H to east t f law sec Kerr B3 171 h D s math sects neer C S Hogg. 2 Has 15 333 (bots) it was sa l that in that at a first late the critical control tatter conversant we man that better section.

It the adje them upon Hr

and authority to such as to casts where, having an independent cause of action, if of fact that a person is received dee not disquirity him from aning and in which case be not as independent of rear f.

⁶ Kerr D 4 (f) H ah s et 183

⁽¹⁾ Beach nects (art if)

^{() []} M 14 L 15 Um

be understood as limiting or restricting lus rights in the manacement of a suit which he has once undertaken, and after entering upon a litigation he is regarded as being entitled to all the freedom of action of any other suitor, and the fact that he appeals from a decision which is against him is not of itself evidence of bad futth or of mismanagement of his trust, and may he a mentorious rather than a consurable set (1)

Some conflict of authority exists whether, in the absence of the special authority, a receiver may sue in his own name or in the name of the original party in whose favour the action accrued. In the first case a distinction must be drawn between the cases where, though the party suing may be a receiver. he bas an independent cause of action entitling him to sue, and to sue in his own name, and in which eases he does not really sue in his character of receiver. So a receiver, who is holder of a hill of exchange, may by the law merchant sue in his own name . (2) also when, as hailce, be has a special property in the goods : (3) or if he is possessed of chattels and those chattels are unlawfully detained from him So, too, after a tenant has attorned to the receiver and so created a tenancy between him and the receiver, the latter may distrain upon the tenant in his own name, and on his own authority without leave obtained from the Court , (4) and there may be other eases in which, having an independent cause of action, the fact that he is receiver does not disquably him from suing (5) In other cases, however, and where the receiver is suing in respect of a cause of action which has accrued to him in his representative capacity from the party whose estate he holds, the prevalent rule appears to he that where the matter is not controlled by statute or order of the Court, the receiver should sue, not in his own name, but in that of the parties whose estate he holds (6) But this view is stated (7) to he losing ground and has not always been adhered to either in America (8) or England (9) and it has been held in the former country that a receiver by virtue of his appointment is a quasi assignee invested with title to

High, sect 207, and see as to appeals by a receiver, Beach, sect 716

⁽²⁾ Ex parte Harris, 2 Ch. D 423, Kerr,

⁽³⁾ Hills r Reeves, 31 W R (Eng.), 209 (4) Kerr, 181, et ibs casas Wilkinson r

⁽⁴⁾ Kerr, 181, et als casas Wilkinson r Gungadhar Sirkar 6 B L. R 491 (1871) (5) In re Sacker 22 Q B D 185, in

Wilkinson t Gengadhar Sukar, supm, at pa 901, it was and 'I' Imay happen that matters arise out of the receiver a possession which are such as to render it necessary for him to sue personally in regard to them, se such as it would be wrong for any of the parties themselves to suc, e.g where tenants have attorned to him or he has let property in his own name 'This was a sunt for specific performance of a contract of sale executed by the receiver in his own name and the receiver was admitted as co-plaintiff.

⁽⁶⁾ Beach sect 688, High, sect 209,

Wikinson : Gungadhar Sirkar, 6 B. L. P.
486 (1871) 'You the application that the
receiver should have leave to sue simply
means thus that he should use the names of
the owners of the property and come into
Court on their behalf whether they consent to
his doing so or not but at p. 490 Ram
Lochan Sirkar Hogg 10 W. R. 430 (1868)
Suit in receiver's own name held to be an
error of form only remediable in appeal where
no objection had been taken. Jingsannath
Perchal Burk, Hogg 12 W. F. 1995

Pershad Dutt t Hogg 12 W R 117 (1809)
(7) Beach sects 688 (89), High, sects 209, 210

⁽⁸⁾ Beach sects 688 689, High, sects 209 210

⁽⁹⁾ Kerr, 199, et ilu casas see also I velyn t Lews, 3 Hare 472, trimstrong t 4rm strong, 4 L B 12 Eq 614, Paterson r Gas Iight & Coke Co 2 Ch. (1896) 476

such an extent at least as will enable him to sue in his official character (1) Where the order appointing the receiver gives him power to sue in his own name or in the names of the parties to the suit, it might well be held that such an order merely entitles the receiver to sue in his own name in cases in which such action is proper, and in all other cases to use the names of the parties It has, however, been decided that the Court had authority under sect 503 (now r 1) to confer on a receiver the power to sue in his own name, and that if the order appointing the receiver gives him liberty, he may do so in any case (2) Where the receiver is permitted to sue in the names of the parties and does so, no action on their part is necessary (3) A receiver of attached property may also sue He does not represent the estate for all purposes would have none of the powers which may be conferred under r 1 in respect of property helonging to the judgment debtor not attached in the suit in which the order was made (4) It has been held that where a receiver institutes proecedings, and is then replaced by another receiver, it is necessary that the new receiver should be made a party to those proceedings (5)

The necessity for permission extends not merely to suits brought by, but also to suits defended by, the receiver (6) The proper rule as regards applications in respect of the estate is that they should be made by the persons bene ficially ontitled, and not by the receiver, though it must be admitted that receivers bayo often originated proceedings in their own name (7)

- (1) Indemnity.—A receiver is entitled to be indemnified out of his estate in respect of all costs, and charges, and expenses, properly incurred by him in the discharge of his office or under the order of the Court (8)
- (1) Salary and allowance -The receiver's allowance is either a percentage (in ordinary cases 5 per cent) upon his receipts or a gross sum by way of salary A receiver is entitled to his easts, charges, and expenses properly incurred in the discharge of his duties (9) A receiver may be entitled to allowances beyond his salary for any extraordinary trouble or expense (10) The receiver is entitled to be paid very after the costs of realizing the estate. As the officer of the Court the Court is bound to see that ho is paid (11)

⁽¹⁾ Beach sect 689 (2) W R Fink : Maharaj Bahadur Singh, 25 C 642 (1898) , s c , 2 C 469 "It is such a convenience to suiters for the receiver to sue in his ewn name. Some of the parties may be deal, and if the receiver is to use the name of the parties he would have to get the suit revised, but if he sues in his own name no such difficulties arise 'ib . 1 er cur . 615 . it is olten a great saving of time, trouble, and expense ib, 118 In Fink t Bulleo Dass. 20 C 715, the receiver sued in his own name The first mentioned case was followed in Jagat Parini Danie Naba G pal Chake, 31 C 305 ([4)7)

⁽³⁾ Dr. bem vi Guytvi Davis, 14 C 33 i

⁽¹⁸⁸⁷⁾

⁽⁴⁾ Sundaram : Sankara, 9 11 334, 337

⁽⁵⁾ Akula Paradesi i Dhelli Jagannadia 28 V 157 (1904)

⁽⁶⁾ Woodroffe, 247, Beach, sect 708

⁽⁷⁾ Woodroffe, 248, 249 (8) Ib, 219, Beach, sect 771, herr,

^{201 ,} Moran v Mitter Bibee, 2 C 63 (1876) (9) Balaji Narayan 1 Ramchandra Govin l. 19 B 660, 662 (1894), Woodroffe, 20 ct seq

⁽¹⁰⁾ Kerr, 213, 214

⁽¹¹⁾ Prom Lall Mullick t Sumbhon Nath

Rrs. 22 C 960 (1814)

(in) Lien.—He has a hen on the estate for his claims and allowances (1)

Duties and liabilities of receiver-Ile is, as an other of the Court, strictly amonal le for his acts and accountable to the Court(2) which appoint (3) him His first duty is to obey the order of the Court appointing him (1) He is not halle for acts done under the order of the Court (5). He should be strictly my artial, as he is appointed for the banefit not merely of the party on whose an lication the appointment is made, but equally for the benefit of all persons who may establish rights in the case (6) Many of the receiver's duties have ben alluded to in dealing with his rights and powers. So his right to take posses ion implies ilso a duty to do so. He is responsible for any los oceasioned to the estate from his wifful default or gross neighbonce (7). He ought to appear and give all neces ary information to the Court in all applications for payment of money (8) He is liable to account (9) He should keep correct and accurate accounts with southers (10) and should file them with regularity and prompt: tu le (11) showing that all disbursements are payments properly made in respect of the c-tate (12). A receiver may be ordered to account although the suit in which he was appointed may be no longer pending (13) It I is new and contains important provisions in this respect. It has been drafted on the lines of sect 15(4) of the Provincial Insolvency Act of 1907. The original proposal to imprison receivers was considered too wide and has been omitted

Jurisdiction to remove and discharge—The power to terminate flows naturally and as a necessary sequence from the power to create. The power of the Court to remove or discharge a receiver whom it has appointed may be exercised at any stage of the hingation. It is a necessary adjunct of that power of appointment and is exercised as an incident to or consequence of, that power, the authority to cell such officer into being necessarily implying the authority to terminate his functions when their exercise is no longer necessary, or to remove the incumbent for an abuse of those functions or for other cause shown, and the cases upon this branch of the subject will resolve themselves into two classes. The cases of removal or substitution for cause, and eases of final disclarge because of the necessity of the appointment having ceased to exist (14).

⁽t) 1b - M ran t Mittu Bebee 2 C - 0 (1876) - see Bertran tv Davies cited ib and Woodroffe 252 of seg

⁽²⁾ Woodroffe, 254

⁽³⁾ Buddinath Paul Chowdhry : Bycaunt Nath Paul Chowdhry 2 Tayl & Bell, 192

⁽⁴⁾ Woodroffe 2a4

^{(5) 1}b 2აა (6) 1b

⁽⁷⁾ R 3 (d), Kerr 302 Woodroffe, 255. Coomar SattyaSankar Ghosalt Rance Golap monee Debee 5 C W N 223 (1900)

⁽⁸⁾ Chartan Charun Mullick v Gocoot Clandra Mullick 1 C W N 303 (1897)

⁽⁹⁾ Woodroff ') See as to hability case cited in last note 1 ut one and as to mis appropriation by receiver semployees. Balaji Narayan e. Ramchandra Govin 1 nost

⁽¹⁰⁾ Balaji Narayan : Ramchan ira Govind 19 B 660 662 (1891)

⁽¹¹⁾ Gonesh Chunder Dass i Iroylucko nath Biswas Re C T Davis, Suit 294 of

^{1881,} Cal H C 23 March 1887

<sup>445 (1911)
(13)</sup> Adjumistrator Generat of Bengal v
Prem Lall Mullick, 22 C 1011 (1895)

⁽¹⁴⁾ High sects 820 826, Woodroffe, 260

security is insufficient the Court may remove him summarily, and direct the delivery of all the assets to his successor, if he neglect or refuse to procure additional sureties (1) Where a receiver becomes bankrupt he will be discharged and a new receiver appointed (2) If a receiver has been wrongly appointed over property of a person not a party to the cause he will be discharged although there has been an abatement by the death of the sole defendant (3) When a receiver has been appointed temporarily in an ex parte proceeding, or before answer, and it subsequently appears from the defendant's pleading or otherwise that the appointment ought not to have been made, or that the complainant has prescuted no case for the intervention of a Court of Equity, it is proper that the receiver should be removed. So where it is made to appear that there was no necessity for the appointment of the receiver, or where it is shown to the satisfaction of the Court that all the usual grounds for the appointment of a receiver-such as imminent danger to the property, fraud, insolvency, and the like-are wanting, the Court will remove the receiver and restore the status quo But where a receiver enters in good faith upon the discharge of his duties and the parties in interest acquiesco for a considerable time, their laches may be such as to defeat a subsequent application on their part looking to the icmoval of the receiver (4)

Since absolute impartiality as between the parties to the litigation is in undispensable qualification of a receiver, upon an application for lus removal the Court may properly consider his past relations to the parties as well as his present sympathies. And when it is shown that he was the nomineo of one hostile party and hitterly opposed by the other, and that he was appointed under the mistaken belief that all interests had united in his selection, and that hy reason of his interest his efficiency as an officer of the Court is impaired, it is proper to remove lum (a) The mere fact of relationship between the receiver and the plaintiff in the action in which he was appointed as not, of itself, sufficient ground for his removal such relationship affording at the most, merely s excumstance to be taken into consideration at the time of his appointment, it heig the general rule that no relative of either of the parties ought to be selected is receiver. But where, in addition to relationship has and improper conduct are shown a ground is made for his removal (6)

It is in established tale that a receiver will not be arbitrarily removed and mother person substituted in his place in the absence of a substantial ground, merely because certain parties in interest desire it. But it is competent for the Court to remove one receiver, and to substitute mother in his stead his consent of all parties when the proceedings are bona fide, and when there is no attempt to traffic in the receivership (7). Where a receiver had been appointed in an administration sint another receiver who offered to act at a lower salary was, on the application of a morthic collision into the effthe property, ordered to be substituted for him (8)

⁽¹⁾ Beach sect 77 >

^(.) Kerr. ... 13 Dm th Ir 1716

⁽¹⁾ thack seet 750

⁽³⁾ the 37 or g taxestre law Ir, 1 - 1' 3 - 1

^() II al most half ()

⁽c) thuch, a town, thigh, sect 82t, at 1 is to white a party in interest has be in specialist a death sect 750

⁽⁷⁾ Be set, met 75) tlink met 5-7 (4) Starley r (ult) rest W 5 (1565)

LIGHT SCHOOL U 40. T 1

The rule that a receiver may be removed for intsconduct or breach of trust ince out of the nature of the office, and the supervising power of the Court of Chancers Whenever the receiver is cults of mustersauce or malfersauce m o hee it is the duty of the Court to call him to account, and in a 1 more ease it has the undoubted right to order a summary removal (1). Lather mismanage ment or incompetence is a ground for removing a receiver (2) A receiver will be removed if his appointment has been an improper one (3) if he is irregular in carrying in and bassing his accounts. (1) if his conduct has been such as to impede the importial course of matice. (a) or to amount to tro a dereliction of duty . (6) and when a receiver appointed on behalf of incumbraneers has been guilty of gross negligence in the discharge of his duties, be may be removed upon their application and may be required to pay interest upon the balances from tune to time in his hands and to may the costs of the proceedings for his removal (7)

Final discharge of the receiver -The discharge of a receiver may take place either during the course of the proceedings or at the conclusion of the htt. atom \ receiver is cenerally continued until judgment, but according to the decision undermentioned (8) if the right of the plaintiff ceases before that time the receiver may be discharged, and cannot be continued at the instance of the defendant. In this case the plaintiff claiming to be an equitable creditor or meumbrancer of the defendant had obtained a recurser of the rents and profits of defendant s real estate upon which he claused to have a charge Defendant having paid and plaintiff having received the amount claimed to he due the receiver was discharged, although other defendants claiming to have annuaties or meutubranees upon the same property objected, and asked to be heard against the discharge Lord Eldon said. I apprehend that with the right of the plaintiff to have the receiver must fall the rights of the other parties. It would be most extraordinary if because a receiver has been appointed on behalf of the plaintiff any defendant is entitled to have a receiver appointed on his helalf. We decided on mion is that the order for the receiver must be discharged and that all falls together. In, however a subsequent case (9) the Master of the Rolls and There is no doubt that where a receiver is appointed under the authority of the Court he is appointed for the benefit of all parties interested and therefore he will not be discharged merely upon the application of the party at whose instance he was appointed (10) If during the course of the proceedings the continuance of a receiver becomes

⁽¹⁾ Beach sect 783

⁽²⁾ Gonesh Chunder Doss & Troylucko Nath Biswas Re C T Davis Suit 294 of 1881 Cal H C O O C J Cor Frevelyan J 23rd March 1887

⁽³⁾ Re 1 loyd 12 Ch D 448 Neilman : Neilman, 43 Ch D 198, Re Wells, 40 Ch D 569, Brenan t Morsset 26 L R Ir 618 cited Kerr 236

⁽⁴⁾ Bertie t Lord Abrogdon 8 Bear 53

⁽a) Vitchell & Candy W N 1873 232

cited in Kerr 236

⁽⁶⁾ Ib citing Re St Guorge's Estate 19 L R Ir J66

⁽⁷⁾ Ib Hgh sect 82)

⁽⁸⁾ Davis v Duke of Marlborough, 2 Sw 167 168 see Woo troffe 2"8 et sea

⁽⁹⁾ Bambrugge v Blau, 3 Beav 421

⁽¹⁰⁾ In other cases also of a somewhat sumilar character proceedings have been stayed without projudice to the order appoint ing a receiver Kerr. 238

unnecessary, or the object of the receivership is attained, the receiver will be discharged (1)

While the property of discharging a receiver, like that of appointing hun, is to some extent a matter of judicial discretion, jet in some cases the right to a discharge becomes an absolute right which the Court has no discretion to refuse (2) In such a case, therefore, the granting of the order of discharge is uot a matter of discretion, hut its refusal is error which may be reversed ou appeal.(3)

In general a receiver will not be discharged until the object for which he was appointed has been fully accomplished, or until the Court is satisfied that the exigency calling for a receiver has ceased (4) Since the final decree in the cause is generally decisive of the subject matter in controversy, and deter unnes the right to the possession of the fund or property held by the receiver, it is usually the case that such decree supersedes the functions of the receiver since there is then nothing further for him to act upon If, on the other hand, the result he favourable to the defendant, the functious of the receiver are at an end, and it is proper to order him to account and be discharged (a) An order of dismissal of the suit which follows on the roversal of an order appointing a receiver elearly operates as a discharge of the receiver (6)

Under the Civil Procedure Code, once a suit has been dismissed, the Court dismissing it is functus officio except that it may stay execution of its own decree or order for costs Its jurisdiction extends no further in regard to a suit which has ceased to be a pending suit (7) If, on the other hand, the controvers; terminates favourably to the plaintiff or the party at whose sustance the receiver was appointed, it will usually devolve upon him to carry out the decree of the Court recording to the nature of the receivership and his powers under the decree (8) It has been said that the determination of the suit, however will not, spso facto, discharge the receiver, but his functions must be terminated by a formal order of Court (9)

Unless the number of the order appointing or continuing a receiver and manager contain a provision for his discharge, an application to the Court is in general necessary to direct the possession of the receiver. The appointment of a receiver made previous to judgment will not be superseded by it unless the receiver is oidy appointed until judgment or further order (10) The receiver may, however, be continued by the decree (11) The Court has juri diction notwithstanding a receiver has been discharged, to surcharge him in his accounts, (12) or to order him to pay his balance together with the amount illowed him for his salary and interest (13)

See Woodr Re. 280

⁽²⁾ High sect 510

⁽¹⁾ Ib Beach, seet 733 (I) Sa Smith a Tvater & Beat -2"

⁽a) Bruch sect 733

⁽⁶⁾ From Lall Mullick's Sarableo Nath It's __ (Ha) 3"3 (IS2)

^() Yan muld ulah e Ahn al Ali Khan -11 rat, and and (1531), a a Weste Has

Injunctions, 56-3 (5) Beach 733

⁽J) Ib , High week 831

⁽¹⁰⁾ Kerr, ...32 (11) See Moti Vihu e From Viha to B

^{11, 512 (165.)} (1.) Jel luarle 31 1 R fr ... t. cm 1 1

Acrr. _ 10

⁽¹³⁾ Harrison : B) ! H B Su L - 11

The decree may direct a permanent appointment, in which case the discharge of the receiver is a matter of discretion (1)

Discharge of sureties -The sureties of a receiver will not be discharged at their own request, and no regard will be had to their application unless it s for the benefit of the estate or unless there he special circumstances in the ease,(2) as for instance where underhand practice can be proved, and the person secured can be shown to be connected with such practice (3) Where also a surety had become such in violation of partnership articles, he was discharged on his own application (4) When a surety procures his discharge during his continuance of the receivership the receiver must enter into a fresh recognizance with new sureties When a surety becomes bankrupt the receiver is usually required to enter into a fresh recognizance with two or more sureties. If a surety dies without leaving any property available for the satisfaction of the recognizance, the Court will direct a new surety to be appointed, but the rule is otherwise where he leaves real property bound by his recognizance (5) The condition of the bond is that if the receiver shall from time to time, and ot all tunes so long as he shall continue as receiver duly and faithfully in all respects discharge the duties and obligations which devolve upon him and duly pass his accounts, then the bond shall be paid but otherwise it will remain in full force (6)

If the receiver faithfully discharges his duties and passes his accounts ond pays the balance due by him the surety is discharged, and he is at liberty te ouply to have the recognizance vocated as to him Should this be not so, on action must be brought on his bond ogainst the surety who is onswerable te the extent of the emount of the recognizance for whatever sum of money, whether principal interest, or costs the receiver has become liable for, including the costs of his removal, and of the oppointment of a new receiver in his place In ascertaining the liability of the surety the Court proceeds upon the principle that the surety is hable (to the extent of the emount of the penalty) for all sums of money which the receiver himself was properly liable to pay into Court or occount for (7)

A surety who has been compelled to pay money on account of his obligation is entitled to he reimbursed out of the balance in the receiver's hands Lord Eldon saying 'As the receiver is an officer of the Court and the surety is so in a sense, if there is anything due on account between them justice requires that, upon the application of the surety, he shall be indemnified for what he has gaid for the receiver out of the balance due him '(8) And a surety who pays the debt of his principal has the same right against his eo surety that he has against the principal, and will be permitted to put the bond in suit as against the eo surety (9)

⁽¹⁾ See Ex parte Ram Mathusra Jyan lmba 13 M. 390 (1890)

⁽²⁾ Griffith t Griffith, 2 Ves. 400 herr

^{241.} Woodroffe 291 (3) Hamilton t Browster, 2 Moll 407

Kerr, 241

⁽⁴⁾ Swam t Smith, Set. on Deer 680

⁽a) Woodroffe, 292

⁽⁶⁾ Lide 1b Appendia

⁽⁷⁾ herr _42 244.

⁽b) Glossup r Harrison J V & B 134. (9) Pe Swans Estate, Ir I. 4 Fq 201,

cited in herr 245

dispossessed (1) and it has also been held that under O XLIII r 1, cl (s) a final, but not an interlocutory order, appointing a receiver is appealable (2) and all o that directions given by a Court in passing a receiver's accounts are not appeal able (3)

O XLIII) that an order authorizing a receiver to remove any person in possession of the property was appealable, under that section, at the instance of the person

(i) Rowland Hudson & John Parpont (3) Mohini e Ram Naram 14 C L J Kcahobati t McGregor, 35 C Morgan, 13 C W N 654 (1909) 445 (1911) (2) Upendra v Bhupendra 13 C L J 568 (1908) 157 (1910)

ORDER XLL

Appeals from Original Decrees

(1) Every appeal shall be preferred in the form of a is memorandum signed by the appellant or his Form of appeal. What

to accompany memoran-

pleader and presented to the Court or to such officer as it appoints in this behalf.

memorandum shall be accompanied by a copy of the decree appealed from and (unless the Appellate Court dispenses there-

with) of the judgment on which it is founded

(2) The memorandum shall set forth, concisely and under distinct heads, the grounds of objection to the Contents of memorandecree appealed from without any argument or narrative, and such grounds shall be numbered consecutively.

Memorandum of appeal - The Appellate Court must look at the memo andum of appeal itself and not at the stamp on it in order to see which part of a decree is the subject of appeal before it. The Court can no more deal with part of a decree which is not chillenged by a memorandum of appeal or by objections filed by the opposite party than it can pass an order reveraing the decree of a first Court when that decree is not in appeal before it. The memo random of appeal or objections when filed are what give the Judge on appeal purisdiction to interfere with the decree below. He cannot of his own motion deal with a decice which is not the subject of appeal to him or with a portion of a decree against which portion there has been no appeal and no objections filed. The appellate Court has no purisdiction to deal with that portion of the decree which is not the subject of appeal before it (1). The Lode does not make iny provision is to how Courts should deal with memorand; of appeal con taining scandalous matter but Courts possess inherent power to stop such in buse of its records (2)

"Presented "- In order to effect a valid presentation of an appeal it must be by the suitor in person or by a person duly qualified to present it,(3) and where an advocate or vikil is heard the grounds should have been duly

⁽¹⁾ Cheda Lal a Badullah 11 4, 35 37, 38 39, 40 (1855)

⁽²⁾ Zamundar of Tune : Bennayya, 22 M. 155, 158 (1635)

⁽³⁾ Shiam Karan e Raghunandan, -2 A.

^{331 (140) [1} resentation by person not autor, advocate attorney or vakil], Wazir un ni sa Habi Balah, 24 A. 172, 173 (1901) [authorized agent of female pauper].

certified (1) Though in the valadatnama filed in the Court below the names of two vikils were entered, and though the takalatnama was accepted only by one of them yet the presentation of the appeal by the pleader, who accepted the rakalatnama, was considered a sufficient presentation (2) But where by an over sight the name of the valid who had filed an appeal was omitted from the body of his vakalatnama, it was held, on objection taken by the respondents, that the document was invalid and the appeal had not been properly presented (3) If an appeal, being in reality a first appeal from a decree, is erroneously described as "First appeal from order" in the memorandum of appeal, and it is shown that neither respondent was in any way prejudiced by such misdescription or an insufficient stamp was placed on the memorandum by reason thereof, the appeal should not be dismissed for such misdescription (4) It has been held that there is no proper presentation when the court fees due have not been paid, (5) but as regards subsequent affixing not having retrospective effect the first set of cases were decided before the enactment of sect 582A of the last Code (see now sect 119), which was intended to cover cases where the msufficiency of the stamp upon the memorandum of appeal was due to mistake (6)

"Accompanied by a copy of the decree "—In appeals against dicrees in suits or proceedings tantamount to a suit (e.g. contentious prolate proceedings) it is necessary that the memoraidinm of appeal should be accompanied by copy of the decree and a copy of the decree is a necessary accompanient for a valid appeal (7). The Court has no power to exempt an appellant from production of a copy of the decree, but (if satisfied that the discretion vested in it under sect. 5 of the Limitation Act should be excreised) it may make an order that a certified copy of the decree may be received and allowed to be attached to the memorandum of appeal (8). But in cases of appeals against orders under sect. 211 (now sect. 17) (which are decrees under ect. 2) it is sufficient to attach to the memorandum a copy of the order itself (which is the decree and no other decree is necessary) and it is not necessary to attach a copy of the decree even if such a decree may have been drawn in (3). The provisions of this rule, as extended to second appeals by sect. 103 do not require that any

⁽¹⁾ Kishen Chun I et Hurs h, 3 W R 216 (1865) Olimliah i Bachulal, 15 C 706 (1888) I re Nor Vhme 1, 17 W R 318 (1872), but a vakil aj pellant cannot certifi I si our aj pad. I hakoor Dass t Vmetr Worlal, 11 W R 118 (1870)

⁽²⁾ Myami i Nasabhoosanim 16 M 2No (1832)

⁽³⁾ Muhammad Ali Ishan t Jas I m, Jo A 17 (1913), P kl pal Singh t Damber Si h o A L J 110 (1909)

⁽⁴⁾ Sant Lafr Srike b ii 11 V 21 (1894) (4) Balkyran ii Cobu 1 12 V 143 112 (1890) see also Slev Turtap c Slev (4 lui 2 V Soc(1890) Yakut iii missa ii k l re 10 (-37 (1891) Lakhi Narim ii kii baa Daa 18 C L J 133 (1413) Tut

see Dhondiram : Tiba Sivilan 27 B 330

<sup>(1902)
(6)</sup> See Doorg's Churn t Dookhuam, 40 C
223 329, 330 (1839) , Barl ult Desar Man 0
bhar 32 B 819 (1837) , Valumbal Virtal'r
Vylhdinga 24 M 331, 332 333 (1300) * C

²⁵ M 350
(7) Chaurela Kuur v Anne kalm 16 4 77
(1993), see also Bhawania Kallu 17 1 53
73(18.1) Kherist Sun Irrit Jinmen ira 6
(W N _53 _81 _80 (1991)

⁽⁵⁾ Pros n at Ram Chandra 17 to L J 66 (131.) Hem t Jalah 16 t L J 116 (1901), Binaj viji t Sashi, 16 C, L J 133 (131.)

⁽J) Mard / Barcules, &C W Nash,

_41 _56 (1 01)

The appellant shall not except by leave of the Court, arge or be heard in support of my ground Gounda i t ch may be of objection not at forth in the memorandum tak n najj al of appeal, but the Appellate Court in deciding the appeal, shall not be confined to the grounds of objection set forth in the memo randum of appeal or taken by leave of the Court under this rule

Provided that the Court shall not rest its decision on any other ground unless the party who may be affected thereby has hid a sufficient opportunity of contesting the case on that ground

Grounds of appeal. The is uni which may lo talen without have under this rule are tho e or h + t out in the memorandum (1) In objection which may be heard under sect. 100 (formerly sect. 591) must be one set f rth in the incinorandum of appeal (a) and the Court has a descrition to grant or refuse leave (6) which is not til en away even when the point sought to be ruse ! is one of limitation (7) Que tions h wever may arise even as to those which

(1) Lirathi Sing t Vencatramanayyan 4

VL 419 (1881) (...) Bhyrub Nath v Huro Su idar v W R Mis 28 (1861) see also Vothoor Nath r

- Lusen Mohun W R, Mrs 9 (1863-1861) (3) Fuzal Mahammad v Phul Kuar 2 A
- 192 (18 9)
- (4) As to succ feally raising the point see Varayana t Chingalamn a 10 M 1 8 (1884) and see Protap Chunder Borooah & Collector of Goalpara 22 W R 210 219 (18 4) . (5) Tılak Roy Singh t Chakardhan Singh 1. A. 119 120 (1892) foll, in Bansi Lal 2

Ran p Lal 20 \ 3 0 3 2 (1898)

(1) Ib It las refused les o viero tio s after as or o of Court fees Ram Aislen Upadhia v D pa Upadhia 13 A 50 (1890) and will so under the conduct of a party

Il akurı v K ndan 17 A 280 281 (1895) (7) Uned the Warm Husain to A 1-3 (1593) and see Dattu v hasai 8 B 33.

(1894) contra Mukvana Saluji i Raj Sangsi 2B H C R 169 1 0 1"3 1 4 In Balora 1 v Mangta Das 11 C W N 9.0 (1907) s e 34 C 911 tle majority of the Court con

si lered that leave should be given

are set out by reason of the fact that they raise a new case or points not the subject of determination in the lower Court Generally speaking, in these eases pure points of law only are arguable which arise on the findings and require no further inquiry This subject will be found discussed under the heading "Scope of the appeal" in the notes to sects 100 and 101, ante This rule is equally applicable to second as to first appeals (1)

Grounds of appeal must be such as arise from out of the plaintiff's pleadings and documentary proofs and necessary to the decision of the appeal (2) In drawing up grounds of appeal it should (it has been held) be remembered that no subsequent event or devolution of interest can effect the decision of a question as it stood at the time the decision was pronounced. To give effect to these, some supplementary proceeding and not an appeal is necessary (3) Points not taken in the memorandum of appeal, if they raise questions of fact, upon which the findings arrived at by the Court of Appeal must be taken to be cou clusive, will not be allowed to be taken in special appeal (4)

If the appellant thinks that his grounds of appeal in the memorandum filed with the Judge are not sufficient, he may apply to the Judge to allow him to be heard upon the objections not mentioned in the memorandum of appeal, but if he does not do so, nor does he even make the objections upon which he relies before the High Courts previously to his appealing to that Court, he cannot isk the High Court to reverso the decision of the Judge of the Lower Appellate Court because he did not reverse the decision of the first Court on grounds which were never mentioned in appeal, or not brought to the notice of the Judgo of the Lower Appellate Court (5) The Court, however, itself is not limited by the grounds of objection It is entirely within the competency of the Court to take into its consideration anything in the case which either affects the regularity of the preceedings of the Court below, or relates to the correctness of the decision upon the ments, and the Court is not confined to the grounds set forth in the memorandum of appeal (6) This rule confers upon Courts power to deedle appeals upon grounds other than those set forth by the appellant in the memo andum, and that power is to be exercised by the Court alone, and not to enable the appellant to take the respondent by surprise by urging matters of which he had no notice Parties, however, complaining of judgments and decrees must mention all the grounds of complaint in the memorandum of appeal, and the e provisions are not meant to relieve them of such necessity (7) As a rule the High Court will not permit grounds of appeal to be taken in argument which have not been taken in the memorandum of appeal, but where a decree comes before it which upon its very face is illegal- a decree which goes beyon! the power of the Court which passed it—the High Court is bound to take up the point itself and rectify the mistike, and not to allow itself to become an

⁽¹⁾ Ahmed Mr. Waris Husain, 15 V 123 (...) Nawab Silh o Nuzur Ally Ichan a

Oj salby tram, 10 M I A 564, 533, a c 5 WRPC.SJ

⁽³⁾ Anual Moyer r Stab Chuntr 2 W R P C D (18(2)

⁽⁴⁾ Niratana Ram Rett n 5C W N 27.

^{(25 (1901)}

⁽⁵⁾ Male out 1 And by Grant Probad a W R 61, 61 (15(6)

⁽⁶⁾ Shama Churn : Berlabun II L. R F B 842, 800 (1514), and see thakura kunfan

^{17 1} _50 _51 (163)

⁽⁷⁾ Hansell are Sits Ram 13 3 381(1831)

instrument for the commission of further mustal es (1) An Appellate Court exceeds its authority in giving a plaintiff a relief for which he does not asl the Court may decide an appeal before it upon grounds other than those stated in the memorandum of appeal set the rulo does not entitle the Court to go beyond the subject matter of appeal (2)

Where a Lower Appellate Court allowed an appellant (one of the defendants intere ted in a small portion of the decreet to ruse an objection verbally (and not tallen in the memoran lum of appeal) to the whole of the decree and dismis ed the suit on the ground of non toimler of parties at was held by the High Court that it was not onen to the Judge upon the appeal of only one of the defendants as to a small portion of the decree to cutertain the objection upon which he had thrown out the suit (3) When a Lower Appellate Court dismissed a suit on a point on which no issue was rused although it had been taken in the written statement, and which was not made a ground of appeal. It was held by the High Court that the name must be considered to have been abandoned at the trial . it was therefore not open to the Lower Appellate Court to dismiss the suit on that ground (4)

(1) Where the memorandum of appeal is not drawn (Rejection or amend- up in the manner herembefore prescribed. it may be rejected, or be returned to the ment of memorandum appellant for the purpose of being amended within a time to be fixed by the Court or be amended then and there

(1) Where the Court rejects any memorandum, it shall

record the reasons for such rejection

(3) Where a memorandum of appeal is amended the Judge. or such officer as he appoints in this behalf shall sign or unitial the amendment

Rejection or amendment of memorandum -The memorandum into be rejected under this rule if it is not drawn up in the manner prescribed . (5) as also on any of the grounds set out in O VII r 11 (formerly sect 54) read with sect 107 (formerly 582) (6) but a judicial order should be passed and the reasons for such rejection must be given (7)

Memo appeal insufficiently stamped -When a memo of appeal which is insufficiently stamped is returned in order that it may be sufficiently stamped the Appellate Court should fix a time within which the deficiency is to be s upplied (8) In this rule there is no limitation as to the time when a memorandum

⁽¹⁾ Poran Sookh v Parbutty 3 C 612 615 616 (18 8) Lachman v Bahadur Singh 2 A 884 888 (1880) and of Bans dhar # Sta

Ram 13 A 381 (1891) (2) Saroda Sundarce : Gob nd Monee 21

W R 1"9 (18"5) (3) Nakur Chunder : Juloo Nath 25 W R 389 (1875)

⁽⁴⁾ Govindrao Krishna r Balu 16 B 386

⁽⁵⁾ Budy Prasad v Ban Nath 15 A 367 3 0 (1893)

⁽⁶⁾ Ib

Jugsib Sahay : hasee \ath 1 (7) Ih Ind. Jur 121 (1867)

⁽⁸⁾ Shee Partab : Shee Golam, 2 A 87.

⁽¹⁸⁸⁰⁾

may be rejected or amended (1) But the time for rejection is when the appeal is presented, and not after it has been once admitted (2) The filing of an appeal out of time is another matter. The registration is a ministerial proceeding And when registered out of time, the Court may, on discovery, reject it (3) where there is fraud, misrepresentation, suppression of fact, or mistake (4) An order admitting an appeal after time, made ex parte by a single Judge of the High Court sitting to receive applications for the admission of appeals under a rule of the Court made under 24 & 25 Viet e 101, sect 13, and seet 27 of the Letters Patent of the Allahabad High Court, can be impugned and set aside, at the hearing by the Division Court before which it is brought for hearing, on the ground that the reasons assigned for admitting it were erroneous and inadequate (5) The High Court in special appeals can look into the grounds which the Lower Appellate Court Judge has given for admitting the appeal in which the decision appealed against was passed after the lapse of the period of limitation, and the grounds upon which he acted in so admitting the appeal are impeachable in special appeal (6) The discretion of the Lower Appellate Court in such cases is liable to review or appeal where such Court is acting through caprico or prejudice, or where the discretion is exercised without any proper legal material to support it Where the exercise of discretion is perverse, the High Court in second appeal will interfere (7)

4 Where there are more plaintiffs or more defendants on of the real plaintiffs or defendants may obtain reversal of whole decree where it proceeds on any ground common to all the plaintiffs or to all the defendants, any appeal from the whole decree, and thereupon the Appellate Court may reverse or vary the decree in favour of all the plaintiffs or defendants, as the case may be.

Decree proceeding on common ground.—The ordinary rule is that upon in appeal of one of several parties, an Appellate Court cannot reverse the decreappealed from as 1,5 met any other of the parties, (8) nor can the Appellate Court, on the appeal of one defendant, having only a part interest in a decrereverse the entire decree (9). It is not competent to certain defendants appealing

⁽¹⁾ Damoda : Gokulchand, 7 \ 71 85 (1954)

⁽²⁾ Gopeo Bullub r Goluck, W R 135 (1564)

⁽³⁾ Syn I Jat r Hossein t Sheikh Mahome I Amir, 4 B L. R. App. 103, 104, 106 (1870) [an I the respondent may apply to dismiss the

⁽⁴⁾ Secretary of State : Mutu Jammy, 1

II L. R. App. 84 (1870)

(*) Dukey Salair (an shr Lal I A 31

^(*) Dules Salair (an dr Lai i s (15")

⁽⁶⁾ Mouri Bewa't Surendra, 2 B. L. R. 181 (1569), Noto, s. c., 10 W. R. 178 See also Surbhai t. Raghu Nathu, 10 B. H. C. R. 397 (1873), Chunder Dess v. Boshoon Lal. 8 C.

^{271, 203 (1881)} (7) Ib., Ranchodji r. Lallu o B. 301 500 307 (1882)., Parbati r. Ganpati _3 B. 513

⁽¹⁵⁹⁸⁾ (5) Koolada Lershad r. Gora Chan I. 17 W.

R 3 3 (1872) (9) Wormesh x Maturgance 2 W R 1 0 (1865)

and making a non appealing defendant a respondent, between themselves, to open out that nortion of the ease which, as between the plaintiff and the non appealing defendant, has not been appealed against, and when the ground on which the decision is given is not common to all the defendants this rule does not apply (1) But when the decision of the first Court proceeds on grounds common to all the defendants, one of the defendants is justified in appealing on behalf of all (2) Thus where, on the angual of one of the several andgmentdebtors, the bond on which the plaintiff sued was found to be false and not binding at all, all the other parties to the bond were released notwithstanding that they did not appeal (3) It is meongruous that a claim should be dismissed as against one party and allowed against another on contradictory grounds, as say, in the first case, on the ground that a mortgage is satisfied, and in the second on the ground that the mortgage had not been discharged. It is to prevent such incongruites that power is conferred when an appeal is presented against the whole deeree to interfere as well on belalf of parties who have not appealed as on behalf of those who have appealed (4) No distinction is made between decrees ex parte and others (5) Where there is a common ground amonast plantiffs or defeudants an appeal by one is virtually an appeal by all, though they may not be parties to the record (6) It is not directed that the Appellato Court should pass a decree in favour of persons who are not before it in appeal. but the effect of the provision is to make a decree passed in favour of one out of the defendants or plaintiffs operate in fix our of all the plaintiffs or defendants as the case may be (7) The decree which may be the subject of such anneal 14 one affecting in the same manner all the plaintiffs and defendants -- one in capable of division and upon which it would be impossible for a Court to find in one sense for some of the plaintiffs or defendants and in the opposite sense for the other plaintiffs or defendants, for instance where the suit relates to property in which all the plaintiffs or all the defendants are co charers (8) If one of tho several defendants appeal not against the whole decree but only against that portion of it which affects him and his defence in the Lower Court was not a defence common to other defendants, the Lower Court deerce cannot be reversed in favour of those defendants who have not appealed (9) In a recent case where a lambardar had appealed against a decree without joining his codefendants (his tenants) it was held that under this rule it was open to him

⁽¹⁾ Khermukureo Dassee v Mambur 2 W R 227 231 (1865), Gudadhur v Momnohmer 7 W R 306 (1867) Deoputtee v Dhumoo Lal, 11 W R 238, 240 (1869) Shailh Mahomed t Sheikh Inwar M 21 W R 112

<sup>(1873).
(2)</sup> Sreestee: Sreenath 18 W R 331 332
(1872) Sreenanquree: Footmastium, 9 W
14 290 (1803) Ram Lochun v Artya 12 W
12 211 (1809), Jadumonn v Fudu Bibs 7 B
L. R. 12 (1871), Mohunt Rung Lal: Court
Vandal 10 W R 286 (1808)

⁽³⁾ Sufur Alı t Busuroolla 6 W R 323 (1866)

⁽⁴⁾ Sc-hadri t Krishnan 5 V 11, 114

⁽¹⁸⁸⁴⁾ and see hular hada : Viswanatha

Pellat 28 V 229 234 (1304) () Seconath v Grey 13 W R 114 116

 <sup>(18.0)
 (6)</sup> Abdul Rahiman : Maidin Saiba, 22 B
 300 308 (1896) Sirdar Single v Arishna

Valls Co , 63 P R (1914)
(7) Mulchand · Ram Ratan 20 1 493,

⁽⁷⁾ Mulchard • Ram Ratan 20 1 493, 496 (1898) (8) Scecram Ghuttuck t Bross Mohan 11

W R 449 (1869), and see per Bayley J in Kharmukra i Ndambur 2 W R 227, 230 (1865)

⁽⁹⁾ Ram Chun ler r O macharn 18 W R 20 27 (1572)

to obtain a reversal of the decree in favour of all the defendants, but the plaintiffs were bound to join all the defendants as respondents in a second appeal (1)

What is a common ground must be determined in each case upon the nature

of the decree given, and the cases cited are given in illustration only of the

general principle enacted (2)

The Calcutta High Court has held, (3) dissenting in this from a Madras descention, subsequently overruled, (4) that the former section did not require that the decree appealed against should proceed exclusively on grounds common to all the defendants, but that it should proceed on any ground common to the

defendants Under this rule, one of several persons who have stood on a common ground may appeal for all They are not prevented from appealing severally if they wish to do so, but if they allow one of their number to represent them for plessing their appeal, they must accept his representative character as to the incidents also of the appeal, at least so far as the juril relation between the parties are concerned. The appeal opens up the whole case, though made by but one of the joint parties in the Court below But the case being thus opened up, it is opened up for the respondent as well as for the appellant, and under the former sect 561 (now O XLI r 22) the respondent may press any objection against the decree which he could have urged in an independent appeal a decree of the Court of the first instance is partly in favour of two joint plaintiffs, and one plaintiff appeals, the Appellate Court may reject the whole claim on the cross objection of the defendant, (5) the decree having been passed against the defendants, it was open to any one of them to appeal against it if the ground of appeal was common to all the defendants (6) But where there are several respondents before the Court of first appeal, though one of them may represent his fellows in a further appeal, he cannot represent a person who was not his

to, 97 (1 to s)

⁽¹⁾ Dasmath v Brojo Mohon, 18 C L J 261 (1913)

⁽²⁾ Joykisto i Nittyanund, J C 738 (1875), Doyal Chunder t Nobin, 8 B L R 180 (1871), Doorga Churn & Shama Nund, 12 W R 376 (1869), Katyance v Madhub, 1 W R 68 (1865), Shaikh Mahomed : Sheikh Anwar, 21 W R 112 (1873), Lall Soondar : Hurry Kishen, Marsh, 113, 115 (1862). Ram Lamal Saha : Ahmad Alt. 30 C 129, 132 (1903), Boydonath t Opin Bibi, 11 W R 238, 210 (1863), I ukby kant c Ram Doyal, Marsh, 281 (1863) , Najamma t Subba, 11 V. 157, 195 (1857), Appa Rau : Ratnam, 13 M 243, 251 (1883) , Yenabalu t Abdul Ishader, 4 M H C. R 26, Sumana Vekraman t Razan, 16 M ... J3 (1892). Amanualay Chettiar t Pitchir Ayyar, 28 M 1-2, 124 (1 04), Vishwa Nath i Vasudev. -5 B + 13,702 (1991) , Rain Chun ler : Ooris Churn, 15 W R 20, 27 (1872), Chunder M to () I all to (1870) } Is 100 (1870) ;

Greesh Chunder v Gour Mohun, 7 W L

<sup>43 (1867)
(3)</sup> Ram Kamal Saha t Ahmid Ah, 30 (429, 432 (1903), foll Amamalay t Pitchi

Ayyar, 28 M 122, 124 (1904) (1) Syed Hussem 2 Madan Khan, 17 M 26a (1894), oversuled by Dhuttaloo Subbayya 2 Pardiguitain Subbayya, 30 M 470,

B (1905), s e, 17 M L J 119
 Babaji Dhondshet t Collector of Salt Revenue, 11 B 506, 597, 538 (1887)

⁽⁶⁾ Chan ler Sang & Khimabhai, 2.2.1.718
721 (1877), also Chintanion & Gang du, 37
823 (1897), a < 5.5 loan L. R. 19, see al. o
Chajjax Umrio Singh, 22 & 380, 352 (1890)
Paran Mal & Krant Singh, 50 & 8 (1857)
Ram Dedum > Nittya, 12 W R. 211 (1894)
Ram Sewith & Lamber Pand , 25 & 27, 32
(1992), Doorga & Bilwant, 53 & 475, 43
(1991), Malla Ghad & Wali amirth, 58

co respondent and against whom therefore no decree could have been made on a point common to the two, or on any point at all (1)

It was held that the former section applied only to appeals by parties arrayed on the same side of a litigation in the original Court and against whom judgment on a common ground had been passed, and only some of them appeal from such judgment on behalf of themselves and others who do not join in the appeal. It did not relate to eases in which a party (be he a plaintiff or a defen dint in the original Court) who has been unsuccessful only to a certain extent of the subject matter of the litigation in appeal from so much of the decree as has been passed against hun, happens to value the appeal as if it related to the whole subject matter of the litigation or to pay Court fees on such amount (2) Where two suits brought by two different parties claiming different interests in a certain share to set aside the sale of that share, having been dismissed one of the plaintiffs appealed and the sale was set uside, it was held that the decision must be considered as setting the sale aside as to the whole of that share although the other parties did not appeal. If they both had somed in one suit but only one had appealed, the decree of the Appellate Court would have been for tho benefit of both and the whole sale would have been set aside. Their bringing separate suits instead of joining in one suit ought not to make any difference in that respect (3)

It was held that where a respondent fuled to give the notice required by cells toll of the former Code (see r. 22 of this Order) it was not open to the Appellate Court to great any relief to that respondent in a case where the granting or such relief was not necessarily modernal to the relief granted to the party who had appealed (4). But see now in this connection r. 33 of this Order, which enacts part of 0.58 r. 4 of the English Rules.

Stay of proceedings and of execution

5 (1) An appeal shall not operate as a stay of proceedings is stay by Appellate under a decree or order appealed from except so far as the Appellate Court may order, nor shall execution of a decree be stayed by reason only of an appeal having been preferred from the decree, but the Appellate Court may for sufficient cause order stay of execut on of such decree

(2) Where an application is made for stay of execution of stay by court which an appealable decree before the expiration of the time allowed for appealing therefrom, the Court which passed the decree may on sufficient cause being shown order the execution to be stayed

⁽¹⁾ Dec Gopal Savant v Vasudov Vithal Savant, 12 B 371 (1887)
(2) Per Mahmood, J, in Cheda Lel v

Badullah 11 1 35, 40 (1888)
(3) Sheikh Nagor t Shuriutoolah _0 W
R 77 (1873)

⁽⁴⁾ Kulai Kada Pillai v. Viswanatha Pillai 28 M. 229 232 (1901), as to suits for contribution see Rup Jan c Abdul Kadir, 8 C W N. 496, 31 C 643 (1904) Isundi t Bareddi, 34 M. 243 (1910)

- (3) No order for stay of execution shall be made under sub-rule (1) or sub-rule (2) unless the Court making it is satisfied—
 - (a) that substantial loss may result to the party applying for stay of execution unless the order is made,(b) that the application has been made without unreasonable

delay and

(c) that security has been given by the applicant for the due performance of such decree or order as may ultimately be binding upon him

(4) Notwithstanding anything contained in sub-rule (3), the Court may make an ex-parte order for stay of execution pending the hearing of the application

"Stay of execution "—This rule, which refers to applications by parties only,(1) assumes that there is something to stay and therefore does not apply where the decree has been in fact executed (2). To execute a judgment of order is to carry it into effect or enforce it. When there still remains something substantial to be done under a decree, before it can become thoroughly effectival that decree has to be "executed" within the meaning of this rule (3). So a decree directing the issue of a grant of probate to the propounder of a will some that is capable of execution, and stay of execution of such decree can be granted under it (1). It was held that seet 2-3 of the former Code did not constitute an exception to the procedure land down by seet 515 now replaced by this rule (5).

The principle upon which all stay is granted for the pre-cryation of property pending hitgation is that the successful pirty in the hitgation—that is, the ultimately successful party—is to resp the fruits of the hitgation and not to obtain merely a burier succes (6). In cases where a stay of execution or in injunction is granted on in expaire application liberty to apply to the dialgetor for or set aside the order must be implied if not expressed (7). And a court which has jurisdiction to pass in order has equally prisalicion to pass in my matter though from in latticilly in lance sands in ingout of the first arder (8). The ruling that if preperty is old before in order staying execution is commitmented, the aleas in such execution role (1).

⁽¹⁾ See Blidgel Chanter (1) in 1101ce, Marsh 175 (1501)

⁽²⁾ Dharam Singh (Kol (Sigh 12 C L. I. 03, (1883)

⁽³⁾ Mt Brij Countrie Burn k Den) (WN 751 (101) het i fin la tik (minkl fracedinge O be tikin agan t partieuer mitteren ne Ban (1 in % D N W 2 3.2 (1963)

⁽i) Mt. Irij Co. arte i Ba i k Da e

⁽¹ Spoil 1 sthules Many que o M 3

^() Mt Br j (oct area (Rat ii k Dase s (W N N (101))

⁽¹ b) r Ha va (Al | Al Ali → A. 50)

<sup>(1985)
(9)</sup> M. J. Mar Mar Kawa Mi

his 17 WR 1 3 (15 1)

(1) Burnari (7 will care or flutto

> lar, 1 (3) > ==3 (1> =)

has been discented from (I) the order of stay taking effect when it is made of I not when it is communicated. It has been said that an applicant who has osked for stay of execution should on the ground of its being an indulgence be made to pay costs even if successful (2). But this has been discented from (3) and there is exitainly strong support in reason for the view that when the law allows an apport and allows an appoint upon proper cause being shown to said, it and obtain an order for stay, it cannot be said that what is asked for is merely an indulgence.

By Court of first Instance.—The rule assumes that the decree is appealible and not unal (t). If an appeal lies, but has not been filed, the first Court but no other (5) may stay execution upon an application made before the expiry of the period of appeal, though as the rule states the successing party is not upossibilited from executing his decree simply on the ground that the period for appealing has not expired (6). The Court which dismisses a suit becomes functus efficies save that it may stay execution of its own decree or order for costs (7). After appeal its field the Appellate Court, as the Court which has sexin of the suit, may stay execution (5). A Civil Court enhot stay execution in cases in which in appeal has been made to the Pricy Council against a decree of the likeh Court (9).

"Sufficient cause"—The application should be supported by an affidavit verticing the facts alleged, and these facts should show sufficient cause for in six (10). What constitutes sufficient cause must depend upon the facts of the particular case (11). In this connection the proviso to the rule must be referred to. The Court is given a discretion in the matter, and may refuse the application where there has been such diday is discritifes the party to any consideration from the Court (12). And see post. The provisions of this rule as regards the exhibition of sufficient cause apply, equally to decreas for immoveable as for moveable property (13).

"Substantial loss."- Is uppears from the use of the word "shall" this

(1) Hukum Chand Bord t hamalanand Singh, 23 C 927 (1996), and see also Meah Jan r Man Singh, 2 A 686 (1880)

Jan r Man Singh, 2 A 656 (1880)

(2) Chuni Lal v Anantram, 25 C 893
(1698), per Macleau, CJ, and Jenkins, J

(3) Ib, per Bauncrice, J (4) Amir Hasan : Ahmad th, 9 A 36

(1) Amer Hasan & Annual III, y A 30 (1856) (5) See Barlow v Abdoof Haye 17 W R

(5) See Barlow v Abdoor Haje 17 W h
341 (1872)

(6) Deputy Collector, Sonthal Pergunnahs
v Binode Ram Sein 5 W R Mise 53 (1866)
(7) Yamin ud Dowlah v Ahmed Ah Khan.

21 C 561 (1894), see this case discussed in Woodroffe's Injunctions, 3rd cd pp 56

(8) hee Chum Lat : Inantram 25 (893, 894 (1898), per Bannerjee, J Satja

Shankar v Maharaj Karun, 35 4 119 (1912) (9) Mutjonlaummaj i Chillisjamal , N

H C R 98 (1869)

(10) Wultan Chand Shuyamı t Khan Saheb Kharsedii, 15 B 536 (1890) As to the duty of a pheader to verdy statements made to lum, see Re Sreenath Roy, 17 W R 406 (1872), Ram Nath t hamleshuer, 15 C W N 432 (1911) (The High Court may also deal with the order under s 115 and direct shat in terms of r 6 of this Order).

(11) See Valuomed Hossem : Lout Ali Lhan, 20 W R 393 (1873), in Re Ahmed Reza, 13 W R 281 (1870), sufficient cause

uas beld not shown.
(12) In re Leslie, 17 W R 140 (1872)

(13) In re Ismail hoter, 9 W R 448 (1868) must be snown (1) So the Court granted the stay of that part of a decree which directed the completion of certain works, but refused it as regards another part ordering payment of money, as it was not satisfied that substantial loss would result (2)

"Delay "-Vide ante

Notice -Though there was no express provision as to notice under the last Code it was the practice to give notice to the decree holder before disposing finally of an application for stay of execution (3) And this will probably be so in the generality of cases now though not statutorily required unless the case falls within the fourth clause

Security -The taking of security is compulsory (4) The nature and extent of the liability depends on the words of the security bond given to the Court (5) The rule refers to the ultimate order, and therefore the obligation extends to the final decree passed after remand by the High Court in second appeal (6) The amount, of course, is determinable by the special circumstances When proceedings are ordered to be stayed on giving security the judgment debtor must be allowed reasonable opportunity to show that the security offered is sufficient (7) This clause does not contemplate a decree or order in a separate proceeding to be instituted in the future (8) The relationship between a decree holder and judgment debtor who has executed a security bond mortgaging property is not such as to be governed by seet 67 of the Transfer of Property Let and a suit is not necessary (9) In the case of third parties, the Bombav High Court has held (10) that payment by a surety may be enforced by summary process in execution The Calcutta High Court has considered a suit necessary (11) The former view has now been adopted in sect 115 ante. In the under mentioned case the Court directed that excention should be first tal en against the judgment debtor and then the surety (12) When property is deposited in Court in hen of security for the purpose of staying a sile and the order directing the sale is confirmed on appeal, neither the depositor nor judgment debtor can claim to have the deposit restored which is then held for the decree holder (13) 15 to appeal see next paragraph. The Court may, on the bond ceasing to have

⁽I) See Nizar Ali Khan i Ojoodhyaram I In ! Jur \ 9 195 (1806)

⁽²⁾ H H Caikwar Sukir i Chan b - B

^{213 (}INII) B C 3 Bom L R 367 (3) Multan Chai I Shivran e

Sal eb Kharac Iji 15 B 530 (1830) (4) Cf Wise t Rajkiishna R 3, B L R

P B 11 " A) (1860), Sagore Clulet Shobourne Burke 103 (1815) () ((Stivlat himbelant e Appl

HINTAN . B to 1 (15 8) 3 B . 01 (15 3) [cf SIL Subramir Shirrin III kapi L. N. 71 (1557)) Mort Ar or Mrt havem the 13 15 1 403 (15 ()

^() State Kindeland e Apage Blisens 14501

⁽⁷⁾ Mt Bali rivi Lalla I mahar Lall, ...)

W R 72 (18/3) (8) Summatha Pathan e Sornatl a Jumal 2. N L J 190 (1311)

⁽J) Shyam Sun lar Lal : Bajpai Jan 1 rayan 30 C. 10 A (1 N/3), s c - C 11 \ 924

⁽¹⁰⁾ Jamed lit Bawallai _ 7 B 4 9

⁽¹⁹⁰⁰⁾ a r 3 Bot: L R 3 (II) Surpos Das : Bulgakunl Das _3 C

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^{3 (15 11)} (13) 51 (La (5 d a Ra) tll - ac) 6 (; (ln n)

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effect, direct that it be cancelled and returned For the power to take scennity involves the other (1) But a Subordinate Court has no jurisdiction to release a security taken under the directions of the High Court (2) Where by order of an Appellate Court a security bond was executed by the judgment debtor for stay of execution of a decree pending the decision of an appeal under sect 545 of the last Code (now represented by this rule) and after the disposal of the appeal the decree holder applied for sale of the property under the subsisting attach ment, it was held that the sale could be carried out in execution proceedings consequent on the attachment (3) A security bond under this rule pledging immoveable property exceeding Rs 100 in value requires registration (4)

Stay by Appellate Court -An appeal must be pending A Court has no power after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree (5) In the decision cited, (6) it was held that where an incidental decree under sect 244 (now 47) is under appeal, the Court may stay execution of the substantive or original decree in the suit peuding the hearing of the appeal, though such original decree is itself not under appeal See now r 8, post The manner in which au Appellate Court effects a stry is either on appeal from an order of the Court of first instance refusing a stay, for such an order when made hy a High Court is a "judgment' under the Letters Patent (7) and when made by other Courts is one falling within sect 244 (now sect 47) ante, (8) provided that the Court against which the appeal is made is the Court executing the decree within the meaning of that section, (9) or after an appeal has been filed an original application may be made direct to the Appellate Court (10) But the Appellate Court must have acquired seizin either of the original suit or of the execution proceedings. It was therefore held that the High Court was not competent to stay proceedings un execution of a decree of a Subordinate Court increly by reason of an appeal having been preferred against an order of refusal to set aside the decree under sect 108 of the former Code, corresponding with O IX r 13 of this Code (11) A Superior Court has no power to direct a Subordinate Court to stay execution m a case which is not before it (12) When an Appellate Court reverses a decree

⁽¹⁾ Moonshee Ameer Ali v Kassim Ah, 13 W R 403, 400 (1870)

⁽²⁾ Abedoonissa Khatoon v Ameeroo nissa Khatoon, 17 W R 464 (1872)

⁽³⁾ Baij Nath v Mohant Sia Ram, 17 C L J 267 (1913)

⁽⁴⁾ Nagaruru : Tangatur, 31 M 330

⁽¹⁹⁰⁹⁾ (5) Ameer Hasan v Ahmad Alt. 9 A 36

⁽¹⁸⁸⁶⁾ (6) Pasupati Nath Bose : Nanda Lal

Bose 28 C 734 (1901) (7) Mt. Bril Coomarce : Ramrick Dass, 5 C. W N 781 (1901)

⁽S) Ghazadin v Fakir Buksh, 7 A 73

^{(1884),} Udeyadıta Dehr Gregson, 12 C 624

^{(1886),} Musan t Damodardas, 12 B 279 (1888), Wahant Ishwargar t Chudasama, 12

B 30 (1887)

⁽⁹⁾ Ramchandra & Balmukund, 6 Born L. R 780 (1904), and see ab, and Mt. Bru

Coomarce t Ramrick Dass, supra, as to inter fering in appeal with an exercise of discretion

⁽¹⁰⁾ Chum Lal : Anantram, 25 C. 893, 894 (1898) In Mt. Brij Coomaree v Ramrick

Dass, supra, there was both an appeal from an order of the original Court followed by a separate application to the Appellate Court

⁽¹¹⁾ Bhagwat Rankoerv Sheo Golam Sahu. 31 C. 1031 (1904) (12) Barlow r Abdool Hap, 17 W. R. 341

⁽¹⁸⁷²⁾

in favour of a plaintiff, it should not stay execution of its own decree, for in such case a plaintiff having lost his decree is in no hetter position until his special appeal is decided than a plaintiff before judgment (1). When an Appellate Court refuses an application for stay, this does not prevent an application under sect 546 (now r. 6), should an order for execution be obtained (2)

The Court has inherent powers of stay beyond those given by statute. There is an inherent power in the Court to stay under proper circumstances the drawing up of its own order or to suspend their operation, if the necessities of justice so require, (3) or to stay proceedings in the Lower Court—such power being auxiliary to that of the Appellate Court to reverse the order of the Inferior Court (4) And when an appeal is pending against a preliminary order directing an account, the Court having seizm of the appeal can, apart from the question whether the case falls within the Code, make an order staying the carrying out of such order pending the hearing of the appeal (3)

Appeal.—An order refusing stay of execution made by a Court which is not executing the decree is not appealable (6)

Security in case of order to recention of a decree from which an appeal is pending, the Court which passed the decree shall, on sufficient cause being shown by the appellant, require security to be taken for the restriction of any property which may be or has been taken in execution of the decree or for the payment of the value of such property and for the due performance of the decree or order of the Appellate Court, or the payment that the restriction of the decree or order of the Appellate Court, or the present the decree to take such security.

(2) Where an order has been made for the sale of immove able property in execution of a decree, and an appeal is pending from such decree, the sale shall, on the appheation of the judgment-debtor to the Court which made the order, be stayed on such terms as a security or otherwise as the Court thinks fit

effect, direct that it be cancelled and returned. For the power to take security involves the other (1) But a Subordmate Court has no jurisdiction to release a security taken under the directions of the High Court (2) Where by order of an Appellate Court a security-bond was executed by the judgment debtor for stay of execution of a decree pending the decision of an appeal under sect. 515 of the last Code (now represented by this rule) and after the disposal of the appeal the decree holder applied for sale of the property under the subsisting attachment, it was held that the sale could be carried out in execution-proceedings consequent on the attachment (3) A security bond under this rule pledging immoveable property exceeding Rs 100 in value requires registration (4)

Stay by Appellate Court -- An appeal must be pending A Court has no power after the passing of a final unappealable decree, and before the granting of an application for review of judgment, to order a stay of execution of the decree (5) In the decision cited (6) it was held that where an meidental decree under sect 241 (now 47) is under appeal, the Court may stay execution of the substantive or original decree in the suit pending the hearing of the appeal, though such original decree is itself not under appeal See now r S, post The manner in which an Appellate Court effects a stay is either on appeal from an order of the Court of first instance refusing a stay, for such an order when made by a High Court is a 'judgment under the Letters Patent, (7) and when made by other Courts is one falling within sect 244 (now sect 17) ante, (8) provided that the Court against which the appeal is made is the Court executing the decree within the meaning of that section, (9) or after an appeal has been filed an original application may be made direct to the Appellate Court (10) But the Appellate Court must have acquired seizin either of the original suit or of the execution-proceedings. It was therefore held that the High Court was not competent to stay proceedings in execution of a decree of a Subordinate Court merely by reason of an appeal having been preferred against an order of refusil to set aside the decree under sect 108 of the former Code, corresponding with O IX r 13 of this Code (11) A Superior Court has no power to direct a Subordinate Court to stay execution in a case which is not before it (12) When an Appellate Court reverses a decree

⁽¹⁾ Moonshee Ameer Aliv Kaasim Vi, 13 W R 403, 409 (1570)

⁽²⁾ Abeloomssa Khatoon r Amecroo mssa Khatoon, 17 W R. 464 (1872)

⁽³⁾ Buj Nath e Mohant Sia Ram, 17 chellam, 15 M Ai3 at p. 210 (1831)

C. L. J. 207 (1913)

⁽⁴⁾ Nagaruru : Tangatur, 31 M 🖈 (1904)

⁽⁵⁾ Ameer Hasan e Ahmad Ah, 9 and

⁽⁶⁾ Pasupati Nath Bose t Nan l Bosc, 28 C 731 (Pol) (7) Mt. Brij Coomaree v Ramra L D'ski

C.W. N. 221 (1801) (8) Gharadin r Pakir Ruksh, 7 A 31

^{(1884).} Pileyadita laber tiregam, 12 C 3

⁽¹⁵⁵⁶⁾ to Mingari 12 8 273 (18" urjoo Das e Balmakuud Das, 234 13

² at p 215 (1835) but see at p 210. (2) Ib and see trunschillam r truns

⁽¹⁰⁾ Jamsody r Banal Lat, 25 B 479 (100) and see Janki Kuar v. Narup Ram, 17 🐛 🗷

⁽¹¹⁾ Bank's behary variable via un (2 au

bluttaclarges, 25 (L 322 (1937). (12) hus; Ial Marwari e liahiiraia Mar

main of W Y 3rd (Loss), In re Manual angema 15 t 1 to (152) Tribe a baba s

s r. 34 1 3"

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clear that the application is to be made to the Court which passed the order (1)

No such security as is mentioned in rules 5 and 6 shall

No security to be required from the Government or a public officer ın certain cases

be required from the Secretary of State for India in Council or, where the Government has undertaken the defence of the sut, from any public officer sucd in respect of an act alleged to be done by him in his official capacity

The powers conferred by rules 5 and 6 shall be exerciseable where an appeal may be or has been preferred Exercise of powers in appeal from order made not from the decree but from an order made in in execution of decree execution of such decree

Appeal from orders in execution -This rule, which is new, has been added to meet particularly the case where the litigant does not quarrel with the decree but appeals from an order passed in execution of that decree It adopts, as regards stay of execution, the decision noted, (2) in which it was held that an Appellate Court had power to stay execution when an appeal from an order in execution proceedings was pending before that Court r 5, ante, "Stry by Appellate Court"

Procedure on admission of appeal

(1) Where a memorandum of appeal is admitted, the Appellate Court or the proper officer of that Registry of memorandum of appeal. Court shall endorse thereon the date of presentation, and shall register the appeal in a book to be kept for the purpose.

shall be eilled the (2) Such book Register of Appeals. Register of Appeals

Registration -The registration of an appeal as a proceeding of a purely munisterial character (3) An appellint has no right to withdrive in appeal which his been regularly registered without the pirm sion of the Court, and the leave of the Court is in every case necessary after an appeal has been regularly As a general rule of practice, the respondent should be served with due notice of the application for leave when it is made after the notice of the day fixed for hearing has been a sued. In every instance the appellant will I halle to pay to the re-pondent his costs occisioned by the appeal (f)

⁽¹⁾ to be not man of expression Curt Wish passell dene, no Classin r lak r Bandi 7 1 "1, "4 (1774) (a) In 1 att Nath Bowe Nat In Int Bow,

⁽³⁾ Sy 1 Jaif ee Sheikh Mah n 1 (1870) 1 B L. R Ap 101, 101, a c, 13 W R 3 f (4) harces Bees Beesam Becan bell is (IS 0 T Mal H C R hs

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the Lower Appeal Court rejects an appeal—holding that no appeal hes, on the ground that the first Court's judgment was final under seet 153 of the Bengal Transey Act—the High Court, on second appeal, when prima face the suit is not one under sect 153 of the Tenancy Act, can direct that the appeal in the Court below be duly registered under this rule (1)

Appellate Court may in its discretion, either paguire appellant to furnish security for costs.

Appellate Court may in its discretion, either paguire appellant to furnish security for costs.

Appellate Court may in its discretion, either paguire appellant is called upon to appear to and answer or afterwards on the application of the respondent, demand from the appellant security for the costs of the appeal, or of the original suit, or of both:

Provided that the Court shall demand such security in all Where appellant resides cases in which the appellant is residing out out of British India, and is not possessed of any sufficient immoveable property within British India other than the property (if any) to which the appeal relates

(2) Where such security is not furnished within such time

as the Court orders, the Court shall reject the appeal

Object of rule —This rule was nover intended by the Legislature to derogate from the right of appeal given by the law to every person who is defeated in a suit in the Court of first instance (2). Its object is to secure the respondent in an appeal from the risk of having to meur further costs which he ringht never succeed in recovering from the appellant (3). The fourth paragraph of the former section which was one of procedure only, (4) and dealt with summary proceedings in execution against the surety has been omitted. The matter is covered by section 145 ante (5).

"The Appellate Gourt."—This rule applies, it has been held, only to appeals preferred to the High Court from subordunate Courts subject to its appellate jurnsdiction, and not to appeals preferred to the High Court under clause 15 of the Letters Patent from the judgment of one of its own Judges, (6) and does not apply to appeals from the orders of a Judge sitting as a commissioner of the Insolvent Court, (7) the right of appeal in such cases being given by sect 73 of the Insolvent Act (11 & 12 Viet c 21) It is applicable to an appeal from an order under sect 244 (now sect 47) (8).

M. 121, 123, as to orders by single Judges sitting on the original side, see Monohur Dosa

t Khodrum (1865), Bourke 110, Cazce Maz hur t Denobundo (1865), Bourke 119, Bama

Sundara e Ramnarayan (1875), 7 B L. R. App. 59, Nawab Behram r Han Sultanah

14 Bom. L. R 1105 (1912)

⁽¹⁾ Mathura Mohun + Amirudda (1903), 8 C. W N 64, 66

⁽²⁾ Lakhmı Chand t Gatto Bai, 7 4 542, 546 (1885)

⁽³⁾ Lckha t Bhauna, 18 4 101, 103, 104 (1895)

⁽⁴⁾ A ided to the Code of 1882 by sect 46
of Act VII of 1888
(a) Abdul Wahed : Farcedonnussa, 16 C.

^{323, 326 (1889)} (6) Sisha Ayyar r Nagarathus (1903), 27

⁽⁷⁾ In the matter of Ramselak Misser, 5 l' L. R. 179 (1870) (8) Dagdu r. Chandravan, I. Bom. L. R.

⁽⁸⁾ Daguar Chandravan, I Bom L. I 837, 24 R. 314 (1899)

of the party complained of, in not paying the costs ordered to be paid, is vexations (1)

Form of order —An order for security for costs should follow the words of the rule, and should not specify the particular amount in rupecs for which security should be given. It would be a good order under the rule if it directed the appellant to furnish the security within a time to be stited "for the costs of the appeal" or "for the costs of the original suit". To hold that the order must specify the amount in rupees of costs for which security should be given would either be to fustrate the intention of the Legislature in framing the section, or to make the order a purely speculative order. The object of the rule is that the respondent at the carliest moment which suits him should take the advantage of the rule, and at that time it would be impossible for the respondent, the appellint, or the Court to say what might be the costs of the appeal. The last paragraph of the former section was said to point to the security being for an indefinite and not for a definite amount. An order specifying the amount would not be a bid order, but the better practice is that the amount should not be specified in the order (2)

"Within such time."—The application to the Court to enling the time for giving security may be made either before or lifer the expurition of the time within which the security has been ordered to be familyhed, and the Court may thereupon callage the time according to any necessity which may arise where it is just and proper that it should do so. If ultimately the order is not complied with, and the security is not family the appeal may be rejected (d) It cannot be had down as a hard and fast rule that the Court can in no case, after the time for giving security is passed, allow the appellant further time for giving security. Thus principle has now been adopted in sect. 118, ante. Though the Court may extend the time for farmishing the security demanded after the time allowed by the order has elapsed it will not do so unless on good grounds (5).

"Shall reject."—The Code empowers the Appellate Court to demand scentry, and directs that Court to reject the appeal if the scentry is not furnt hed within the time the Court orders. To justify the rejection of the appeal there must have been a demand on the part of the Court. The issue of a peclanian is notice to show cause as not tant mount to a demand. It simply informs the appeal int that the Court proposes to consider the propriety of demanding scenarios from him, and offers him the opportunity of showing cause to the contrary. Court is not bound by the Code to issue such a notice, though in practice it would generally be improper to make an order for security without affording

⁽¹⁾ Ahmed bin Shark Lasa r Shark Loor
13 B 153 162 (1858)
(2) Lekha r Bhanna (1855) 18 A 101

⁽²⁾ Takin v. 10 aunu (1835) 18 v. 100 105, overrulu "Thakur Dass i Kishori Laf (1834), J.V. 104, we also Ahni I bin Shaik I wa r. Shaik I wa 13 B. F.5 (1838)

⁽³⁾ Bulit Narain : N o Kor (1953) 17 1 V 1 3 L & , 17 C 12,511 [permit 3 Harlit Bar r) 1 1 5 C y (1973) 1 V

^{957 (58)} followed in Shiriyu lin (Kind in 11 M 1.99 (1557) , see Blingwan Das B gla-Hapi Mone I, 10 B = 3 , 205 (1511)] , Chu - 1 Lali (Ayu lin Presad 10 V = 10 , 213 (15.8) (1) Juna Bar (Arean In (1507) = 1 B

^{5&}quot;c 57; () Malhamlan (Milkari Iropaica (ban) 171 M n c, 17('10, Rajab Mi) Ar o'll sacta (ban) 17 (1 (v)

the appellant the opportunity of contesting it. Where such notice is given the appellant is not bound to appear. He may allow the application to be decided in his ib cuce. If he does not appear and the order is not made in his presence. he must have due notice of it to constitute a demand. The order directing the appellant to furnish security must be served either on him or on his vakil It would be unreasonable to hold that he was in contempt or disobedience of an order which had not been communicated to him (1) Conflicting opinious have been expressed upon the question whether when the appellant has not given security for costs, the respondent should apply specially to have the appeal rejected or whether it is sufficient for him to object at the hearing of the appeal for non compliance with the order (2) An appeal, though rejected may on sufficient grounds be restored (3) No appeal is given from an order for security for costs It has been held, therefore, that it could not have been munded that the order for security which was numpeealable might be questioned by au appeal from the act of the Court compulsordy done under the rule on security not being given as ordered. An order, therefore rejecting an appeal under this rule is not a decree and is not appealable as such (4) nor as an order (5)

11 (1) The Appellate Court, after sending for the record is frequency of the thinks fit so to do, and after fright a day without sending notice to the caring the appellant or his pleader and hearing him accordingly if he appears on that day, may dismiss the appeal without sending notice to the Court from whose decree the appeal is preferred and without serving

notice on the respondent or his pleader

(2) If on the day fixed or any other day to which the hearing may he adjourned the appellant does not appear when the appeal as called on for hearing, the Court may make an order that the appeal be dismissed

(3) The dismissal of an appeal under this rule shall be notified to the Court from whose decree the appeal is preferred

Summary dismissal—This rule applies to appeals admitted and registered (6). A proceeding under this rule is to all intents and purposes a trial (7).

(now 100) exasted.

⁽¹⁾ Immu t Devi Rar 5 W. 265, 266 (1882)

⁽²⁾ Mahammadhha e Bhauji Fojan 3 Boun II C B (4 (1860), contra Thakur Das v Keshori Lal, 0 \(\) 104, 166 (1886) [overruked on another point by Lakha e Bhauna (1880) 18\(\) 101 [105] It is to be noted that in the first case another rule of Court had sho been disregarded.

⁽³⁾ Balwant Singh v Doulat Singh, 8 A 315 (1856) ace Jaminabart Vissondas 21 B 376, 579 (1837)

⁽i) Lakha r Bhauna, fo 1 101, 103, 104

F B overruhn, Siraj ul Haj t Khadim Husam 5 A 380 (1883) Firozi Be₀4in t

Abdul Latif 30 1 143 (108) (5) O XLIII

⁽⁶⁾ Rudr Prasad t Baijnath, Lo A 367 (1893) in which Ldge CJ also hild that there was a power to summarily reject a memorandum of aj pal before admission, if none of the grounds mentioned in sect 554.

⁽⁷⁾ Thakur of Masada r Widow of Thakur of Natidwasa, 2 V SIJ 8.3 (1880)

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and a judgment and decree should be drawn up in the usual manner. It has been held that in discussing in appeal under this rule a District Judge is not relieved from the necessity of writing a judgment, however short, showing the points raised, the decision thereon, and the reasons therefor (1) But it is not the practice of the Calcutta High Court to draw up decrees under this rule (2) And the Allahabad High Court has held that it is not obligators upon the lower Appellate Court to write a judgment in such cases (3) But a Full Bench of the Bombay High Court has recently held that a lower Appellate Court must write its judgment (as provided by Bombay Civil Circular 51), when it dismisses an appeal under this rule (4) The order of dismissal under this rule is a decree and not merely a refusal to entertum the appeal, and so far as it is a final adjudication there is no distinction between an appeal which is dismissed under this rule and in appeal dismissed after full hearing (5) Where an appeal is dismissed under this rule, the effect of the dismissal is to affirm the decree appealed against, which becomes merged in the decree of dismissal of the Appellate Court When, therefore, an appeal has been dismissed under this rule the Court which made the decree appealed against his no jurisdiction to review its judgment or decree (6)

12 (1) Unless the Appellate Court dismisses the appeal under rule 11, it shall fix a day for hearing the appeal.

(2) Such day shall be fixed with reference to the current business of the Court, the place of residence of the respondent, and the time necessary for the service of the notice of appeal, so as to allow the respondent sufficient time to appear and answer the appeal on such day

It is not competent to a Court of Appeal to restrict the ground or grounds upon which the appeal heard under this rule is to be admitted finally (7)

13 (1) Where the appeal is not dismissed under rule 11.

Appellate Court to give the Appellate Court shall send notice of the notice to Court whose decree appealed from appeal is preferred

⁽¹⁾ Puttappa 1 Adlaj pr 3 Bona I. R 233 (1993) Ramu Deka 1 Bropo Aath Saikrs, 25 C 97 (1837), Royal Reddi 1 Inga Reddi, 3 U. I (1831), Rakhal Liunder Lwan 1 Studich Dhe Rai, 5 C I. J 348 (1990), Pachi Dassi 1 Bala Das 13 C W N 1031 (1999)

⁽²⁾ Uma Sundari Devi i Bin lu Bashim 21 C 753

^{(3&#}x27; Samin Hasan i Perm, 50 1 319 (1908) Fan i Degde v Shankar, 30 B 116 (1911)

i ii i (1.11) oscirulus lengi Disdo

t Shankar 36 B 116 (1911)

⁽a) Unra Sundara Dear v Bundu Bashmat Choudhram 214 C 750 (1857), Introe B14 v Vagu 21 B J15 (1536) which as well as the forwer case, data with the quistion of amendment of the decree This latter case has been dissented from in Vana Bibb! Manad Husseria, 20 V 20,0 (1908)

⁽⁶⁾ Peary Mohan Mukherjee t M hendra Nath Manua, 4 C L. J. 566 (1906), and see Ramappa t Bharma 30 B (20 (1906)

⁽⁷⁾ lukhi t Sri Ram, 15 C. W N Ll (1911) 11 C L J 116

(.) Where the appeal is from the decree of a Court, the records of which are not deposited in the Appellate Court, Transmission of papers in Appellate Court. With all practicable despatch all materia papers in the suit, or such papers as may be specially called for by the Appellate Court.

Copies of exhibits in court whose decree the appeal is preferred, specifying only of the papers in such Court of which he requires copies to be made, and copies of applicant

Records. If there is any part of the record not sent up which the appellant wishes to Iring before the Appellate Court, it is lies duty to ask the Court to send for it before the day of trail (1).

- 11. (1) Notice of the day fixed under rule 12 shall be affixed in the day let be affixed in the day let be affixed in the Appellate Court-linise, and a like incite stay let be sent by the Appellate Court to the Court from whose dictee the appeal is preferred, and shall be served on the respondent or on his pleader in the Appellate Court in the manner provided for the service on a defendant of a summons to appear and answer, and all the provisions applicable to such summons, and to proceedings with reference to the service thereof, shall apply to the service of such notice.
- (2) Instead of sending the notice to the Court from whose decree the appeal is preferred, the Appellate court may itself cause the notice to be served on the respondent or his pleader under the procusions above referred to
- 15. The notice to the respondent shall declare that, if he does not appear in the Appellate Court on the day so fixed the appeal will be heard ex parte.

Procedure on hearing

16. (1) On the day fixed, or on any other day to which the hearing may be adjourned, the appellant shall be heard in support of the appeal.

⁽¹⁾ Buksh Alı Soudagır v Joyanut Khan, 11 W R 218 (1869)

(c) The Court shall then, if it does not finished the appeal at once, hear the respondent against the appeal and in such one the appellant shall be entitled to reply:

Hearing.—The row and a " on the day little for the hearing of the of paid of the table the tay little, if the pleader of while parties are greater and argue the table, is not an an order to produce the results interferent a trapped organization of the surface o

17. (1) Where on the day nized, or on any other day to Decard of open for which the learning may be adjourned the special so that is appellent does not appear after the appeal is defined on for learning, the Court may make an order that the appeal be dismissed.

(2) Where the appellant appears and the respondent does Hearing appear or pure not appear, the appeal shall be heard at parts.

"Where on the day fixed," etc.-A party areating to put in matthe stragent provenies of the rule is bound to the very determine that the procolline under it has oven atrivaly complied thin and that the appellant did not make me appearance on the day to thich the one was adjourned. When he is weable to show that, or that the appellant below had any nonce that me appeal was to have been heard on the day on which the Judge disputed of it. the appeal carnot be command under this rule (3). Where a Lower Appellate (bourt, after eleven months' delay and without firm; any time for displacing of in appeal, do no sed it for delault, the High Court art aside the order and resurably the sure (4). If an appeal is called on without any day having been fixed for learng and the appellant is absent, his ab ence is not a default worth renders he appeal hable to be dismitted (5). It should appear on the record that a day had been fixed for the hearing of the appeal, and that therepoin the default had followed (6). But if an appeal is taken up before the appointed day and is allowed to proceed to a hearing in the pre-ence of the pleuders of the party and is argued by them, there is no defect in the procedure (7)

"Appear."—The former section (556) ran "does not attend in person or by his pleader." But the word "attend" was held to be practically synonymous with "appear." (6) The pre-ent wording therefore effects no alteration in the

W. R 176

⁽I) Hukum maissa c Bibos Much Liomun, I W. B. 246 (1864)

⁽²⁾ bhur, i Girdhar a Mar, an, a B H.

⁽ B O C 1 et (1866)

⁽³⁾ Shib Chunder v Alla I Moneo (1866).

⁵ W R Mrs 22 (1) Soodham me e Gooroopersan I (1964).

⁽⁵⁾ Huro Chunder e Ram Coomar (1865), 2 W R. 254

⁽⁶⁾ Ib

⁽⁷⁾ Hukumunansa a bib-e Muckdooman (1904), f W. R 246

⁽⁶⁾ Satish r Ahara Prasad, 34 C. 403, 405, 417, P. B., s. c., 11 C. W. N. 329.

scuse. Where there has been no "appearance" the rule applies. But when there has been an "appearance" it does not (1) The question, however, has ariseu as to what constitutes an appearance within the meaning of the rule.

"Appearance" has several meanings, and these must be understood in reference to the particular subject to which it relates, and the purpose or end to be answered by the appearance has an important bearing in determining what is sufficient to constitute an appearance in a particular case. A Full Bench of the Calcutta High Court (2) has recently ruled that an application by counsel or pleader who is instructed only to apply for an adjournment, which is refused, is not an "appearance," and that when m such circumstance an appeal is dismissed, the dismissal is one for default under this rule entitling the appellant to apply for re-admission under r 19 The decisions are not altogether uniform, but the balance of authority in the Bombay (3) and Allahabad (1) High Courts is m favour of the same view, which has also been taken by the Punjab Chief Court (5) Where, however, a pleader for the appellant appeared and asked for an adjournment but did not withdraw from the case, merely urging that the records were in possession of his leader who was absent, and that he could not argue the appeal, but the application for adjournment was not granted, it was held by the Madias High Court that it was open to the Court to refuse the adjournment, but that if it did so it was bound to write a judgment and dispose of the appeal, and could not dismiss it for default (6) But the Madras High Court has recently held that where the pleader was instructed only to apply for an adjournment and was not duly instructed and ablo to answer all material questions relating to the suit, nor accompanied by any one able to answer such questions, there was no appearance by the defendant (7) When the appellant and his pleaders were present when the appeal was called ou for hearing, and one of the pleaders addressed the Court, but soon after the commencement of his argument, went to another Court and did not return, and the other pleader refused to address the Court, the appeal, it was held, should be dismissed, but not for default (8) If the appellant, in a case remanded to the Lower Appellate Court, does not put in an appearance and takes no steps to produce cyclence, the Lower Appellate Court may dismiss the appeal for default (9) Where there were two appeals

(1573), 21 W R. W.

⁽I) Patinharo larkatt : Vellur Krishnan 20 M. 267 (1902) [pleader appeared-asked for adjournment but did not withdraw), Chranji Lal t Kundan Lal, 20 1, 291 (1895) [pleader stated that brief had come into his hands too late, but did not withdraw]

⁽²⁾ Satish Chandra Mukerjee c Abara Prasad Mukerjee, 31 C 403 (1907), where the caring cases will be found collected. (3) Bhimacharya t Fakiraj pa, 4 B H C

R. 206 (1507), Sounder Lal v Goer Presad, 23 B. 414 (1818), certra Bam Chandra e Madhay, 10 B. 23 (1891)

⁽⁴⁾ Lalta Pracad r Nand Auh re, 22 A. 60 (1839), Hars Date Hars Lal, 7 1 558 (1881), Bantahal e Bamedar, 5 & 140

^{(1886),} Shankar Dat e Badha Krishini, 20 1 19 (1537) [aftern d by P C m 23 1, 220 (1900)], Baldeo Prasad e Kunwar Bahadur. 35 L 105 (1912)

⁽⁵⁾ Gurdat Singh & Sohan Singh, 6 P L.

R. 595 (1 104) (6) Palmhare Tarkett c Veller Krishman (1 02), 26 M. 257. Chranp Lake Kundan

Lal (1535), 20 1 ... He sho "Atala t Abara (1907) 34 C 403, 414 (7) Ventatarama e Natara, a, 24 M. L. J. 235 (1312)

^(*) Janahir r Deli " nob (1530), 15 4

⁽⁹⁾ Tracke Chamber of Ashid Chamber

by the same appellant before the Court and he was summoned to give evidence in one of them, but failed to attend, judgment, it was held, could not be given against lum for default in the other appeal (1)

"Be dismissed"—The Court, in the absence of the appellant on the day fixed for hearing, should dismiss the uppeal and not reverse the judgment of the lower Court (2). If a Judge, instead of dismissing the appeal for non appearance of the appellant in person or hy pleader, goes into the merits of the case and gives judgment against the appellant, the appeal must be considered as dismissed for default of the appeal annot be treated as one for review it is improper to consider or decide upon the merits of a case when the Judge has no opportunity of hearing what the appellant has to say in support of it (3). It is illegal to try an appeal on the merits in such a case, and the judgment given in this way is a nullity and must be cauciled, and its existence is no bar to the admission of the appeal (4). The amended rule now says the Court may make an order of dismissel. The former section ran "shall be dismissed." (5)

Appeal — In order dismissing an appeal from a decree for default, (6) or dismissing objections to the execution of a decree for default, (7) was formerly held to be a decree within the meaning of sect 2 of the last Code and thus appeal table. But that section now evaludes orders of dismissal for default from the category of a decree (8). A party may apply for re-dimension under r 19 and from this there is an appeal under O. XLIII, post

Delivery of paper books —In appeals to the High Court from its original junisdiction, if the appellant does not deliver the presented number of paper books within the prescribed time, the respondent or his attorney may, with the leave of the Court, or a Judge prepare and deliver such paper book, or he may apply on notice to the appellant, to have the appeal dismissed for want of prosecution, or for such other order as he may be advised. If no application

 ⁽¹⁾ Munachella v Vencatachella (18"0) 5
 M H C R ~69
 (2) Munickaram v Roop Maram (1862)

⁽²⁾ Numekaram v Roop Naram (1862) Narsh, 5 But see Dakshinamoorthy t Numeipal Council of Trinchinopoly, 31 M 157 (1.97)

⁽³⁾ Mohesh Chuuder i Ihakoor Dass (1843) 20 W R 425 420 [approved in State Chandra Mukerjee i Ahara Prasad 34 C 103, 414 (1907)] Buldeo Misser i Syu I Ahmed (1871) 15 W R 143 Kanahai Lal v Naubat Rai (1881) 3 \ 519

⁽⁴⁾ Zamab Begail t Manawar Husam (1880) 8 A. - 17 278

⁽⁵⁾ Muruga Chetty: Ruasam 22 M L J 281 (1912)

⁽b) Radha Nath e Chandi Charan (1903), 30 C 660 (F B) 1 rinsep, J dissenting over ruling Jagarnath e Budhan (1855), 3 C 115

^{117,} Anwar Ah t Jaffer Ah (1836) .3 C 827, see also Ram Chandrav Vadhav (1891) 16 B 23, Mansangh t Motha Harsharram (1894) 19 B 307 In Mansab Ah v Nihal Chand (1893) 15 A 39 the Allhabad High Court has held that such an order is not a

^{3 1 519,} Lal Singh t Kunjan (1882) 4 1 387, Gilkinson t Subramania (1898) 22 M 221, see also the cases cited in Radhauath

^{21.} see also the cases cited in Radhanats

v Chandi Charan, surra

⁽⁷⁾ Lal \aram : Millomed Rafied in (1,000) 28 C 81

⁽⁸⁾ Rukmininayi v Paran Chan ira 3 i C 341 (1910) 15 C L. J 331, followe i n Parbata v Tulsi Kocri 18 C I J 1.8 (1913)

hearing.

be made, the case will be set down in the next percuiptory lists of appeals from the original side, and be disposed of by the Court as it may think fit (1)

18. Where on the day fixed, or on any other day to which [s. Dismissal of appeal where notice not served in consequence of appelant's failure to deposit costs. the sum required to defray the eost of serving the notice, the

Court may make an order that the appeal be dismissed:
Provided that no such order shall be made although the
notice has not heen served upon the respondent, if on any such
day the respondent appears when the appeal is called on for

Deposit.—A period must be fixed by the Court for the deposit, unless a time has been fixed the suit cannot be dismissed on the ground of failure to deposit (2). A party has been held not evenused for omission to deposit by the fact of the duty having been committed to an ignorant Lurpurdaz who failed to perform it (3). An appeal should not be dismissed for default increby because the appellant has failed to explain satisfactorily why the talakana was not deposited within the period fixed by the Court, without ascertaining whether there was ample time after the deposit to serve the notices upon the respondents (4). If the fees for the service of the notice of appeal on the respondent are deposited, but the notice to be served as required by the Circular Order of the High Court is not filled, the appeal cannot be dismissed under this rule (3).

19. Where an appeal is dismissed under rule 11, suhRe-admission of appeal rule (2), or rule 17 or rule 18, the appellant
simissed for default. may apply to the Appellate Court for the
re-admission of the appeal; and, where it is proved that he
was prevented by any sufficient cause from appearing when the
appeal was called on for hearing or from depositing the sum so
required, the Court shall re-admit the appeal on such terms as
to costs or otherwise as it thinks fit.

"The appellant."—This rule provides that an appellant, whose appeal has been dismissed for want of prosecution under the circumstances mentioned, may apply for the readmission of the appeal, but nothing is said in it as to re hearing the case upon the application of the respondent against whom an expante decree has been passed, and a respondent against whom such a decree

⁽¹⁾ Belchamber s Rules and Orders. Appel late Side Rules, Pt 11, Ch VII, r. vm., p 29 (2) See Purshader Lalit Unibika Pershad, (1995)

¹¹ W R 200 (1869)
(3) PranChunder Roy r Jaggessar Mooker
(5) Gol Mahomed t Abdul Jubbar, 16
(6) W V 498 (1912); 15 C L J, 683

has been passed cannot apply for a hearing under this rule (1). In such cases the remedy his under 1 21

"To the Appellate Gourt"—The application must be made to the Court dismissing the appeal (2) If an appeal is referred by a District Judge to an assistant Judge for trial, under seet 17 of the Bombay Civil Courts Act (Act XIV of 1869), and the Assistant Judge dismisses the appeal for default, the application for readmission of the appeal should be made to him and not to the District Judge, and his order refusing to readmit the appeal is not subject to reversal or review by the District Judge (3) As to limitation in case of such an application, see case cited (4)

"Prevented "-This and the kindred provision in O IX i 13 mean that the application may be based upon any ground which would be a just and proper one for granting the application, and not that the application can be based upon one ground only, viz that the applicant was prevented by sufficient cause from appearing. The affirmative provisions of the Code that a plaintiff or appellant may prove that he was " prevented hy sufficient cause ' from appearing or attending when his suit or appeal was colled on and dismissed, do not imply the negative, namely, that an application for restoration cannot be granted unless "sufficient cause (in this sense) is shown " (5) It has been recently held that a Court has power to restore an appeal dismissed for default even where the appellant is not able to prove that he was prevented by a sufficient cause from appearing, and that the Court is not bound to restore an appeal in every case where the non appearance is due to the pleader's negligence, but may in its discretion leave him to his remedy against the pleader by an action for damages (6) The Court is bound to see whether the reasons set forth in the application for the re admission of the appeal are satisfactors or not Thus, where the Lower Appellate Court refused an application for readmission merely because the appellant had not conformed to a rule which he had passed that two pleaders should be engaged in every appeal, the High Court sent back the case to the Judge to cousider whether a good ground had been shown for the re admission of the appeal (7) The reasons for rejecting the application should be stated (3) When an appeal was transferred from the file of one Court to another, no notice of the transfer having been given to the appellant by the pleaders in the case and the appeal was dismissed in his absence, held that sufficient ground for his absence had been made out (9) What, however, is "sufficient cause ' mu t be decided in each case according to its own peculiar circumstances

"From appearing"—Whether the application is made for restoration under this rule or O IX r 13 the same principle will apply In both cases

Fara Chan I v Anun I Chunder (1868)
 W R 450

⁽²⁾ Kisto Persad v Cowie (1864) W R

³¹⁵ (3) Sklaram Lalshman v Govind Joti 15 B 107 MS00)

¹⁵ B 107 (1500) (1) Hir ka Dibec + Minna Bibec 31 C 1.0 (1901)

⁽⁾ S n Ayy 1 , 5 1 mm a (1903) =6 M

^{99 602}

⁽⁶⁾ Muruga Cletty : Rajasami, 22 M L J -34 (1912)

<sup>-31 (1912)
(7)</sup> Shomaed Mrv Eusoof Khan Lo W 1
50 (1871), Huro Chunder : Ram Coon ar

W R 254 (1865)
(8) Huro Chunder t Ram Coomar sufft

⁽⁵⁾ Huro Chunder t Ram Coomar suff.
(J) Nu m Sught Bheurab (1 im Pan la
S & L. R 350 (1881)

the question is whether an appearance by a counsel or pleader instructed to apply only for an adjournment is an "appearance within the meaning of the Code, and whether in such a case the suit or appeal can be dismissed for default the first question I is been answered in the negative and the second in the affirmative (I). When an appeal is dismissed under such circumstances, the order of dismissal is for default and the appellant is entitled to apply for readmission of the appeal under this rule (2). Where an appeal is dismissed by a Divisional Bench of the High Court for default in depositing the estimated costs of preparation of the paper bool such a dismissed can be set aside by review Such a case is not one in which default was jurded in appearing at the hearing of the case if the record shows that the pleaders on both sides were in attendance and heard. Under the Codo there are only two methods known to the law by which a independent and decree of a Divisional Bench of the III. Bourt can be

t aside in In in. These two methods are described in these provisions and tho e relating to review. Where it appears from the record that pleaders on both alles were in attendance and heard there has been no default in appearing at the hearing of the case and therefore this rule will not apply (3)

Anneal.—The Code allows an appeal from an order refusing to grant an application under this rule for the restoration of an appeal. But it does not provide for an appeal from an order granting such an application (4) When however the order dismussing on appeal is not one which can properly be made under r 17 there is no appeal from an order refusing to readmit the appeal under this rule and the remedy in such a case is by revision. Thus in a casa when the appeal cams on for hearing the appellant himself and two pleaders on he helialf were present in the Lower Appellate Court, one of the pleaders oneped the case but in a short time was called away to attend to a case before another Court and the Lower Appellate Court waiting some little time for the pleader to return called upon the other pleader and the appellant to support the appeal and when each of them declared his mability to do so dismissed the appeal for the default of prosecution The then appellant applied for the restoration of the appeal which was refused on the ground that no sufficient cause was shown for the restoration. The appellant appealed to the High Court under this rule It was dismissed on the ground that the appeal in the Lower Appellate Court was not dismissed for default but the appellant was allowed to file an application for revi ion (a) When an application for restoration

⁽¹⁾ Satish t Mars Prasad (190) 34 C 403 417 (F B) s c 11 C W \ 3.9 s C L J 247 Cooke t Equitable Coal Co (1904) 8 C W N 621 see also the cases c ted in notes to r 17

⁽²⁾ Satish v Ahara Prasad supra over ruling Watson & Co t Ambica Dasi (1899) 4 C W N 237 s c 27 C \(\omega 29\)

⁽³⁾ Fatimunnissa v Deoki Pershad (1896) 24 C 3.0 3.4 (F B) s c 1 C W V 21 Ramhari t Madan Mohan (1895) 23 C 339 so far as it dec de l the contrary overruled.

⁽⁴⁾ O Llll Gulab Kunwar : Thakur

Das (190.) 24 A 464 Huro Chunder 1 Ram Coomar (180.) 2 W R 2.4 "Sha kh M thoo 1 Ruhman Khan (1807) 8 W R 361 of Ramesur Dutt v Lootlunnissa (1800) 6 W R Mis 130 Kalee Kistoo i Hureel ur (1881) 10 W R 150

⁽a) Jawahir Sing t Debi Sing (180a) 18 A 119 for meaning of the word default see Satish t Ahara Prasad 34 C 903 and notes tor 1 but see Buldeo Misser r Syed Ahmel 1 b W R 143 (1871) Shibendra v Kongo Ram 12 C 600 (188)

7.6

is made the applicant must produce all his evidence in support of it before the Court to which it is made. If he does not do so and the application is refused, he cannot, on appeal from the order dismissing his application, supplement his evidence (1)

20. Where in Power to adjourn hearing and direct persons

appearing interested to be

made respondents.

Where it appears to the Court at the hearing that any persons who was a party to the suit in the Court from whose decree the appeal is mefeired, but who has not heen made a party to the appeal, is interested in the result of the

appeal, the Court may adjourn the hearing to a future day to be fixed by the Court and direct that such person be made a respondent.

Adding respondent.-The power of the Court to act under this rule is only limited in two respects, first, the person whom the Court may add must have been a party to the auit, and secondly, he must be a person interested in the result of the appeal There is no period of limitation specified in the Limitation Act, for the action of the Court in that matter (2) The party added must be interested in the result of the appeal Whether this be so must be determined in each case on its facts (3) In a suit for contribution the first Court give a decree against one of the defendants and dismissed it against the other On appeal by the defendant against whom the decree was passed, the lower appeal Court having, at the hearing of the appeal, found that the defendants, against whom the suit was dismissed, were not made parties to the appeal, though interested in the result of the appeal, directed that they should be made parties, and they entered appearance in accordance with the order made Held that there was nothing wrong in the lower appeal Courts making them respondents and passing a decree against them (4) An Appellate Court is competent to make a person a respondent who in the original suit was arrayed on the same side with the appellant (5) In a suit for contribution, where there was a decree against defendants Nos 1 and 3 separately, and the suit was dismissed against defendant No 2 on appeal by defendant No 1, there being no appeal by the plaintiff,

Muzaffar Alı v Kedarnath, 20 A 266 (1898)

⁽²⁾ Bindeshri v Ganga Saran (1892), 14 A 154, Girish Chunder Lahiri v Sasi, 33 C 329, 327 (1995)

<sup>337 (1905)
(3)</sup> See e g Bishun Churn v Jagendranath,
(1898), 26 C 114, 121, Amlook Chand t
Sarat, 16 C W N 49 (1911), 38 C 913

⁽⁴⁾ Upendra Lal Vulcerye v Cirindra (1998), 25 C 565, 668, 8 c, 2 C W N 425, Rup Tan Bibee: A blul kader (1994), 8 C W N 194, 50 Cl. B), dies from Jana Ram Balkisha (1889), 5 A 250, where it was led that masmich ags 553 del not impower an Appillar Court virtually to make an

appeal for an appellant, who had refranced from availing binsself of his privileges under law, by introducing for him other respondents than those included in the nemo randium of appeal, defendants against whom the suit was damissed could not be made respondents. See also Sour Pailins abb it Narayan Rao (1893), 18 B 250, Husdon v Bavdee Bajpyo (1893), 26 C 109, 113, se, 3 C W N 76; Subramanium i Veccabadian, 31 M 112 (1908)

⁽a) Solma v Khalak Singh (1889), 13 V 78, 86, Konagappi v Sokkalinga (1832), 15 V 362

defendant No 2 might, it was held, be made a respondent (1) The Allahabad High Court has held that the provisions of the former section did not apply to second appeals, and that a second Appellate Court could not add a party as a respondent unless that party was a party to the appeal below, and this not withstanding that he was a party to the suit in the Court of first instance : (2) but the opposite view has been held by the Madras High Court, and according to the ruling of that High Court, it is competent for the second Appellate Court to add parties who were defendants in the Court of first instance, though not joined as respondents in the Lower Appellate Court (3) This rule applies only to cases where at the hearing of the appeal the Court is satisfied that a person who was a party to the suit in the Court from whose decree the appeal is preferred, but who has not been made a party to the appeal, is interested in the result of the appeal (4)

21. Where an appeal is heard ex parte and judgment is ! pronounced against the respondent, he may Re-hearing on appliapply to the Appellate Court to re-hear the respondent cation of against whom ex parte appeal; and, if he satisfies the Court that decree made. the notice was not duly served or that he was prevented by sufficient cause from appearing when the appeal was called on for hearing, the Court shall re-hear the appeal on

such terms as to costs or otherwise as it thinks fit to impose upon him.

Rehearing of appeal,-After an appeal is filed the power to set aside the original decree on an application under sect 108 (now O IX r 13) is vested m the Appellate Court This power is distinct from the power to set aside an ex parte appellate deerce conferred by the present rule, which only enables the Court to direct the appeal from the original decree to be reheard, thus temporarily restoring the original decree (5) No appeal has to the High Court under sect 153 of the Bengal Tenancy Act from an order refusing to hear an application under this rule to have an appeal from a decree in a rent suit, valued less than Rs 100, reheard in the presence of the respondent (6) An application to rehear the appeal is an application in the suit (7)

(1) Any respondent, though he may not bave appealed is from any part of the decree, may not only Upon hearing, responsupport the decree on any of the grounds dent may object to decree decided against him in the Court below, but as if he had preferred separate appeal. take any cross-objection to the decree which

⁽¹⁾ Rup Jan Bibco : Abdul Kadir (1904). 8 C. W. N 496, 500

⁽²⁾ Chunn 1, Lala Ram (15J3), 15 1 5, 8. (3) Paya Matalbil r Kovamel Amma (1895), 19 M 151, 153

⁽⁴⁾ Bhuna Rout r Dasarathi, 40 C 323 1912)

⁽⁵⁾ Sankara Bhalta r Subraya Bhatta 30 M. 535 (1907), a.e. 17 M L. J 430

⁽⁶⁾ Samed Should t Naba Nepal Choic. 19 C L J 310 (1914) (7) Ib., and see Accha Mun v Lura

Churn, 25 C. 146, 2 (W N 137 (1597)

he could have taken by way of appeal, provided he has filed such objection in the Appellate Court within one mouth from the date of service on him or his pleader of notice of the day fixed for hearing the appeal, or within such finither time as the Appellate Court may see fit to allow

(2) Such cross-objection shall be in the form of a memo-Form of objection and provisions applicable thereto.

The form of a memorandum, and the provisions of rule 1, so far as they relate to the form and contents of the memorandum of appeal, shall apply thereto.

(3) Unless the respondent files with the objection a written acknowledgment from the party who may be affected by such objection or his pleader of having received a copy thereof, the Appellate Court shall causo a copy to be served, as soon as may be after the filing of the objection, on such party or his pleader at the expense of tho respondent

(4) Where, in any ease in which any respondent has under this rule filed a memorandum of objection, the original appeal is with drawn or is dismissed for default, the objection so filed may need theless be heard and determined after such notice to the other pathos

as the Court thinks fit.

(5) The provisions relating to pauper appeals shall, so far as they can be made applicable, apply to an objection under this rule

Scope of rule -In this rule two classes of cases have been referred to under it a respondent may, firstly support the decree of the Court of first instance upon grounds which may have been decided against him by that Court, and if a part of the decree is adverse to him he has the right to object at the hearing of the uppeal to that put of the decree without filing a separate appeal two classes of cases are not of an analogous character Cross objections are in the nature of an appeal, a remedy which a respondent has against a decree which is partly unfavourable to him (1) A respondent, when the decree is against him, cannot (unless he has filed a cross appeal) be heard except to support the decree, and can only alter it by means of a cross appeal (2) A party may be satisfied with the decree of the Lower Court, and may be willing to allow it to stand unumperched if his opponent does not think it necessary to appeal; but he may not be willing to have the decree modified or altered upon appeal in favour of his opponent, without having the whole decree set right suppose a defendant sets up two defences to a claim brought against him, and the Lower Court determines in his favour as to one of them and against him as

City of Bombay Improvement Act, see Raghunath Das v Secretary of State, 20 B 511 (1905), and see Rangam Lal i Jandhu (1911) 34 A 32

(2) Casperz t Kishon Lal Roy Chowdhur) (1896) 23 C 922, 929, s c, 1 C W N 12

⁽¹⁾ Kalyan Singh r Rahmu 23 A 130, 134 (1901), see also Rampwan Mal v Chand Mal, 10 A. 537, 601, 602 (1888), Jariastuniassa v Lufunnissa (1835) 7 A 608, 621, Fhakoor Dway Gopce Kristo (1871), 6 W R 19, and as to at peal and cross of teet in sun kir the

to the other the plaintiff's claim would be dismissed. The Lower Court might be wrong as to both defences and on ht to have decided in the defendant's far our the defence which was deaded against him and occurrent. If the plaintiff were to appeal and to rever a the decision of the Lower Court, upon the defence decreed in the defendant's favour at would be unjust not to allow the defendant, if he could, to show that the Lower Court was wrong in point of law in determining the other defence against him, for he might thereby be able to show that the Lower Court was substantially right in dismissing the plantiff's suit, though wrong as to the defence which larred it (1) He may support the decree on the _round decided as unst him This reason applies to special appeals with as much force as it does to regular appeals (2) It was held that the order of a Loner Appellate Court di allowing the objections filed by the respondent in that Court under sect 561, was appealable because it was a decree passed in appeal within the meaning of sect 581 of the list Code, whether it dealt with the grounds of appeal urged by the appellant or the objections taken by the respondent under sect 561 (3) It was also held that sect 617 of the last Code made applicable to revision petitions under sect 25 of the Provincial Small Causo Court Act, the procedure relating to appeals, and consequently a memorandum of objections would be in such revision petitions (1)

Decree entirely in favour of respondent.—Where a decree is entirely in favour of a respondent it is not necessary for him to file a notice of objection to the decision on any issue found against him. He can support the decree on the ground that that issue ought to have been decided in his favour. The Appellate Court ought to decide that issue or show in its judgment a reason for not doing as (3). And see ante

"Decided against him."—If a point has not been decided in favour of the re-pondent it must for the purposes of the rule be taken to have been decided against him within its meaning. It is not necessary to entitle a re-pondent to support a decree upon a particular ground that that ground should have been in express terms decided against him (6). Where a claim to set off was asserted in the re-pondent's (defendant s) written statement, but no issue ou the point wis raised, and no pronouncement on it was made by the first Court, and it was not mude the subject of any cross objection, nor was it urged before the 'appellate Court in argument, the former section was keld to be no but to the 'appellate

Issur Ghose t Hdls (1862), I Ind. Jur 25, 29, s c, Marsh, 151, 153, 1 Hay 350 W
 R. Sp. n. 49, and as to Code of 1859, see In re Murza Hummat, B L. R., F B 429, 131 (1866)

⁽²⁾ Ib , Narayan Ayyar t Lakshmi Ammal, 3 M. H. C R 216 291 (1866) (3) Ganapati v Sitharama (1887) 10 M.

<sup>292, 291
(4)</sup> Krishna Aiyangar v Appanaiyangar,

⁽¹⁾ Krishna Alyangar v Alpanaiyangar, 17 M. L. J. 62 (1906) (5) Lala Gouri Sunkar v Janki Pershad

^{(1889), 17} I A 57, 61, s c, 17 C 809, Bhagopt Bapup (1888), 13 B 75, 77

⁽⁶⁾ Shrush Chunder Ray t Munger Bewa, 9 C W N 14, 18 (1904) In Baids t Kanail, 4 A 491 (1882), & was held on the facts that the natter was not deeded against the respondent, in Ganga Prasad t Gudadhar Prasad, 2 A. 601, 654 (1859), the appellant to the High Court lost his appeal in the Lower Court, and there was no objection which respondents could have taken by way of appeal to this Court against the decrea of the Lower Appellate Court See as to this case, hainst v Kamat, 8 B 368, 370 (1851).

before the Calcutta High Court (I) it was decided that as a general rule the right of a respondent to urge cross objections should be limited to his urging them against the appellants, and it is only by way of exception to this general rule that one respondent may urge cross objections as against the other respondents, the exception holding good, among other cases, in those in which the appeal of some of the parties opens out questions which cannot be disposed of completely without matters being allowed to be opened up as between co respondents (2) Thus where the Court of first instance decided a suit upon a ground common to all the defendants, it was held it was competent for the Appellate Court, on the appeal of only one of the defendants, to modify or set aside in favour of all the defendants the decree of the Lower Court, and the whole case was opened out in appeal, not only as between the plaintiff and the defendant who had appealed, but also as between the plaintiff and other defendants, who had been made respondents apparently because they had not joined in the appeal. It was held that the Appellate Court could not do complete justice between all the parties without opening up the whole case, and such an instance was one of the exceptional cases in which a respondent should be allowed to prefer objections as against his co respondents (3) It was also held by the Madias High Court that one respondent can file a memorandum of objections against another respondent (4)

Court fees on cross-objections—The objections under this rule have to be mide by means of a document which has to be filed within one month after service of notice of the appeal, that is, on a date which is generally long prior to the date of hearing. Is that document chargeable with court fees at the time it is filed? Under sect 4, Court Fees Act, it is not so chargeable unless it is a document of any of the kinds specified in the first or second Schedule annexed to the Act. A memorandum of objections is not a document so specified in those schedules. Such being the ease, no fee is leviable on a memorandum of objections until the time of heaving, and it is leviable under the special provision in sect. 16 of the Court Fees Act (5). The Court cannot remit the stamp duty in such cases, (6) the proper order is to dismiss the memorandum (with or without costs, at the discretion of the Court) (7).

⁽¹⁾ Bishun Churn Roy Chowdhury i Jogendranath Roy (1838), 26 C 114, followed in Shibiuddin i Deomoorat, 30 C

<sup>655 (1993)
(2)</sup> Bishun Churn Roy v Jogendranath, 26
(2) Bishun Churn Roy v Jogendranath, 26
(114, 121 (1898), and see Abdul Ghana t Muhammad Fasih, 28 A. 95 (1995), Ppendien dra Lall Mukherjea i Garmdranath Mukher jet, 25 C 505 (1898), Shabruddin v Deomoorat (1903), 30 C 655, 557, 505, Jadu Nandan t Deo Naram, 16 C W N 612 (1911), 15 C L J 61, Nursey Yup t Harrison, 37 B 5 11 (1913).

⁽³⁾ Midul Gham r Mahammad Lash (1905) 28 A 95, 97, 98, dast Kallu r Minu (1900) 3 A 93, and pointing out that the reasoning in Liminopya r

Lakshmans, 7 M 215 (1883), was bas d upon the provisions of het VII of 1844, the language of which materially differed from

the Code of 1882
(4) Per Benson and Boddam, JJ (1903).

 ¹⁴ Vad L J 34 S N
 (5) Reference under Court Free Act, 25 V
 24, 26 (1901), Narayan t Krishna (1884), 5

M 211, 217 Bab 11 Harr v Rajaram Ballal (1895), 1 B 75, 79, Sharada Soondurco t Gobind Monee (1875), 24 W R 179

⁽⁶⁾ Brojeshwari e Guroo Chura (1880), 11 C 735 [pauper respondent]

⁽⁷⁾ Kumarusamin : Udayar Nylin, 32 M 170 (1908), for cross objections in formal paraperts, see Covint : Radhy, 15 C. W. N 205 (1910)

"Within one month."—This rule allows a respondent to file a memorandum of objections within one month from the date on which notice has been excred on him or on his pleader. The right so confirm dis an absolute right, and the hearing of the appeal cannot be advanced so as to defeat this provision. An appeal cannot be definitely posted until the Contr has ascertained that notice of the appeal his been served on the respondent, and in date should then be fixed not less than one month from the date of service (1). The Court may grant further time. Whether it will do so will depend on the particular facts proved (2). Under this rule the Court has power to receive a memorandum of cross-objections at any time (3).

Withdrawal of appeal (sub-rule (4)).-Cross objections are in the nature of an appeal, a remedy which a respondent has against a decree partly unfavourable to han, but they were considered to so far differ from a cro-s-appeal that they depended on the hearing of the appeal, and could not be heard if the appeal was not heard. Upon this view a number of questions arose as to the effect of the withdrawal of in appeal before and after the commencement of the hearing, and what constituted a hearing upon the right to have cross objections heard and determined (1) The general result of these decisions may be stated to be that they involved a discussion of the meining of the term "hearing," that if the appeal was withdrawn before the "hearing" the respondent could not be heard upon his cross objections dependent as they were on the appeal, but that if the hearing had begun and the Court had thus become reized of the cross objections the respondent could not be deprived of his remedy because the appellant choose to abandon his (5) The matter need not now be further considered. An appellant may of course withdraw his appeal nt any time up to its actual decision (6) But now under sub rule (4) in all cases of withdrawal the Court may proceed to determine the cross objections Where, however, the decree is wholly in favour of the respondent his right to contest any of the conclusions in the first Court judgment is only for the purpose of supporting the decree, and if the appeal is withdrawn that purpose is fully secured because the decree is left standing and the right to dispute the conclusions in the judgment is no longer of any use to hun. To withdraw the appeal in such a case cannot, as in the case of cross objections deprive the respondent of

⁽I) Sundaram : Annangar, 13 M 492, 493

⁽¹⁸⁹⁰⁾ (2) In Sulleman : Joosub Jan, 14 B 111

^{(1800),} the Court refused an extension (3) Govind t Radha, 15 C W N 205 (1910)

⁽⁴⁾ See Kalyan Singli v Rahmu, 23 A 130, 134 (1901), Jafar Hasam v Ramit Singh, 17 A 518, Ramjuvan v Chandmal, 19 A 587, 602 (1888) [dismissal of appeal as barred by immtation], Kombi Achen v Koshanin, 21 M, 352 (1897) [dismissal for failure to join

immtation], Kombi Achen v Aoshanm, 21 M. 352 (1897) [dismussal for failure to join partics]. Baroda kant v Pearto Mohun, 23 W. R. 37 (1874) [dismussal for default], and see also Paresh Naraim v Watson & Co., 23 W.

R 229 (1874) Bahadoor Singh t Bhugwan Dass I Agra H C R 23, Shama Charan t Radha Kristo, I W R 210 (18.0), Sarbhan Doyali t Raghunathin, 10 B H C R 397 (1873), Dhoni I Jagannath t Collector of Salt Revenue, 9 B 28, 30 (1884), Valktab Beg t Hassan AL, 8 A 53 (1886), Venkata-ramanaya v Koppi, 3 M H C R 502 (1867), Ram Pershad t Bhurosa, 9 W R 328 (1868)

⁽⁵⁾ See Shankar Lal : Sarup 34 A 40 (1911)

⁽⁶⁾ Kalyan Singh v Rahmu, 23 A 130, 134 (1901)

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any remedy whatever (1) Sub rule (4) is therefore limited to cross objections. A question also arose as to whether, when an appeal was abandoned, and the respondent could not proceed with his objections to the decree, he could file an appeal, after the expiry of time allowed for appeal by the Limitation Act, under sect 5 of that Act. It was held that the mere fact that an appeal has been withdrawn did not amount to "sufficient cause" within that section. But each case had to be decided upon its own special encumstances. If the Court was satisfied in any case that there had been "sufficient cause for not presenting the appeal within the preserved time," then it would allow the appeal to be admitted (2). For the reason given such a case is not likely to recur, as there is no necessity to file an appeal if the appeal covers only the ground of the cross objections which can now be determined when the appeal is abandoned

23 Where the Court from whose decree an appeal is meRemand of case by Apferred has disposed of the suit upon a preliminary point and the decree is reversed in
appeal, the Appellate Court may, if it thinks fit, by order remand
the case, and may further direct what issue or issues shall be
tired in the case so remanded, and shall send a copy of its
judgment and order to the Court from whose decree the appeal
is preferred, with directions to re admit the suit under its original
number in the register of civil suits, and proceed to determine
the suit, and the evidence (if any) recorded during the original
trial shall, subject to all just exceptions, be evidence during the trial
after remand.

Remand —Where the Lower Court has taken evidence sufficiently to chable the Appellate Court in its view of the case to pronounce judgment, then the latter Court must determine the case whether the Lower Court has or has not fixed the proper issues. In such case it has all the muterials necessary to the exercise of its judgment, and if the proper issues have not been fixed, it may resettle the issues under r 24 Cases may, however, occur where the Court has not such material

The first case is where there has been no complete determination of the suit by reason of the Court's erroneous disposal of the case on 1 "preliminary point" Such an order of remand implies a reversal of the first judgment (3) and re opens the whole case, (4) and involves a second decision by the Lower Court, that is, the Court which first disposed of the suit and no other (5) This

⁽I) Kalyan Singh v Rahmu, 23 A 130, 134 (1901)

⁽²⁾ Hurgovindas v Jadavahoo (1899), 23

<sup>18 002, 605
(4)</sup> See Kebul Kishen t Mt Ambala 7
W R 326 (1807) and Madhub Chunder t
Kam Dyal, S W R 303 (1807), where it was
pointed out that an 'pprellate Court could not
affirm a decision regarding one jast of the
cham when it had remanded the substantive

part for the trial of the ments which the first Court had refused. As to informal orders in this respect, see Lala Rain Saran r Neri

Naram Singh, 6 C W \ 326 (192)

(4) Farinco K int Lahirco t Kunj Behared

Awustee, 12 W R. 112 (1865), Gudadhur*
Dutt : Shushee Monee, 21 W R 7 (1873)
(5) Bai Shri Majirajha : Majinalal Bhai

shankar, 13 B 303 (1894)

is a complete remand. As already stated a complete remand involves a reversal of the first judgment. Where the first Court disposes of the suit on two grounds only, res judicata and limit tion, and on appeal its decision was upheld only on the first ground and the question of limitation was not gone into, in second appeal the High Court reversed the decision and remanded the case to the Lower Appellate Court to decide it on the ments. This was held to leave the whole case open to that Court, and before it could reverse the first Court's decree and remand the case for a first decision, it was bound to determine whether the fresh Court's decision on the question of limitation was right or wrong (1). It has been held that it is not a good ground for passing an order of remand under this rule to say that the preliminary issue has been decided by the Court of first instance on a wrong view of the burden of proof, unless the Appellate Court finds that such decision was wrong (2).

The next case is when the Lower Court has omitted to try an issue or to determine a question of fact essential to the right decision of the case set up in the first Court, and in consequence the evidence is misufficient (ir 25, 26). In such a case the decree is not set aside (3). The case is retained undeposed of on the file of the Appellate Court. The Lower Court is directed to take the additional evidence and to try on such evidence the issues remitted. When the his done this it returns the additional evidence with its finding thereon to the Appellate Court, which then being placed in a position to determine the appeal, passes judgment (4). In this case there is what has been called a partial remand. Where the Court of first instance has considered the whole of the evidence before it and completely disposed of the suit on the merits, the Appellate Court must itself finally determine the appeal and crunot remand, (5) but if it thinks that the determination of any particular question unincessary, it may make an order under 25 post (6)

The third case (which is not, properly speaking, a remaid) exists where the Lower Court has determined the whole case and has not cointed to frame or determine any issues but has deceded the ease on insufficient evidence (r. 27-29) In this case the Appellate Court itself takes the evidence or directs the Lower Court to do so and when such evidence is returned passes judgment in the appeal which, as in the former case, has meanwhile remained ou its file

An improper order of remand is not necessarily void but only illegal or irregular (7) Under the last Code an order under sect 562 was

- (1) Raisingii : Balvantrao, 11 B 663
- (2) Habib ul lah t Lalta Prasad 34 A 612 (1912)
- (3) See Mokund Lall (Hurbullabh \arsin 12 C. L. R. 136, 138 (1882)
- (4) See Lalla Chum Lall t Wohn Singh 1 C. W. N. 340 (1895)
- (5) Narain Palt I salt Aishore 1 (W X XXX (1896) Mallikarjuna r Patharm I J M 479 (1890), Parvatsankar t Bai Nasal 17 B 733 (1851) Ram Das Mindal r Indro moin Dasi, 3 C. W N 325 (1858), and sextrumizem Chetter Jagateers Rama 29 W.

- 444 (1905)
- (6) Ambica Churn Das i Kala Chandra Das III C W N 422 (1905)

(7) Marza Jiwad Mi t Hossen Biber, 8 W R. 207 (1867) Mohesh Chandra Dasa r Jamuruddin Mollah 23 C 321 (1760), contri Cheda Lal i Bidullah, 11 A 35 (1859) Rameshur Singh r Sheodin Singh, 12 A 310 (1859) Traidolya Mohim Dasi r Kah Prosanna Ghose 11 C W N 350 (1307), and as to proceedings subsequent to an ilk gal order of remand, see Jatinga Tea Co. r Clear Fea Co., 12 C. 45 (1859), Durga Kindar

Konchas Bonza, 3 C L. J 71 (1'400).

appealable,(1) and a party might impeach the order of remand on appeal from the final decree (2) Under sect 578 (now s 99), however, no decision should be reversed unless it has affected the merits of the case or the jurisdiction of the Court But jurisdiction in this section is used in its strict sense, and does not mean the legal authority of a Court to do a certain thing, viz to order a remand, and therefore in each case it had to be determined whether the merits had been prejudicially affected (3) Under the present Code, however, an appeal is given from an order under this rule (O XLIII), and under sect 105, if an appeal lies and the party does not appeal, he cannot afterwards dispute the correctness of the order of remand

When a case is remanded the Lower Court should fix a reasonable date for the parties to appear and carry on the suit, (4) and if they do not appear the case should be dismissed (5) If they appear no fresh valutuama is neces sary (6) When a case is remanded to a District Judge he should not transfer it to another officer (7) Costs of the Appellate Court can be recovered only when the order of remand provides for them (8) If on the return of the case it appears that the remand order has not been carried out, the Court, in remanding it a second time, chould point out the manner in which the carrying out of the provious order seemed defective (9) If a party who is offered a remand elects to go on with the case as it stands, ho is estopped from impugning the decision on that point (10) Where a case was remanded to be tried on the merits, the Court remanding considering it not barred, the Lower Court was held wrong in entering again into the question of limitation (11) For the Court cannot

⁽¹⁾ S 588, cl 28, and the appeal was not restricted by the sect 586 Mahadev v Ragho, 7 B 292 (1883), Gulam Husen v Sayad Musa 8 B 260, 261 (1884), Kirti Mohaldar & Ramjan, 10 C 523 (1884), Collector of Bijnor v Jafar Ah 3 A 18 (1890) As to appeals, see Lol 1 Mahto 1 Aghoree Apail, 5 C 142 (1879), Gaura Shankar v Karıma Bibi 15 A 413 (1893) Abrahim Khan t Taizunnessa 17 C 168 (1889), Bhau Bala v Bapan Bapun 14 B 14 (1880), Deolishen t Bansi, 8 A 172 (1886), Sohan Lal v Azizunnissa, 7 A 136 (1884), Jhanday Lal v Sarman Jal, 21 A. 291 (1899), Partap Singh v Narain Day, 16 A 370 (1894), Ram Prosad v Sachi Dassi, 6 C W N 585 (1902) Mathura Nath Chose t Nobin Chandra, 24 C 774 (1897) [no appeal from order under cl. 16, sect. 588]. Hasan Alı : Siraj Husain, 10 A. 2"2 (1894)

⁽²⁾ Savitri v Ramji, 14 B 232 (1889), Rameshur Singh t Shoodin Singh, 12 A 510 (1889), Cheda Lal : Badullah, 11 A 35 (1888) , Badaru : 1mrat 2 1 675 (1881), and next case

⁽i) Molicali Chan Ira Das i Jamirud lin

Mollah, 28 C 324 (1900), s c, 5 C. W N 509, and cases there cited, Nawcourse Mundal v Wookta Bibee, 2 W R 181 (1865), Nasurooddeen v Lall Mahomed, 10 W R 234 (1870), Gunga Monee v Issur Chunder, 17 W R 465 (1872)

⁽⁴⁾ Haradhun Chuckerbutty v Protap Naram Chowdhury, 14 W R 401 (1870).

Watson & Co v Kunhin Bahadoor, 9 W R 294 (1868) (5) In 7" Kalee Wohun Dass 17 W R "0

⁽¹⁸⁷²⁾ (6) Sm Nobin Monce Dassee : Joy Gopal

Gossam, 1 W R 275 (1864)

⁽⁷⁾ Sita Ram : Naum Dulauja, 21 A 230 (1899) . Chowdhry Hamedoollah v Mutecoon nasa Bibec, 15 W R 574 (1871) (8) Digambar Chatteries : Ram Roodro,

¹³ W R 39 (1870)

⁽⁹⁾ Radhabullub Surma : Anundmoyco Dabia, 1864, W R 39, Miso

⁽¹⁰⁾ Nobo Lall Khan v Oodheerance, 3 W R 5 (186.)

⁽¹¹⁾ Mt Judoobunsce & Mt Asman Koocr,

¹⁴ W R 371 (1870)

to open a matter already adjudicated upon between the parties (1) It has been held that when a case is sent back for trial on the merits the order of remand shuts out preliminary objections such as limitation or res adjudicata (2) or jurisdiction (3) On the other hand, it has been held that the remand of a case for trial on the merits does not prevent adjudication upon any other issue arising in the case of limitation, provided that such usue has not been adjudicated upon by the Court making the remand (1) The question whether sect 25 of the last Code, now sect. 21, had application to a ease remanded was considered in the case cited (a) It has been held that where the decision of the Court of first instance is not based on any preliminary ground and where the whole of the evidence has been taken and the conclusion of the Court relates to the merits of the case the Appellate Court cannot set aside the decree under this rule (6)

"Preliminary point."-Prior to the amendment of the Code of 1882 by Act VII of 1858 sect 562 contained the words "So as to exclude any cuidence of feet which appears to the Appellate Court essential to the determination of the rights of the parties" and the word "micetigate" was used instead of the word "determine" at the end of the section The condition therefore necessary to justify a remand consisted prior to Act VII of 1888 in the exclusion of evidence of a material fact or in the omission to investigate the merits as the consequence of the decision on a preliminary question which the Appellate Court could not unhold (7)

The condition necessary to a remand after 1888 was the omission to deter mine the merits. Therefore it was held competent for an Appellate Court to remand a case where the Court of first instance recorded evidence on all the issues and at the final hearing determined the suit erroneously on some particular point without expressing any opinion on the other issues (8) But there could be no remand where, though the Court held that the suit was barred by lumitation, it at the same time came to a definite decision on each of the other i-sucs (9)

⁽¹⁾ Saheb Tewarce r Ausborce Sahoy, 24 W R. 330 (1875), Ram Kuvarbhai v Damodhar, 6 B H. C. R. 146 (1869)

⁽²⁾ Sheo Sahoy Tewarco t Ram Pershad Varain, 24 W R 333 (1870), and see Moru bin Patlaji: Gopal bin Sahu, 2 B 120 (1877), Dattu v Kasai, 8 B 535 (1884), where the objections seem to have been taken in the final appeal after the remand order had been carried out.

⁽³⁾ Temulji Rustamji v Fardunji Kavasji, 5 B H. C. R. 137 (1868) (4) Rajah Tej Kishen v Shib Chunder

Boss. 3 W R Act V 158 (1865) (5) Gurdeo Singh : Chandrikah Singh, 5 C L J 611 (1907), followed in Protab

Chandra Roy v Judisthie Das, 19 C. L. J 408 (1914) (6) Ram Dassi t Ashntosh, 15 C L J

^{310 (1910)}

⁽⁷⁾ Ramachandra Joshi : Hazi Kassim,

¹⁶ M. 207, at p 209 (1832), see Muniappa Naidu : Iyasamy Mudely, 5 M. H. C R. 313 (1870), Synd Hussup Ali : Manoowar Ali 21 W R 413 (1874), Durga v Haidar Ali 7A 167(1884), Lingammaly Venkatammal, 6 M 239, 242 (1882), Mt Rama Accer v Lall. Bhagwan Lall, 22 W R 224 (1874) Amma : Kunhunni, 9 M. 355 (1856)

⁽⁸⁾ Ramachandra Joshi v Hazi Kassim. 16 ML 207, 200, 210 (1892), Vengansyyan y Ramasami Ayyan, 19 M. 422, 423 (1895). Arshnan Chetti t Muthu Palandi, 22 M 172 (1893), Watadin v Jamna Das, 27 A 691 (190a), and see Muhammad Allahdad hhan : Muhammad Ismail hhan, 10 A, 289 (1888), Kelumutschen v Chendu, 19 M 157 159 (1895)

⁽⁹⁾ Hafiz Abdul Rahim v Hari Raj Singh, 22 A. 405 (1900) . Paramehand : Nuvani. 1 Born, L. R. 72 (1899)

It was held that the expression "preliminary point" was used in sect 562 of the last Code, not in the sense of some point collateral to the ments, e.g. limitation, res judicata, and the like, but of some point preliminary to a general investigation of the ments. The words referred thus to some point either collateral to the ments which precluded their determination altogether or some particular question which, though relating to the ments, precluded their general determination (1). The term is somewhat ambiguous. The meaning would appear to be that the Appellite Court may rimind where the Lower Court has disposed of a suit upon a point or issue, the determination of which has precluded the necessity for determining other points or issues have been left undetermined.

Sect 562 was held to authorize a remand only where the entire suit and not merely a portion of it had been disposed of by the Court upon a preliminary point (2). In an appeal from an order refusing to set aside a decree (sect 108 or O IX r 13 of this Code), the only case which cau be remanded to be tried on its merits is the application under sect 108, and not the original case the decree in which is sought to be set aside (3). When, in contravention of the provisions of sect 202 of the Agra Tenancy Act, 1901, a Civil Court heard and determined a suit in which a question of tenant light was raised, and on appeal the Lower Appellate Court remanded the suit, it was held that that Court ought not to have done so, but should have passed the order required by sect 202 of the Act (4).

It not infrequently, however, happens that a remaid is necessary in consequence of an error, omission, or irregularity by reason of which there has not been a proper trial or an effectual and complete adjudication of the suit. The former Code not providing for the ease, difficulty was felt (5) and recourse was had to an inherent jurisdiction (6) (the only powers of remaind being those contained in secte 562 and 566 of that Code) (7) or a jurisdiction implied in the terms of other sections of the Code (8). So a case has been remainded where the suit was decided without the plaintiff being given a fair opportunity of

⁽¹⁾ Ramachandra Joshi v Hazi Kassim, 16 M. 207, 210 (1892), Kanakammal v Rungacharnz 20 M 25, 27 (1896) (wheathe Court held that there was no cause of action), Mata Din v Jamna Das, 27 A 696 (1965) In Mana Vikrama v Gopalan Nari, 30 M. 203 (1966), the point was held not preliminary but an integral part of the merits, Vigitan Dabe : Fran Singh, 30 Å 63 (1907)

⁽²⁾ Banwari Lal v Samman Lal 11 A 488 (1889)

⁽³⁾ Rai Radha Kissen v Collector of Jaun 1 ore, 5 C W N 153 (1900)

⁽¹⁾ Jagan Nath v Bhauani, 27 1 167 (1901)

⁽⁵⁾ See Mohesh Chandra Days a Jamurud din Mollah, 28 C. 324, at p 334, ["we may all that cases may any un which

although a complete remand under sect 502 may not be warranted still nothing short of 7 retrail of 41 the issues randered necessary by the previous imperfect trial of them would satisfy the requirements of justice, 'Jfollowed in Nabin Chan ha Tripate v Prankraina De.

⁴¹ C. 108 (1913)

(6) Perumbra Nayar v Suhtahmanian Pattar, 23 V 445 (1899), Durga Dihal Dav v Anoraji, 17 A 29 (1894), Zohra Bibi t Zobeda Khatun 12 C L. J. 368 (1101) But this case has been dissented from in Nalan Chandra Tripat v Prankrishna De, 41 C 105.

18 C L. J. 613 (1913) (no inherent power of

⁽⁷⁾ Habib Baksh t Buldeo Prasad, 23 \ 167, 171 (1901)

⁽⁸⁾ Ib at 1 173

knowing the line of defence he had to meet, (1) where the decision was given without taking the defendant's evidence , (2) or where an Appellate Court made an order under sects 27, 32, or 53 of the former Code , (3) or where the Court mistook the nature of the case (4) and had not properly tried an issue, (5) where the parties were or might have been misled by the act of the Court . (6) where an appeal was held wrongly to have abated, (7) or a suit was wrongly decided ex parte (8) A remand under sect 562 was, however, under the last Code held to he bad where the Lower Court acted arregularly in issuing a commission (9) and on the ground of defect of parties, (10) and where the deposition of the witnesses did not be ir the usual certificate (11) It was proposed to specially legislate for cases where the Lower Court had committed any error omission, or irregularity by reason of which in the opinion of the Appellate Court, there had not heen a proper trial or an effectual and complete adjudication of the suit as contemplated by law, and the party complaining of such error, omission or irregularity had been materially prejudiced thereby. The Special Committee, however, reported that they thought it safer not to give legislative sanction to the views enunciated by the Allahabad High Court in Habih Baksh v Baldeo Prisad,(12) considering that the power of reversal and remaid was liable to he abused while the procedure under r 25 was free from this liability and at the same tune furnished (as it considered) an effectual remedy. As to this it is to he observed that under that rule a remand is not made for a further trial and decision by the first Court on the whole case, but only for findings on specified issues to enable the appellate Court itself to pass a proper decision. Cases may occur where an Appellate Court has power to make an order under some section or rule of the Code, and in order to give effect to the provisions of the section or rule applicable, it is necessary that it should in certain cases for the ends of justice send back the case to the Court of first instance In the present Code the absolute prohibition of sect 561, which created a difficulty against the adoption of this course has been removed (that section being now omitted). and under sect 151 the Court may make such order as is necessary for the ends of justice Probably under the circumstances it is a correct conclusion to draw

⁽¹⁾ Shib Pershad Pattuck : Aubo Kishen Mookerjee 17 W R. 445 (18"2)

⁽²⁾ Perumbra Nayar t Subrahmaman Pattar 23 V 445 (1899)

⁽³⁾ Habib Baksh v Baldeo Prasad, 23 1 167 (1901), Lingammal v Chinna Venka tammal 6 M 239, 241 245 (1852), but see as to amen lment and joinder of partica Farzand Alı r Yus if Alı 2 A. 669 (1880) Ganesh Bhikaji r Bhikaji Krishna, 10 V 398 (1886), Kelu Mulacheri i Chendu 19 M 157 (1895), Keshav Mohadev t Pandu rang Waman, 1 Bom. L. R. 29 (1899). hrishnaya v Panchu 17 M. 157 (1893)

⁽⁴⁾ Juggur Nath t Rajah Chutter Narain 17 W R, 410 (1571)

⁽a) Lam Chaud Mookerpee r Kameenee Debia, 10 W R. 236 (1808), see Umbika

Chura v Ramdhun Mohurrur II W R J.

⁽¹⁸⁶⁹⁾ (6) Mahammad Mahda i v Mahammad Ismail Khan 10 A. 290 (1855)

⁽⁷⁾ Bas Full v Adesang 3 Born. L. R. 736 (1901)

⁽⁸⁾ Krishna Ayyar e Kuppan Ayyangar, 30 VL 54 (1906)

⁽⁹⁾ Dhondo r Panha Lall 1 Bom. L. R. 110 (1599)

⁽¹⁰⁾ Bando Daji r Bhasker Mahadeo 1

Bom. L. R 369 (1839) (11) Ram Gopal Dey t Raghu Nath

Ghoshal, 2 C L. J 496 (1.04) (12) 23 1 107, followed in Jaduh r Gobinda 3" C. 171 (1'09) and see Narottam

r Mohanlal 14 bom. L. R. 1151 (1312) 37 B 259

that though the Legislature has expressly omitted to lay down as a positive rule that a remand may be granted in the cases referred to in the proposed, but rejected, amendment, for fear that a power expressed in such wide terms might be hable to abuse, the Court may, where that course is absolutely necessary for the ends of justice, excicise the power of remand in cases not falling within the precise terms of this rule or of r 25, post Further, if an order of remand is erroneous, a party who has consented to it may be estopped from contesting it,(1) and in no case are subsequent proceedings void merely because of such error (2) It has, however, been recently held that an Appellate Court has no inherent power to remand when the Lower Court has committed errors materially prejudicing the complainant, and that its only power of remand is under sect 107 (1) (b) as limited by this rule and is no wider than it was under the last Code (3) In the under-mentioned cases it has been held that an order of remand may be made even when the disposal has not been on a strictly preliminary point, eg where there has been no regular hearing of the matter and the evidence on which the disposal was made has not been placed on record (4) Where a judgment had been partly based on evidence not on the record it was held on second appeal that if such evidence was excepted it would be impossible to decide whether the remainder was sufficient to support the judgment and the case was remanded (5) In this case the lower Court had rehed on a statement made by a pleader, and it was held that such a statement must be regularly proved and permission to admit additional evidence was given

"And the evidence"—It was reported that the practice in various pio vinces differed on the question whether evidence recorded in the proceedings leading up to the decree set aside under sec 562 was in itself available as evidence during the retrial, or whether it could only be made admissible in the case of witnesses attending at the hearing by examining them upon their previous depositions as statements recorded in a different proceeding. The Legislature has shown itself to be of the opinion that, subject to all just exceptions such depositions should of their own force be available as evidence. Evidence may be received from parties who did not appear at the former trial (6). Where the Judge in a remand observed that evidence was unnecessary, the declaration was held to sufficiently justify the plantiff in making no further application for a summons on their witnesses (7). Where a review had been granted for the purpose of seeing whether a chittah ought not to be used, and the case wis remanded for a chearing, the party was held to be concluded from objecting that the chitath a wis impropelly made use of upon the relevanting (8). It has been

⁽¹⁾ Bukunta Nath Dey v Nawab Sah mulla, 6 C L. J 547 (1907)

⁽²⁾ Durga Kinkar v Konchas Ronza, 5

C I J 71 (1 106)

⁽⁴⁾ Nabui Chandra Iripati r Pran Krishna De, 41 C 108 (1913) dissenting from Zohra Bili r Zobeda Khatun, 12 C L J 368 (1910)

⁽i) Venula Jambalayya i Rajarma, "I M L.J 5/2 (191.) Kuppalan i Kunjuvalli,

⁹ M L. 1 373 (1911)

⁽⁵⁾ Mont I al v Um, Charan, 1) C L J 541 (1913)

⁽⁶⁾ Koonj Biharce Awastee v larme

Kant I ahiree, S W R 285 (1867)

⁽⁷⁾ Ram Jowan Suigh : Ra tha Pershal Siigh 16 W R 103 (1871)

⁽⁸⁾ Makhun Kooer t Incowere Dutt II

W R 22 (18°0)

held that a case in which there was no proper hearing by the first Court, and no record of the evidence, was a fit one for remaind (1)

Appeal —An appeal hes under O XLIII But the right of appeal from interlocutory orders ceases with the disposal of the sut (2) and under the provisions of sect. 105, ante, a party who does not appeal from the order is thereafter precluded from disputing its correctness. It has been held that no appeal lay in a suit or proceeding under the Agra Tenancy Act, 1901,(3) and that O XLIII. gives no appeal against an order of remand not passed under this rule,(4) or against an order setting aside a dismissal of 1 suit under O IX, r. 4 (5)

24 Where the evidence upon the record is sufficient to

Where evidence on record sufficient, Appellate Court may determine case finally. enable the Appellate Court to pronounce judgment, the Appellate Court may, after resetting the issues, if necessary, finally determine the suit, notwithstanding that the

judgment of the Court from whose decree the appeal is preferred has proceeded wholly upon some ground other than that on which the Appellate Court proceeds

"Determine the suit"—See notes to r 23, ante The word "may" heloro "after resulting the issues" (6) was substituted for "shall" in the last Code by sect 51, Act VII of 1888 Where a Court of first instance after taking evidence dismisses a suit upon a preliminary objection without giving a decision upon the merits of the case and the decree is reversed on appeal, the Court of Appeal, if it considers the evidence on the record sufficient may decide the case, and is not bound to remand it for trial under sect 562 (now r 23) (7) If the evidence is insufficient the Court should proceed under the next rule or r 27 This rule does not enable an Appellate Court to declare a right in favour of one of the parties where no issue has been fixed on the point, and the right has not been set up in the Lower Court (8) But if all the points in dispute are covered by the issues and there is a vidence to decade them, there cannot be a remand (9) Where a Court of first appeal omits to determine a material issue of firet, the High Court as a Court of second appeal was held not competent under this rule

kuppalan v kunjuvalii, 9 M. L. T 373
 (1911)

⁽²⁾ Madhu Sudan Sen e hammi Kanta Sen, 32 C 1023 (1905), foll Salg Ram a, Brij Bilas, 29 A 650 (which case has since been overruled in Uman Kuuwari e Jarhandhan, 30 A 470 (F B) (1905) and not followed in Lakshmur Maru D.vr., 37 M 29 (1914) and see Bakuuta Aath Dey e Vawab Sahmulla, 6 C L J 547 (1907), Gulzari Mal v Habir un missa 30 L 191 (1908)

⁽³⁾ Vilayat Husen r Mahen Ira Chandra Nandy, 28 A. SS (1900)

⁽⁴⁾ Vijayaraghava v Komarappa, 22 M. L. J 400 (1912)

⁽⁵⁾ Wahid un masa : Aundan Lal, 35 A. 427 (1913)

⁽⁶⁾ See Sharkh Futteh Ooilah v Oomdanssa Bibee, 14 W R oJ 70 (1870), where the duty as to resettlement of issues was pointed out.

 ⁽⁷⁾ Bandi Subbayya v Madalapatti 3 M
 96 (1550)
 (8) Official Trustee v Krishna Chandra

¹² C. 239, a. c., 12 I A. 160 (1885)
(J) Radha Prasad Singh r. Lal Sahab Ras,

^{13 4} w3 & c 1" 1 4 Lot loo (10,0).

to determine such issue itself, but should refer it for determination to the Court. of first appeal (1) But see now sect 103, ante

25 Where the Court from whose decree the appeal is preferred has omitted to frame or try any issue, Where Appellate Court may frame issues and or to determine any question of fact, which

refer them for trial to Court whose decree appealed from.

appears to the Appellate Court essential to the right decision of the suit upon the merits, the Appellate Court may, if necessary, frame issues, and refer the same for trial to the Court from whose decree the appeal

is preferred, and in such case shall direct such Court to take the additional evidence required;

and such Court shall proceed to try such issues, and shall neturn the evidence to the Appellate Court together with its finding thereon and the reasons therefor.

Omission to frame or try issue -See notes to r 23 Prior to sect 52 of Act VII of 1888, sect 566, which this rule replaces, contained in place of the words "if necessary" the words "and the evidence upon the record is not sufficient to enable the Appellate Court to determine such assue or question" The rule, it has been said, is intended to provide for cases where some point has come to light in the Appellate Court which has not been raised or the importance of which has not occurred to the parties or to the Judge in the Court below (2) Where, however, though no specific issue has been framed on a particular question yet the matter has been tried and determined without any objection on the part of the plaintiff who has not been taken by surprise, but was fully informed by the defendant's list of documents and from cross examination of his witnesses that the defence would be taken, it is undesirable in general that the case should be sent back to be retried on a special issue framed as to that particular question (3) The expression "determine any question of fact" means in a legal manner (4) The Court may (5) frame issues (6) provided that there has been an omission (7) on the part of the Lower Count The Appellate Court should frame the issues which are essential and send them to the Lower Court for trial, but should not remand and direct the Lower Court to frame the issues (8)

⁽¹⁾ Sheo Ratan v Lappu Kuar, 5 A 14 (1882), Sohawan : Babu Nand, 9 A 26, 30 (1886), Girdhari Lall v Crawford, 9 A 147 (1886)

⁽²⁾ Anundo Lall Dass v Boycaunt Ram

Rov. 5 C 283 (1879) (3) Chundra Kunwar v Chaudhri Narpat,

^{29 1 184 (1906)} (4) Nivath Singh t Blakki Singh, 7 1 649, 655 (1885)

⁽⁵⁾ Maina v Puzl Rub, 13 M I A 573 (1870), Shenath Biswas i Luckhoo Narain Aich, 24 W. R. 268 (6) Chandi Bin v. Narain, 14 A. 366

^{(1892).} Udenath

Umer Alı

Hurpershad : Shee Dyal, 3 I A 259, 279 (1876), Goluck Chunder Sen : Paresh Maho med, 25 W R 284 (1876), Ganga Prasad t Lal Bahadoor Such, 17 A 117 (1894), Bungo Chunder Banerjeo : Chunder Nath Chucker

butty, 25 W R 47 (1875) (7) Runpal Singh i Toy Mungul, 11 W R

^{106 (1869) ,} Tiluck Chunder: Brojo Soondur 24 W R 121 (1875)

⁽⁸⁾ Chunder Nath Sarma & Ramanauth, I

W R 69 (1854)

The issues should be specifically stated by the Appellate Court | It is not sufficient to direct the case to be decided in accordance with the observations in the judge ment (1) It is always dangerous to allow parties to make a new case in a Mofussil Apprilate Court, and the Courts as a reporal rule should not allow a point not appearing in the eleadings or raised in any other way in the first Court to be framed into an issue (2) A party cannot change the nature of the case after remand (3) Where a Judge proceeds under this rule he should not reverse the decree of the Lower Court and remand the suit, but should frame the necessary issues and send them down for trial, and keep the suit pending until the return of the first Court's finding on the issues with the record of the trial (1) The efact of such an order is not a re hearing, and save as to the issues sent down the first Court has no power to deal with the case (5). The Court is to direct additional evidence to be taken, and the parties are entitled to have the opportunity of Living evidence upon the fresh issue, even though the order of remand contains no express direction to that effect (6). The parties should have the fullest opportunity to produce their evidence (7) When a case is remanded by one Judge and subsequently comes before another of equal jurisdiction (8) or the Judge's successor. (9) the latter officer cannot set aside the order of remand. So where a Judge remanded a case to be tried on a certain issue and directed the Munsiff to any plaintiff a decree according to the decision at which he would arrive, and the case went back in appeal before another Judge, it was held that the Appellate Court was limited to seeing whether the issue was a proper issue or not, and could not go behind the order (10) A Court to which a case is remanded for retrial, on a particular issue amongst others, cannot on remand allow that issue to be ahandoned and proceed to try the case upon the other issues raised. (11) nor can the Court refer the case to an arhitrator. (12) and when the case is remainded to the Lower Appellate Court for findings on certain issues.

- (I) Grish Chunder Lahuri v Soshi Shik harra-lwar Roy, 4 C W N 631 (1900)
- (2) Harpushade Sheo Dyal, 3 A 259, 279 (1870); Sreenath Bisway v Luckee Narain Arch, 24 W R 268 (1875); Ram Naram Roy v Nihaonee Adhikarce, 27 W R 169 (1875); Pran Kishen Del, v Mahomed Amer. 21 W
 - R. 338 (1574), Ustooruna Mohun Lal, 21 W R. 333 (1874), Brojo Soondur a Fatick Chunder, 17 W. R. 407 (1872); Illikka Pak ramar a Kutti Kunhamed, 17 V. 69 (1893)
 - (3) Radha Kishore: Mahtab Chund, 3 W R Mise 5 (1865), Norendro Coomar Dutt: French, 3 W R 198 (1865)
- (4) Boncharce Chose v Annoadden Bis was, 21 W R.137 (1975). see Umbaka Churn Mundle v. Rem.lhar, 11 W R. 35 at p. 36 (1869). Whise v. Ishan Chunder Bancuer, 41 W R. 350 (1870). In Ganga Monee t. Issue Chunder, 17 W R. 405 (1872), it was held that the rregularity in procedure did not affect the ments of the cwe, Abdid r Pajaz, 15 C. W N. 575 (1911).

- (5) Gassau Dowlut Geer Bissessur Geer,
- 22 W. R. 207 (1874)

 (6) Kalo Churn Chuckerbutty i Muggun
 Chuckerbutty, 10 W. R. 401 (1805), and see
 as to evidence additional to that on the record,
 Ram Sunkur v. Nilkant Biswas, 9 W. R. 302
 (1808)
- (7) Lakoo Mundal (Bhooban Mohun Chattergee, 17 W R 301 (1872)
- (8) Birjo Soondur : Juggut Chunder, 21 W It 199(1874), Kharag Pravad v Durdham, 14 \ 348 (1892)
- (9) Lulect Panday v Brinath Singh, 14 W R 285 (1870), Wise v Ishan Chunder Banerice, 14 W R 380 (1870)
- (10) Bodun Burooah t Abdul Gunny, 19 W R 281 (1873) See also Suraj Din v Chattar, 3 A 755 (1881)
- (11) Shib Chund Lahiri t Joymala Dast, 7 C L. R 103 (1880)
- (12) Nand Ram v Pakir Chand, 7 A 523, 526 (1885)

it is not competent to that Court to delegate the decision of those issues to a Court subordinate thereto, (1) for when issues are remitted under this rule, such issues are triable only by the Court which was originally seized of the case (2) There is no appeal under the Letters Patent from an order referring to issues for trial (3)

"Return "-Where an Appellate Court has made an order under this rule the return to such order must be made to the same Court, and such Court is not competent to transfer the appeal for disposal elsewhere (4) Where a Judge has heard the argument on some of the issues and expressed his decision upon them, he is not bound to hear the whole case on the return made to another issue framed under these sections (5) The findings upon issues remanded by the High Court in second appeal cannot be challenged upon the evidence as in first appeals, but objections to these findings must be restricted to the limits within which the original pleas in second appeal are confined (6) In certifying to the High Court the findings on issues sent back on remand and found by the Court of first instance, the Lower Appellate Court is, in the absence of any admission by the party against whom the issues have been found bound to form its own opinion on the evidence and record its findings with the reasons for them (7) Where a party is dissatisfied with a decision and appeals and re opens the whole case, he must acquiesce in the result finally arrived at by the Court below in accordance with the instructions of the High Court in his special appeal (8)

(1) Such evidence and findings shall form part of the 67 1

be put on record Objections to finding. to any finding

Finding and evidence to

record in the suit, and either party may,

within a time to be fixed by the Appellate Court, present a memorandum of objections

(2) After the expiration of the period so fixed for presenting such memorandum the Appellate Court shall Determination of appeal proceed to determine the appeal

Objections —The Appellate Court on the return of the finding and evidence should fix a reasonable time (9) for the parties to file their objections If no objection is raised by either party within the period allowed, neither has a right to be heard, though the Court has a discretion to allow objections afterwards and if no objection be raised then or at the hearing, the Appellate Court is not bound to amend the finding hut apart from any objection by the parties it

(155.)

Sabri v Ganeshi, 14 A 23 (1891) (2) Alı Sher Khan v Ahmad Ullah, 29 A

^{600 (1907)} (3) Kalı Kristo Pal Chowdhry : Ram

Chunder Nag 9 C L. R 401 (1881) (4) Uht Naram Singh v Jhanda 15 A

^{315 (1893)} (J) Lachman v Jamna, 10 16...

⁽⁶⁾ Balkishen : Jasoda Kuar 7 A 115 (1885)

⁽⁷⁾ Ramchan Ira Govin I Manik & Sono Sarl hhot 19 B 551 (1894) and see Bhagtan v Kesur Kuverji 17 B 4-8 (1892)

⁽⁸⁾ Gungaram Dutt : Chow lhr.) Jun majoy, 1 C. L. R 144 (1877)

⁽⁹⁾ S c Bukhtouree r Mcl en Lall 3 lgr s Jü

0 41, r 27

should examine and test them to see whether or not they ought to be accepted (1) Objections which might have been but were not made under this rule in a Lower Appellate Court to the findings on remand of the Court of first instance cannot be raised for the first time as grounds of second appeal from the Lower Appellate Court's decree (2)—In case of an unnecessary remand under the last rule, it is competent to the Judge hefore whom the appeal subsequently comes to disregard the finding on the order of remand (3)—The Court is in any case hound to cours der the findings of the Lower Court on the ments (4)

- 27. (1) The parties to an appeal shall not be entitled to a produce additional evidence, whether oral or ditional evidence in Appellate Court. But produce additional evidence in Appellate Court. But
 - (a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
 - (b) the Appellate Court requires any document to be produced or any witness to be examined to cuable it to prouounce judgment, or for any other substantial cause.

the Appellate Court may allow such evidence or document

to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

"Additional evidence"—There ought not to he a remand for the purpose of enabling a party to make out a fresh case. If cases were remanded for the purpose of allowing parties to improve their respective cases by calling further witnesses there would he no end of hitigation (5). It is always dangerous to allow parties to make a new case and call fresh evidence upon an issue on which they have fuled upon the evidence originally adduced in support of it and more expressly so in the Mofussil Courts (6). The power given by this rule should be exercised sparingly except at the instance of the parties (7) and then with caution. An appellant, who has had ample opportunity of giving evidence in the Court below and elected not to do so, but to rest his case on the evidence which

Damodar Das v Gopal Chand 7 A
 Ol (1884), Ratan Singh t Wazir 1 A
 165(18:6), Mumtaz Begam t Fatch Husain
 A. 301 (1884), Abbari Begam t Wilayat
 A 2 A 908 (1880)

Ali 2 A 908 (1880) (2) Muhammad Abdul Hai : Sheo Bishal Rai, 10 A- 28 (1887)

⁽³⁾ Mubarak Husam t Bihari, 16 L 306 (1891), Ganendra t Surya kant, 17 C W N 462 (1912)

⁽⁴⁾ Umed Ah t Sahma Bibi 6 A 383 (1884) Woomesh Chunder Roy t Jonardun

Hajrah, 15 W R 235 (1871)

(5) Ram Pershad Sookul t Rajunder
Saloy 6 W R 262 265 (1866)

⁽⁶⁾ Hurpurshad t Sheo Dyal, 31 A 259, 279 (1876)

⁽⁷⁾ Sreeman Chunder Deyr Gopaul Chunder Chuckerbutty 11 M. L. A. 28, 48, 49 (1866)

he could have given below (1) Ordinarily speaking it is only when a Court sees that from some madvertence, mistake, or surprise a party has not adduced evidence which he was capable of adducing, and that he is likely to he prejudiced by the omission, that the Court should allow further evidence to he taken (2) The test as to whether additional evidence should be received depends on the question whether or not the Appellate Court requires the evidence ' to enable it to pronounce judgment" or for any other substantial cause, and as to this the Appellate Court is to be the sole judge (3) The word ' requires" means needs or finds uccdful The legitimate occasion for this rule is when on examining the evidence as it stands, some inherent lacuna or defect becomes apparent, and not where a discovery is made outside the Court of fresh evidence, and the application is made to import it. That is the subject of review of judgment (4) An application to admit fresh documents the genuineness of which can be tested with certainty, stands on a much more favourable footing than an application to admit fresh parol evidence after the pinch and pressure of the case has been sustained, (5) but they should not be admitted if the appellaut cannot show sufficient cause, (6) or generally if having had an opportunity of tendering them in the Court below he omitted to do so , (7) or resisted their production , (8) or if they do not bear on the issues tried by the Court of first instance (9) Where the Appellate Court, with the assent of both sides, examines witnesses and also admits documentary evidence, and there is nothing to show that such admission was objected to, it is not open to any party ou appeal to the Privy Council to take exception to the regularity of this procedure (10) As each case must depend on its own circumstances it is not profitable to deal in detail with the eases in which additional evidence has been allowed or refused (11) A local inquiry may be ordered under this rule (12) The improper reception of evidence under this rule is not sufficient to reverse a decision if, independently of that

⁽¹⁾ Ram Das Chakarbativ Official Liquida tor, 9 A 366 (1887)

⁽²⁾ Gowhur Ali Khana Sakheena Khanum, 15 W R 507 (1871)

⁽⁷⁾ In the goods of Prem Chand Moonshee, 21 C 484 (1894), Addaypa Pillar: Muthu kumara Thovan, 36 M. 477 (1912), and Juba Naidur Ethirajammal, 22 M. L. J 15 (1911) (meanure of "substantial cause")

⁽⁴⁾ Kesowpi Isaur B G I P Radiway Co., 31 B 381 (1907), Midnapur Zamindary Co., 11 td. v Muktakashi, 17 C W N 615 (1912), Krishnama v Narasimha, 31 M 114 (1908), Jagom Kunwar v Durga Prasad, 36 A 93, 19 C L J 165 (1913), P C

 ⁽⁵⁾ InreWittehre Iron Co., JCh App 419
 (6) Nadhar Chand : Chunder Sikhur, 15
 C 705 (1888), Durga : Jai Naram, 33 \ 379 (1911)

⁽⁷⁾ Bibeo Zahrah : Bhugwan Diss, 16 W R 211 (1971)

⁽⁸⁾ Wan har Ganesh t Jakhunram Gavindrum, L. B. 217 (1887)

⁽J) Lesuer Mender, 17 W R 390 (1872) (10) Jagarnath Pershad : Hanuman Per shad, 36 C 833, 13 C W N 830 (1909) (11) See Abelakh Roy : Guggun Bhuggut 22 W R 268 (1874), Shaikh Komarooddeen Monye Mundal, 16 W R 220 (1871), Appa t Vithoba, 6 B H C R , H. C J SS (1869) [section applies not merely to case where Lower Court has refused to take evidence but also where there is substantial cause for taking further ovidence], Mohesh Chunder Doss v Wadbub Chunder Sirdar, 13 W R 85 (18"0), Khuda Baksh v Imam Ah Shah, 9 A 339 (1886), Srimiyasa Chariar t Ran gammal, 18 W 94 (1894), Arjun t Shanlar, 22 B 253 (1896) , Jadu Nath Mookerjee " Hari Pada Mookerjee, 1 C W N lxxx (1897) [omission to summon and rejection of documents], Dhon lo Gobin l t Panha Lal,

¹ Bom. L. R. 110 (1899), Seshan Pattar r Seshan Pattar, 23 M. 147 (1894) (12) Roy Seoltana Lalos Koocr, 17 W. 1 300 (1872)

evilence, there is sufficient evidence on the record (1) It has been held that on an appeal against an order made under O XVII r 3, when the plaintiff was present, but his witnesses were not, and no application for adjournment or to enferce the attendance of the witnesses was made, the Appellate Court should proceed under this rule to direct the admission of fresh evidence, and under 7 25 of this Order to refer the issues (which in fact had never been tried) for trial to the Court of first instance, directing that Court to return findings (2)

the power can be exercised even after the case has been remanded on special appeal (3) It is not necessary that the party before applying to the Appellate Court should have sought for a review of the original Court's judgment and asked at to receive the evidence (1) After a review has been admitted fresh evidence may be taken under this rule (5)

An appeal does not be from an order admitting or refusing to admit additional evilence (6) but both may be considered in an appeal from the final decree unk so the appellant has taken advantage of the order and so cannot subsequently impugn it in appeal (7) Where the Subordinate Judge in appeal took evidence and the case was heard in second appeal, it was held that the fact of the Lower Appellate Court taking additional evidence did not make the special appeal hable to be heard as if it were a regular appeal (8). The rejection of an appeal under this rule gives no right of appeal to the Privy Council (9) This and the next rule are not it has been held, applicable to proceedings before Civil Courts un her sect 195 of the Criminal Procedure Code (10)

Record of reasons for admission. - They are strictly required (11) and should be stated in open (ourt in the presence of the parties (12) It is a salutary provision which operates is a check against a too easy reception of evidence it a late stage of hitigation, and the statement of the reasons may inspire confulence and disarm objection (13) But such record of reasons is not a condition precedent to the reception of the evidence, so that the omission to do so would not render the evidence madim sible (14)

⁽¹⁾ Maharajah Jagadindra Banwasi t Bhabatarini Dast, 5 R. L. R. App 54 (18"0)

⁽²⁾ Ram Saraint Jagdeo 33 1 630 (1911) (3) halt laristo l'agore i Jud o Lall Mul 1 ck 24 W P 20 (1875)

⁽⁴⁾ Ram Lill t Rung Lall 17 W R 47 (1872)

⁽⁵⁾ Beharce Lall Nundeo : Frojluckho Movce Burmonce 12 W R. 223 (1869), and see Gunesh Ram Surmah v Rohmee Dassee 14 W R 236 (1870)

⁽⁶⁾ Kulpo Singh v Thakoor Singh, 15 W R 429 (1871) Golam Muk toom v Hafeezoonissa, 7 W R 489 (1867), Mohesh Chunder Shah v Shosheo Mookkee 6 W R 196 (1866) though the retusal to excress discretion would be an error in procedure Ram Pears t Kallu, 23 A 121 (1900)

⁽⁷⁾ Mohunt Damoodur : Ritoo Singh 24 W R 325 (1875)

⁽⁸⁾ Mahome I Karul v Abdool I utect 23

W R 57 (1875) (9) In the goods of Prim Chan I Moonshee. 21 (484 (1894)

⁽¹⁰⁾ Ramalyere Venkatachela Padayachi 17 M L. J 123 (1906)

⁽¹¹⁾ See Sreeman Chunder Dey v Gopaul Chunder Chuckerbutty II V I A 28, 48 (1866), Hurparshad v Sheo Dyal 3 I A 2.9 (1876). Gunga Gobind Mundal t Col lector of 24 Purgunnahs II M I A 345, 368 (1867)

⁽¹²⁾ See Gunput Roy : Ram Deen Roy,

²¹ W R 416 (18°4) (13) Gunga Gobind Mundal v Collector of

²⁴ Purgunnahs 11 M I A. 345 368 (1867) (14) Ib , Bhugwan Chunder & Ray Coomar, 13 W R 303 (1870), Gopal Singh 1 Jhakri Rai 12 C 37 (1885), Hafiz Abdul kurim v Sri Kissen Pai 11 C 139 (1884)

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Mode of taking additional evidence is allowed to be produced, the Appellate Court may either take such evidence, or direct the Court from whose decree the appeal is preferred, or any other subordinate Court, to take such evidence and to send it when taken to the Appellate Court

"Or direct the Court"—If the order is for the taking of particular evidence the Lower Court cannot go beyond it and take other evidence, (1) though in a case where A was directed to be examined and was ill, his agent was allowed to be examined in his stead (2) It has been held that the lower Court taking evidence acts in a ministerial capacity (sed queere), and that the parties may object to the admissibility of the cyclence recorded before it without objection, when it is submitted for the consideration of the Appellate Court (3)

29 Where additional evidence is directed or allowed to Foints to be defined and be taken, the Appellate Court shall specify the points to which the evidence is to be confined, and record on its proceedings the points so specified

Judgment in appeal

30 The Appellate Court, after hearing the parties or mere pronounced the proceedings, whether on appeal or in the proceedings, whether on appeal or in the proceedings, whether on appeal or in the proceedings, whether on appeal or in the cone may be considered necessary, shall pronounce judgment in open Court, either at once or on some future day, of which notice shall be given to the parties or their pleaders

"After hearing"—It is the duty of the Appellate Court to allow the parties or their pleaders to submit the evidence to it at the hearing in open Court, and to make upon the evidence so submitted every comment and found upon it every argument they may think necessary. To succeed in an appeal on the ground that the Judge had neglected or misconceived his duty on this point the affidavits containing frets proving such an illegation ought to be perfectly clear and exhaustive, and should leave no doubt upon the subject excluding the possibility of the Judge having done that which it was his duty to do. The judgment may be given at once. But there are cases especially complicated eases, in which it is desirable that the Judge should have an opportunity of considering the evidence at leasure before giving judgment (1). This rule only

Bolakce Lall : Radha S ng I W R 357 (1861)

⁽²⁾ Rajah Syul Thined v I naet Hossein 1 W R 330 (1864)

⁽³⁾ Ram Joy Surmah : Prankishen Sugh 2 W R 80 (1805)

⁽¹⁾ Jugge-sur Sahoy: Gopal Lall J. W R 51, '5 (1871)

authorizes the Court to pronounce judgment after hearing the parties and judgment pronounced without hearing them is unauthorized by the Code. This where the appellant died hefore the hearing of the appeal, but his pleader did not know of his death until after the appeal had heen decided, and an application of his son to the District Judge to have his name placed on the record, and the appeal reargued, was rejected. held by the High Court that as the representative of the pluntiff appellant applied within the prescribed timo to have his name entered on the record, the Court was bound to enter his name, and in not doing so the Court failed to exercise a jurisdiction vested in the Jaw. As the judgment was pronounced without hearing him, it was unauthorized by the Code (1) It has been held that the senior pleader who is present before the Court has the entire control of a case in the High Court, and that it is not open to the jumor pleader to take any ground of appeal which his senior has not thought fit to argue, except only when the senior has obtained the permission of the Court that that course should be taken (2)

31. The judgment of the Appellate Court shall be in [Contents, date and siz- writing and shall state-

nature of judgment (a) the points for determination,

(b) the decision thereon,

(c) the reasons for the decision, and

(d) where the decree appealed from is reversed or varied, the relief to which the appellant is entitled, and shall at the time that it is pronounced be signed and dated

by the Judge or by the Judges concurring therein

by the Judge of by the Judges concurring there

Judgment of Appeal Court.—The duty of the Appellate Court is not to interfere with the judgment of the first Court until it is perfectly satisfied in its own mind that the conclusion arrived at by the first Court is erroneous. If there is any doubt in the case, the benefit of that doubt ought to be given to the respondent and not to the appellant, for it must be presumed in law that the judgment of the Lower Court is right until the contrary is shown. No doubt the Appellate Court may make further inquiries, but such inquiries ought to be made with discretion and only in those cases where the Appellate Court finds it unable to do justice to the parties on the evidence and material as they stand upon the record (3). The judgment therefore, of the first Court, if not shown to be erroneous, ought to he affirmed, and it is for the appellant to show manifest (4) errors in the decree appealed from (5). The Court of Appeal ought to give great weight, but not undue weight, to the of minor of the Judge who tried the cause and saw the witnesses and their demeanour. That gives him considerable advantages over those who only draw this information from

⁽¹⁾ Jonardhan v Ram Chandra 26 B 317

^{319 (1901),} s. c., 4 Bom. L. R. 23

⁽²⁾ Sreeneebash t Umbika, 12 W R. 3"5 (1809)

<sup>228, 229 (1871)
(4)</sup> Shetabdre Biswas r Molamdoe, 25 W
R 30 (1875)

⁽⁵⁾ Wise r Sunduloonissa, 11 M I A 177,

⁽³⁾ Taliboonusa r Sham Lishore, 15 W R. 181 (1507)

perusing the notes But still, though the Court of Appeal ought not lightly to find against the opinion of the Judge who tried the cause, that Court, if convinced that the inference in favour of the plaintiff ought not to have been drawn from the evidence, should find the verdict the other way (1) The parties to the cause are entitled, as well on questions of fact as ou questions of law, to demand the decision of the Court of Appeal, and that Court cannot excuse itself from the task of weighing conflicting evidence and drawing its own in ferences and conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect (2) "If we are to accept," says James, L J, "as final the decision of the Court of first instance in every case where there is a conflict of evidence, our labours would be very much lightened But then, that would be in truth to do away with the right of appeal in all cases of nuisance, for there is never one brought into Court in which there is not contradictory evidence, and there have been, I am satisfied, a larger percentage of appeals in those cases than in any other "(3) And therefore the Judge of an Appellate Court ought to explain his own views instead of merely saying that he adopts those of the first Court (4) It has been said as regards the rule of the Privy Council not to disturb a judgment of a Court in India upon a question of the credibility of witnesses, unless it is manifestly clear from the probabilities attached to certain circumstances in the case that the Court below was wrong in the couclusion drawn from such evidence, that however necessary as regards a Court of Appeal far removed from India, it need not be extended as one equally necessary and applicable with the same strictness, to a Court of Appeal in India, which has the opportunity of calling witnesses and has all the advantages to be derived from a personal acquaintance with the prople, their feelings, liabits, and character as well as other local advautages (5)

The dismissal of an appeal under sect 551 (now r 11) by a Court whose decision may be the subject of an appeal, does not relieve the Court from the necessity of writing a judgment which, according to the provisions of this rule, should show the points raised, the decision upon those points, and the reasons for deciding them Thus, where in Appellate Court's judgment was simply "Appeal rejected under sect 551 of the Code of Civil Procedure, ' held that

⁽¹⁾ Smith v Chadwiel L R 9 A C'187, 194 (1884), per Lord Black burn

⁽²⁾ The Glanmbanta 1 P D 283 287

⁽¹⁸⁷⁶⁾ (3) Bigsby v Diel inson, 4 Ch D 24 29 (1876), see also Akhari Begum v Wilayat 11, 2 1 908 (1880), Mumtaz Begum v I atch Hussain, 6 A 3J1 (1884), compare Nobm t Rungochunder, 25 W R 363 (1876) . Hoymobutty t Sreeki sen, 14 W R 58 (1870), Anun l : Rutnessur, 25 W R 50 (1875), where it was held that the Appellate Court should not disbelieve the witnesses believed by the first Court without good reasons for doing so and that it is n tju tile 1 on beleving a vite as whose it in amour was

declared, by the first Cour to be unsatisfac tory, Gopeo Nath : Boo lhumunt 25 W R

^{26 (1875)} (4) Rohmoni z Zamruddin, 8 C L R

^{597 (1881)} (5) Sarodasoondery : Tincowry Nun ly 1 Hyde, 223, 252 (1862) in which it was als? held that a Court of Appeal cannot refer to

avidence in another e ise But see Heera Loll Wohesh Chunder, 1 Hyde, 105 (1862), when it was held that the High Court sitting in

from the Oll Sujects Court

the julument was not in conformity with law and the ease was remanded for disposing of the appeal according to law (1)

1 Court of second appeal cannot enter into the merits of the appeal, in order to accertain the weight of the evidence produced in support of the allegations of the parties. So it will insist upon having before it findings recorded in a judgment which strictly conforms to the imperative rule laid down in this rule The rule here had down cannot be too strictly enforced A judgment which falls short of complying with the clear provisions of this section is, as such worthless for the purpo es contemplated by the law Its imperative provisions apply able to cases remained by the first Appellate Court for trial of assues and to the c in which no such remand has taken place (2) As the High Court in second appeal is bound to accept the findings of fact arrived at by the Lower Court it should must upon a due obedience by those Courts of the mandate contained in this rule (3)

Under clau e (42) of the Letters Patent the Judges of the High Court are bound to record the reasons for their decisions and these reasons should on appeal to England be transmitted with the record for information at the hearing by the Judicial Committee (4) These reasons should be stated publicly at the hearing and not reserved to influence the Court of Appeal (5) But it has been held to be doubtful whether the former section applied to cases where the High Court having heard the judgment of the Court below and argument upon that judgment came to the conclusion that it was right and agreed with the reasons which it _ ive (6)

It was held that on remand under sect 366 of the last Code that sect 367 required the lower Court of Appeal to proceed to determine the appeal Sect 571 required it to pronounce judgment and sect 574 (this rule) was imperative as to what the judgment was to contain The Appellate Court was required to give its own decision and the reasons for it upon the issues remanded to the original Court under sect 566 (7) These provisions apply able to cases remanded by the first Appellate Court for the trial of issues and to those in which no such remand has taken place (8) A Judge having remanded a case for further evidence to be taken and a fresh finding recorded on a question of fact is bound though there is no memorandum of objection, to examine into the correctness of the finding and come to a conclusion whether he accepts it or not unless its correctness has been admitted by the party to whom it is

⁽I) Rami Deka r Brojo 25 C 9 (189) this case was dissented from in Samin Hasa v Piran 30 A 319 (1908) but followed in Sarayana Pillai i Sesha Reddi 31 M 469 (1908)

⁽²⁾ Ahmed Alı : Salıma Bibi 6 A 383 (1884), Mumtaz Begum : Fatch Hussain 6 A 391 (1884), Schawan v Babu \and 9 A 26 (1886) Bhagvan t Kesur Kuverji 17 B 428 430 (1892) Ramchandra Govind e Sono Sadashiv 19 B 551 (1894) and as to sudgment on remand for further systence sce Kunhi Marakkar v Kuth Umma 20 V 496 (1897)

⁽³⁾ Sohawan t Babu \and 9 A 20 31 (1886) Mont Lal v Uma Charan 19 C L. J

^{541 (1913)} (4) Katchelabyana Rungappa v Kachivi Lava Rungappa 12 M. I. A. 495 502 (1869) (a) Richer v Vover L R 5 P C 46I

^{481 (1874)} (6) Sunday Bibi v Bisheshar 9 A 93 9.

⁽¹⁸⁸⁶⁾

⁽⁷⁾ Bhagvan a Kesur Kuverji 17 B 428 430 (1892) (8) Umed Alı : Salıma Bibi, 6 A 383

^{(1884),} Mumtaz Begum v Fatch Hussain 6 A 39I (1884)

adverse (1) An appellant is faily entitled to an expression of opinion of the Appellate Court on the grounds taken in the memorandum of appeal (2) If, however, the Appellate Court is not asked to express any opinion on any particular ground of appeal stated in the memorandum of appeal, the Court is not at fault if no decision is passed upon it. If, having had his attention called to it, a Judge fails to decide such point, the proper course for the parties aggreed is to ask him to review his judgment. In order to satisfy the High Court that a point which the Judge omitted to notice was actually taken in the oral pleadings, a party may put in either an affidavit of some person who heard the point raised or a copy of the petition to the Judge drawing attention to the omission with his order (3) Where this rule has not been complied with and action is required, the Court may either reverse the decree and remand the case for a fresh decision, (4) and this is generally done, or the Court may (it has been said), without reversing the decree, retain the case on appeal, but return the proceedings in order that the Lower Court may state its reasons (5) But though a decision may not be as clear as it might have been, if there are words to be found which substantially dispose of the case set up the Court may consider it nnnecessary to remand for a clearer finding (6) It is, however, no objection that a judgment is short if it sufficiently appears that the evidence has been considered and the Court has given its opinion thereon (7) As to whether a Lower Court's omission to comply (8) with the terms of this rule can be considered a ground for second appeal sec notes to sect 100, ante

Clause (a)—The necessity for this clause is obvious it being the foundation of those which follow. The point or points on which the appeal has to be decided should be set down distinctly (9). And it is a convenient practice which keeps the decision on each point and the reasons therefor separate from the rest.

Clause (b)—The judgment should clearly and fully dispose of all the points in issue between the parties by a distinct finding on each of them (10)

⁽¹⁾ Kunhi Maral at Haji r Kutti Umma, 20 M 496 (1991), Subbayya r Rami Reddi, 22 M 344 (1899)

⁽²⁾ Muhammad Ahma I v Zubada Jan, 10 1 A 205, 211 (1889), s. c. 11 A 460, 470 Fayami aul v Saschachalla Nail er 10 M 1 A 129 4 36 (1865)

⁽³⁾ Yu cof Mr a Fyzioni sa 15 W R 206 (1871)

⁽¹⁾ Haimabati Daviv Govinda Chandra, 2 C. W. N. 635 (17 (1898), Kristo Chundera Ram Brohmo 20 W. R. 403 (1873) and municrous cases

⁽⁵⁾ Dooke Chand i Oomda Begum, 17 W R 472 (1872), Bisvanath Marti i Badya nath Mun lul, 12 C 193 (1885), Assanullah i Hafiz Mahomed Ah, 10 C 932 (1884), Arato (hundei i Ram Brohme, upra)

⁽⁰⁾ Shurbessur Chose : Sadhoo Churn, 15 W R 130 (1871)

Hafiz Mahomed Ah, 10 C 932 (1884). (10) Bhagbut Khan r Paldo Bewa, ³ WR 152 (1865) (b) Shurlessur Ches r Sailte Chun, 75

W R 130 (1871)

⁽⁷⁾ Ramessm : Shail h Banoo, 12 W R 372 (1869)

⁽⁸⁾ See Doolee Chand t Oomda Begum, 18 W R 473 (1872), Pamessur t Bhauo, 12 W R 273 (1879), Kamata t Amat, 8 B 308 (1884), Purshotam t Durgoj, 14 B 43 (1890), Nun,ajup r Shivappa, 19 B 23 (1894), Gopal Rao r Kribor Kali ka, 9 B 277 (1885) Bisvanth Mutt v Bardyandh Mundul, 12 C 199 (1883), Golam If csent Ram Gopal, 12 W R 152 (1861), Shun sqirod by r Jan W themed, 21 W R 260, 21 (1871)

Sect 565 of the last Code was held to enable the Appellate Court in some cases to determine a question of fact upon the evidence then on the record, but not to declare a right in fayour of one of the parties, where no issue had been framed on the point, and the right had not been set up in the Lower Court (1). The Judge should specifically decide each point or noints raised and give his reasons It is not sufficient to say that by confirming generally the order of the Lower Court it has therefore virtually tried and disposed of the particular point when no mention has been made by it (2) Where the Appellate Court does not sufficiently consider important matters, such as sufficiency of notice or a question of the nature of a tenure, its judgment will be set aside (3)

Clause (c) - Having stated the points for determination and the decision thereon, the Court must state its reasons therefor (4) The provisions of this rule are imperative, and require the Appellate Court to give its own decision and the reasons for it (5) and a judgment which falls short of complying with the clear provisions of this section is, as such, worthless for the purposes con templated by the law (6) It is not, however, laid down in this rule that the underment of the Appellate Court, any more than the underment of the Court of the first instance, is to contain a review or setting forth of the whole of the evidence, and therefore it can hardly be assigned as an absolute error if a judgment is defective on this point. Although the law does not require a detailed examina tion of the cyidence, yet the Judge does well who gives an intelligent and char account of the evidence which he has had to consider, and states the reasons for which he thinks particular portions of the evidence to have heen more or less worthy of consideration The Judge of the Appellate Court who most fully gave his reasons or his judgment and most fully entered into the merits of the case before him would be held to have most efficiently and intelligently carried out the duties required of him (7) In certifying to the High Court the findings on issues sent back on remand the Lower Appellate Court in the absence of any distinct admission by the appellant's pleader that the finding of the first

(1) Official Trustee of Bengal : Krishna Chandra 12 C 239 246 (1885), s e 12 1 1 166, 170

(2) Radha Golund : Ram Kishore SW R 340 (1876), Hannabalı Dası ı Govinda Chan Ira 2 C W N 075 (1898) [decision by implication1

(3) Perlap Narain : Waigh Lal 13 C W N 949 (1909) Shaharulla e Bangoo Mondal, 13 C W N 143 (1905) Santishwar : Laklit Kanta, 13 C W N 177 (1908)

(4) See Shurbessur : Sadhoo Churn 15 W R. 130 (1871) . Raj Chun ler e Ramakant 15 W R 324, 326 (1871), Hossem Buksh r Ameena Khatoon, 15 W R 280 (1871) horban Mit Ashan M, 4 W R. 4 (1863). Rughubeer Sahai t Chaltrajut 1 Agra, 73 (1806), Dhun Rae e Ramphul Rae. 2 N P H C R 101 (15"01 Sohawan s

Babu Nand 9 A 2n 28 (1886) Karım Baksh t 1 ucas 2 (W N cccxxxix (15 is) Hurt Das 11 (I R 131 (1882) Ram Daka + Brojo 2 + ()" (1897) Gun darpa : Lebo a 1 Borr L. R 490 (1833) . Arpa Kaha Nask : Mallu 16 B 477 (1891) Impt Singht Koylashor 11 W R 533/18c3) Kartick Sanit t Personomovee 2 W R "7 (1865) Hannabati Dasi r Govin la Chan ira, 2 (W \ 635, 637 (1898) Chan ler Kant t Hurrish Chun ler 1 W B 214 (1861)

(5) Bhagvan r Kesur Kuvern 17 ll 4.5, 430 (1892)

(c) I med Ali r Salima Bibi, 6 4, 383 (1854) Mumtaz Begum r Fatch Blumain, 6 4. 331 (1994) Ramchanira Gorind e Sano Sada his 13 R. Sol (1834).

(7) Noor Mahomed r Zuboor th, 11 W R. 34 (1 10 1)

such case, reasons should be stated. But there may be cases in which the Court would not think it necessary to require them (1)

Clause (d)—When an Appellate Court, in a judgment which in some insternal matters differs from the conclusion of the first Court, upholds the decree of the first Court, it must specify in the decree the exact modifications which its conclusions have necessitated, as contemplated by this rule, (2) and when treveres a decree it should state the relief which it considers the appellant intitled to (3)

32 The judgment may be for confirming, varying or what judgment may reversing the deerce from which the appeal agree is to the form which the deerce in appeal shall take, or as to the order to be made in appeal, the Appellate Court may pass a decree or make an order accordingly

Judgment in appeal.—As to functions of the Appeal Court see notes to sect 96 and r 4 and the last rule of this Order (4). The powers conferred by this rule are powers which require that parties should be in accord with each other at the time when the decree is pronounced by the Appellate Court. The use of the word 'min,' indicates discretion in a Court and does not force the Court to pass a decree in any manner which goes beyond the scope of its discretionary power. This where an application continuing the terms of a compromise was presented to the High Court by one of the parties and the Solchinama was cent down to the Lower Court for verification but the attendance of the parties for that purpose could not be procured the High Court refused to pass a decree under set 577 in necordance with the terms of the Solchinama (5)

33 The Appellate Court shall have power to pass any decree power of court of and make any order which ought to have been Appeal or other decree or order as the case may require, and this power may be exercised by the Court notwithstanding that the appeal is as to part only of the decree and may be exercised in favour of all or any of the respondents or parties, although such respondents or parties may not have filed any appeal or objections

Illustration

I claims a sum of money as due to him from λ or 1 and in a suit against both obtains a decree against Y λ appeals and 1 and λ are respondents

⁽t) Shunshuroodiy 1 Jan Mahomed (1968,

²¹ W. R. 260 (1874) (4) Kailash r. Girija Sunlari 33 C. J., 5 (2) Lachho t. Har Sabat 12 A. 40 (48 (1312)

<sup>(1887)
(</sup>a) Bandhu Bhagat t Shah Yuhammad 14
(3) Bell v Gurudas 1 B L. R A C 50 4 359, 352 (1892)

The Appellate Court decides in favour of X . It has power to pass a decree against Y

Powers -1 his rule, which is taken from English O 58, r 4, is new, and has been inserted because (as the Select Committee said) it is most imperative that an Appellate Court should have the fallest power to do complete justice hetween the parties (I) It is applicable to all cases where an appeal is heard after this Code came into force (2) The latter part of the clause is explained by the illustration (3) It is open to the Appellate Court to vary the decree appealed against, either in points (if any) in which it is erroneous or in respect of supplemental matters which are admitted (4) It is entitled to take eognizance of events which have happened since the filing of the appeal (5) or, in other words, it is open to the Appellate Court to vary a decree under appeal, not only for error, but also on grounds which have come into existence since it was passed (6) The Courts, in the exercise of the powers conferred by this rule, should not lose sight of the other provisions of the Code, nor of the Court Fees Act, nor of the Limitation Act In particular, it should hear in mind the ease stated in the Illustration (7) R 22 of this Order shows that it is intended that (prima facie at least) a respondent should not be allowed to take exception to so much of a decree as was against him without complying with the provisions of the rule (8)

"May not have filed any appeal or objection"—See notes to rr i and 22 of this Order, as also notes to seet 96, ante

34 Where the appeal is heard by more Judges than one, any Judge dissenting from the judgment of the Court shall state in writing the decision of order which he thinks should be passed on the appeal, and he may state his reasons for the same

Decree in appeal

35 (1) The decree of the Appellate Court shall bear date the day on which the judgment was pronounced.

(2) The decree shall contain the number of the appeal, the names and descriptions of the appellant and respondent, and a clear specification of the rehef granted or other adjudication made.

(4) The decree shall also state the amount of costs incurred in the appeal, and by whom, or out of what property, and in what proportions such cost and the costs in the suit are to be paid

⁽¹⁾ Rayaneshwart Chan is 38C 72f(1911) (2) Chandramarthy : Narayanasawmy, 33

M _11 (1903)
(3) Itangam Lale Jhar lu 34 % 32 (1 111)

⁽⁴⁾ Sakharam Moha lee a Hari Krishna 6 B 113, 110 (1881)

⁽⁵⁾ Mmadp : Mahamadp, I Bom L R

^{218 (1899)} (6) Rustomji i Purshotam Dis, 25 B 606 613 (1901)

⁽⁷⁾ Ratham Lai e Jhan lu 34 \ 32 (1911)

^{(5) 16}

to sign the decree.

(4) The decree shall be signed and dated by the Judge or Judges who bassed it;

Provided that where there are more Judges than one and Judge absenting from Judge and there is a difference of opinion among them, it shall not be necessary for any Judge describe.

Appellate decree.-The appellate decree is the first decree and the only decree capable of being executed after it has been passed, whether the same reverses, modifies, or confirms the decree of the Court from which the appeal was made (I) It is clear from the terms of this rule that in any case the decree to be executed, not only for the costs of the appeal, but for the costs of the suit, is the decree of the Appellate Court only The effect of the rule is to cause the decree of the Appellate Court to supersede the decree of the Court below. even when the decree of the Appellate Court is one which merely affirms that decree below and does not reverse it or modify it. The only decree that can be amended as the decree to be executed, and the decree to be executed as the decree of the Appellate Court and not the decree of the Court helow (2) If a decree is made in appeal so that the appellate decree becomes the one to be executed, time runs from its date and not from that of the original decree (3) When, however, an appellant withdraws an appeal, no decree is made. The order of the Court does not come within the definition of the word "decree" The litigation commenced with the presentation of the appeal is merely dis continued, and the ease remains as if the appeal had never taken place, and the decree appealed against becomes final, and time runs from the date of that decree (4) The only Court which has jurisdiction to amend an appellate decree is the Court of Appeal (5) When two parties to a suit appeal, so that the one

258, 200 (1894), of Mulchand : Ram Ratan,

⁽¹⁾ Shohrat Sing v Bridgmann, 4 A 376,

F B (1882) (2) Muhammad Sulaiman Khan t Muhammad Yar Khan, 11 A 267, 273, 271 (1888), Mahmood, J , dissenting See also Bhanushankar t Raghunathram, 2 Bom H C R (A C J) 106 (1865), Doulat : Bhukau Das, 11 B 172 (1886), also Sikhal Chand t Velchand, 18 B 203 (1893), Arunachellathu dayan v Veludayan, 5 M H C R 215 (1870), Noor Alı Chowdhury : Konı Meah, 13 C 13 (1886), Kisto Kinlar v Burroda Caunt, 10 B L R 101 (P C.) (1872). Manavikraman t. Unniappan, 15 M. 170, 171, 172 (1891), Nourang Rai t Latif Choud huri, 13 A 394 (1891), Jawahir Wal t Kistur Chand, 13 A 343 (1891); Pichuvay yangar 1 Seshayyangar, 18 W. 214, 216 (F. B) (1891), Nan Chand & Vithu, 19 B

²⁰ A 493, 495 (1898), Kailash t Girija

Sundarı, 39 C. 925 (1912) (3) Patlojı i Ganu, 15 B. 370 375 (1890), Noor di Choudhury i Kom Weah 13 C. 13 (1886), Muhammad Sulamman i Muhammad Yar Khan, 11 4. 267 (1888), Rup Chand i Shamah ul Jehan, 11 4. 349 (1889); Aruna Chellathudayan i Veludayan, 5 M. II, C. R. 213 (1870), Sakhal Chand i Velchand, 18 B. 203 (1893), Abdul Rahiman i Moidin Sauba, 22 B. 500, 503 (1893)

⁽⁴⁾ Patleji i Gann, 15 B 370, 375 (1890), Vythihoga i Vijayathammal, 6 M 43, 46 (1892), Hingan Khan i Ganga Pershad, 1 A 293 (1867)

⁽⁵⁾ Mubammad Sulaiman t Muhammad Yar Khan, 11 A 267 (1888), Mahmood, J, dissenting, Sheolal v Jumaklal, 18 B 542, 545 (1893)

appeal is but the cross appeal of the other, there ought to be only one final decree made between the two parties. Not only is there nothing to prevent, but it is the duty of the Court to make one decree, and only one decree, between the same parties (1) The date which the decree should bear is the date when the judgment was delivered (2)

"Relief granted," etc -A deerce should be so drawn up as to need no interpretation other than may be gathered from the language of the decree itself, and there should be no need of reference to any document or paper whatsoever, unless such document or paper is attached to the decree and forms part of it While, on the one hand, it is true that the decree should be drawn up in this manner, it is also just that litigants who have been successful should not be deprived of the fruits of their success owing to carelessness on the part of the Court or officer charged with the preparation of decrees Thus where a decree, in its terms, is ambiguous, the Court executing the decree can refer to the plead ings in the suit in which the decree was passed to ascertain its precise meaning (3) Again, where the decres omits to reserve the rights of prior mortgages admitted by all the parties to the suit, it ought to be construed with reference to the admission contained in the pleading or made in the course of the case, and ought not to be so construed as to grant a larger measure of rehef than is prayed for or to negative rights admitted by all parties (4) The decree of the Appellate Court should be drawn up in such a form as will show in itself the ultimate rehef granted If the Appellate Court decrees an additional amount and the decree as drawn up only mentions the amount decreed by the first Court, and the amount due to the decree holder is ascertainable from the decree of the first Court and the finding of the Lower Appellate Court, then he should obtain execution for the amount found in his favour and for his costs (5) This rule does not require the claim to be stated in the decree so as to make the statement a part of the decree itself (6)

Costs—It was held that the former section, when it provided that the discrete of the Appellate Court should state by what parties and in what proportion the costs in the red in the appeal and the costs in the suftwere to be prid, referred to the parties who were parties to the appeal, and not to parties who were not arrayed either as appellants or as respondents in the appeal, but who under sect 541 of the former Code, might take the benefit of the decree (7). This section referred (as does also this rule) to cases where there are more parties than one made liable for costs, which necessitate the fixing by the Court of Appeal of the proportion in which the costs are to be paid (8)

Raghoobuns Sahoy t Asloo, 2 W R 291, 296 (1873)

⁽²⁾ Parbati i Bhola, 12 A 79 SI (1853)

⁽²⁾ Parbuti i Bhola, 12 A 79 81 (1853)
(3) Lachmi Narain i Jwala Nath, 18 A

^{341, 347 (1896),} Robinson t Dulcep Singh, I R II Ch D 798, 813, 818 821 (1876), Muhammad Sulannan t Muhammad Yar Khan II A 207, dist (1888)

⁽¹⁾ Stinivasa e Yamunallin 2) M 51 (1 05) . . 16 M L J 50

⁽⁵⁾ Jawahir Mala Kistur Chand, 13 A 343 345 (1891)

⁽b) Soud's Shriniyasapa t Krishna] a 11 B 177 (1886) In this case the decree iwarded the plaintiff s claim

⁽⁷⁾ Mulchand e Ram Ratan, 20 A 133, 495 dest (1838), Muhammad Sulaman i Muham ad Yar Khan, 11 1 207 (1883)

⁽⁸⁾ Raj Krishna i Pramoda, 21 W R 74 (1873)

It is the husiness of the Appellate Court finally determining a suit to decide by which of the parties before it the costs shall be horne, it is not at liberty to deelere that the costs of the suit shall be borne by the unsuccessful party in a suit to be thereafter brought, because it mucht be that the suit will not be brought at all, and in that case there will be no execution, or the plaintiff and the defendant nught he left to bear their own costs (1) Though the Judge must state hy what parties (and in what proportions if necessary) the costs of the original suits are to be paid, he is not bound to go into particulars, or append to his judgment a schedule setting forth the different items which make up the costs of the first Court He takes the amount of costs for granted and decides who is to pay them (2) Where the order of the Appellate Court awarded (a) all the costs of the appeal, amounting to a certain sum named (b) all the costs in the original Court, not naming any sum, and (c) the costs of the remand, and it was argued that the decree holders were only entitled to the sum of money specifically named in the High Court's deerce for easts, and that they could not have the costs of the first Court, because the amount was not mentioned, nor the costs of the remand because such remand costs if they come in under any he id at all would come under the head of costs of the appeal and that these had not been allowed beyond the sum fixed by the decree, it was held that the decree was perfectly clear as to what it meant to give and there was nothing in the law which made the order for costs bad simply because it did not specify the exact sum to be paid as costs of the Lower Court, that there was nothing to make it incumbent on a Court of Appeal to specify the amount of the costs incurred in the first Court It had only to declare the proportion in which they were to be paid. As to the costs of the remand it was held that the decree declared that hesides the costs of the appeal and the costs in the original Court the costs of the remand were to be paid, it did not matter whether those costs were included or not in the appeal costs (3) But though the law does not direct that n Court should annex to every decree the costs mourred by both parties, yet it is a convenient practice to do so (4) When an Appellate Court decrees an appeal and gives costs of its own Court, the costs of the first Court should be meluded in the decree (5) When an appeal is dismissed on wholly different grounds from those relied on hy the Court below the dismissal should be without costs (6)

Certified copies of the judgment and decree in appeal is Copies of judgment and

parties.

decree to be furnished to expense

shall be furnished to the parties on application to the Appellate Court and at their

(4) Aubo Kristo : Parbutty, 13 W R 23

(5) Busseeroollah : Ram Kant, 16 W R

266 (1871)

⁽¹⁾ Kashee Chunder v Bungshee Buddun 23 W R 89, 90 (1574)

⁽²⁾ Mothoora Mohun : Hureclishore 19 W R 286 (18-2), Raghu z Rajendra, 14 C W N 556 (1909)

⁽³⁾ Rajkrishna i Promoda, 21 W R 74 (1873)

⁽⁶⁾ Pischer : hamala Maicher, 8 V I A 170 192 (1860) · c , 3 W R (P C) 33

by the Appellate Court or such officer as it Certified copy of decree to be sent to Court whose appoints in this behalf, shall be sent to the decree appealed from Court which passed the decree appealed from and shall be filed with the original proceedings in the sut, and an entry of the judgment of the Appellate Court shall be made in the register of civil suits.

ORDERTXLII.

Appeals from Appellate Decrees.

1. The rules of Order XLI shall apply, so far as may be,
Procedure to appeals from appellate decrees.

Second appeals.—See sects 100-103 and sects 107 and 108, ante, and notes thereto, and notes to O XLI

ORDER XLIV.

Pauper Appeals.

1. Any person entitled to prefer an appeal, who is unable who may appeal as to pay the fee required for the memorandum of appeal, may present an application accompanied by a memorandum of appeal, and may be allowed to appeal as a pauper, subject, in all matters including the presentation of such application, to the provisions relating to suits by paupers, in so far as those provisions are applicable.

Provided that the Court shall reject the application unless,

Procedure on application of an application of admission of an decree appealed from, it sees reason to

appeal. think that the decree is contrary to law or to some usage having the force of law, or is otherwise erroneous or unjust

The inquiry into the pauperism of the applicant may be made either by the Appellate Court or under the orders of the Appellate Court by the Court from whose decision the appeal is preferred:

Provided that, if the applicant was allowed to sue or appeal as a pauper in the Court from whose decree the appeal is preferred, no further inquiry in respect of his pauperism shall be necessary, unless the Appellate Court sees cause to direct such inquiry

Application—In the case of appeals the rule requires two separate documents to be presented—an application for leave to appeal is a pumper, and a memorandum of appeal. When the Judge disposes of the pumper application he does not thereby necessarily dispose of the appeal. There are two separate documents and in this respect this evas differs from a polition to such as a pumper which includes both the plaint the allegations as to pumpersin, and the prayer to such as a pumper. In the latter case, when the pumper petition is rejected in left of NXXIII is 7 the proceedings are at an end, and the Judge, has no jour to allow it to be stumped, as a plaint, it 15 of that Order providing the course, open to the applicant viz to institute a suit in the ordinary manner. On the

other hand, in proceedings under this rule, when the Judge refuses leave to appeal as a pauper, he effectually deals with the pauper application, but he does not necessarily deal with the memorandum of appeal which accompanies it rejection of the application, there is nothing to prevent him from treating the memorandum as still a memorandum of appeal, if the appellant, on being refused leave to appeal as a pauper, desires, with the aid of horrowed funds or the assistance of friends, to continue the appeal If O XXXIII r 15 applied to the memorandum of appeal, the result would in practice be that the appeal would be time harred when the application was refused. The result is that a Court is under no legal obligation to dismiss the appeal if and when it refused leave to appeal as a pauper (1)

"Subject, in all matters"-A petition for leave to appeal as a pauper is presented together with a memorandum of appeal. It was held under the last Code that the presentation of the application itself was not subject to the rules contained in Chapter XXVI of that Code But, after an application had been presented, all action taken subsequent to such presentation was by the terms of the section to be subject to the rules contained in that Chapter Therefore sect 404 of that Code, which required, except in certain circumstances. that the application should be presented in person, did not apply (2) In any case, if sect 404 did apply an appeal presented on hehalf of an exempted papper by a vakil retained under an ordinary retainer and not authorized to sign as agent, was considered insufficiently presented (3) A petition presented by a duly authorized agent of an exempted person though not by an advocate. valil, or attorney was properly presented (4) Although the Madras High Court held that the question of the presentation of an appeal was not subject to the rules contained in Chapter XXXVI of the former Code, the same Court determined that the question of the right to appeal under the section corresponding with r 1 of this Order was subject to such rules Therefore, when at the time of the institution of the suit there was subsisting an agreement falling within the terms of sect 407 (d), now (O XXXIII r 5 cl (e)) no leave to anneal under r 1 could it was held be given to the plaintiff who by such agreement had allowed other persons to obtain an interest in the subject matter

⁽¹⁾ Builult Desai Manorbhai 22 B 849 850 855 857 (189") per larran CJ Canly I , decided the case on the groun I that there was sufficient cause for not presenting the appeal within proper time under s 7 of the Limitation let In Bil nath . Jagarnath 13 \ 305 (1891) where an application to appeal as a pauper was rejected an lare, ular at real on a proper stamp was subsequently tresculed, but after time it was beld in t to iclate back to the time of the application in frm 1 pauperis is to extension of the when application is rejected, see Jumi alars Vess n las, 21 11 5 o (18 17)

⁽²⁾ Madther > mappa Barta 26 W 3t J (1302) desenting from In re Nam 1 5 V 404

⁽¹⁸⁸⁵⁾ which fill Bhugi butty Kier t Gun sh Dutt 21 W R 308 (18"4) saran Singh t Muhamma I Raza 1 1 31 (1851) also the High C urt refused un ler a 622 to interfere with an or her rejecting an application which was I rimited by a plead r And Wazir un Nissa e Halli Baksh 24 1 172 (1 01) appears to as up o that presentate n in pure n is n con any extent in the case of persona exempted. In r. Name, I werer, states several curcumstances in favour el the ruk in the text

⁽³⁾ Bhanobatty Keer r Gureah Date, as W R 505 (1574

⁽⁴⁾ Wazar un No a r. Hahi Lakel, 21 4

¹⁷²⁽¹⁴⁰⁾

of the suit (1) The amendment now includes the presentation of the application, and has been made to avoid the conclusion at which the Madras High Courtarrised in the decision cited

After presentation of the petition an inquiry as to pauperism is directed, and the application to appeal as a pauper is refused or granted (2). The application must be presented within thirty days from the date of the decree-appealed against, and no extension can be allowed under sect. 5 of the Limitation Act (3). The Code of 1859 directed (4) that the inquiry might be conducted either by the Appellate Court, or by the Court from whose decision the appeal was made under the orders of the Appellate Court, provided that if the applicant was allowed to sue in forma pauperis in the Court helow no further inquiry was allowed to sue in forma paupers in the Court should see special cause to direct such inquiry, and these provisions have been reproduced in sect. 593 of the last Code and r. 2 of this Order.

The proceedings are subject to the provisions mentioned only "in so far as those provisions are applicable". So if the appellant is found to be a pauper, and the appeal is admitted, he cannot be called in to give security for costs (5). It would render the section nugatory if the Judge could say that although the applicant was a pauper, and although there was just ground for appealing (for such a decision is required by the proviso), a condition shall be imposed which, in the case of a pauper, would render it impossible to go on with the appeal. The question has already been discussed as to whether this rule is subject to O XXXIII r 3, and a memorandum of appeal to r 15 of that Order

Proviso to r 1—This is mandatory, being a necessary safeguard for the benefit of litigants who find themselves opposed by paupers, and the Courts should be eareful to see that the proviso is satisfied. It is to be noticed that the Court must come to its conclusion upon a perusal only of the application the judgment and decree. This proviso is apt to be overlooked, but it would provide a safeguard against this it the Judge or Bench admitting a pauper appeal were to express and record very hriefly the reasons for granting leaves that the Appellate Court may have an assurance that the leave was properly given (6)

Appeal.—The Code gives no appeal from an order refusing leave to appeal as a pauper (7). As regards appeal from orders of a single Judge rejecting

Hamfa Bai v Haji Siddick, 30 M 547
 s, c, 17 M L J 447

⁽²⁾ See Bar Ful v Desai Manorbhar, 22 B \$49, \$50 (1897) An application need not be preceded by a separate formal application for inquiry into the jauper.sm of the applicant, Kained Poory v Shee Poory, I A H C R 219 (1863)

⁽³⁾ Parbatri Bhola 12 A 79, 93 (1889), Rechi t, Ahsanulla 12 A 161, 165, 488 (1800), Mahador i Ialahman, IJ B 49

⁽⁴⁾ let \ III (1 1453, s 370 See se 167 371, ib

⁽⁵⁾ Nussecrooddeen Biswas : Uggal Biswas, 17 W R 63 (1871) aliter, how vir where the application to sue as a paper is dismissed. In re Jogen ha Deb Royl ut, 18

W R 102 (1872)
(6) Sakubar v Gran at Ramkrishna -5 B
451 (1904)

⁽⁷⁾ In one sut, however, the High Courtson the case back for re ; ms kration, with an expression of their opinion. In re Moshaolish khan, 11 W. R. 115 (1870). In Hearest to Sught + Unbramad Reza, 1 V. J. (1891), th. High contrefused to interfer unkers 12.5 (1916) last 6.

in application on the original side of the High Court, it was held that no appeal lay from an order of a single Judge of the High Court made under this rule rejecting an application for leave to appeal in forma pouperis (1). These decisions, however, proceeded on the ground that the right of appeal given by the Letters Patent is subject to the limitations on appeal presented by the Code (2). It is, however, now law, so far as the Calcutta and Madras High Courts are concerned, that the interpretation to be placed on the decision of the Privy Council, (3) is that sect 588 (now 104) of the Code does not touch the right of appeal given by the Letters Patent (4)

Respondents—The Code provides for pauper plaintiffs and appellants, hunt for pauper defendants and respondents. Objections his a respondent to a decree under O XLI is 22 cannot be filed in forming paupers. If a pauper desires to contest any part of the decree of the Court of first instance which is inflavourable to him, he should directly appeal as a pauper, and, as an appeal lant, clium the benefit of this section (5). The opinion has here expressed that the omission was unintentional, (6) but, on the other hand, it has been said that the reason why no exception is made in favour of a pauper respondent probably was that he already had the opportunity of directly making an appeal without expense for court fees, and that an inquiry into his pauperism at the last stage of the ease would involve great delay and meanvenence (7). The omission now must be taken to be intentional, the Legislature considering that the exceptional liberty of moving a Court in forms paupers should not extend to objections to appeals.

at p 79

⁽¹⁾ In re Rajagopal, 9 M 447 (1886), Banno Bibi e Mehde Husain, 11 A 375 (1889)

⁽²⁾ is to whether these decisions are de fensible on any other ground, see arg in Toolsee Money t Sudevi Dasse, 26 t at p

<sup>364 (1899)
(3)</sup> Hurrish Chunder : Kali Sunders, 9 (
482, 10 I A 4 (1882)

⁽¹⁾ Lool-ce Money v Sudevi Dessee, 26 t. 361 (1899), Chappan t Modin Kutti, 22 M 68 (1898). Sabhapathi Chetti t Narajana

sami Chetti, 25 M 555 (1901)

⁽⁵⁾ Narayana v Krishna 8 M 414 (1881), Bropeshwari Dasi v Guroo Churn, 11 C 732 (1885.), Rashomonce Dossec i Junnojo, Mullick, 9 W R 356 (1868), Babaji Hari i Rajarani Ballal, 1 B 75, 79 (1876), as regards paujer defendants, mo notes to

⁰ XXIII r t, unte (6) Aarayana t Krishna, supra, at p 217 (7) Babaji Hari t Rajaram Ivillal, sujra,

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determined by a Division Bench of the High Court, which in theory of Law is a decision of the High Court All that a Judge of the High Court can in most cases do after that is to assist the parties in bringing their appeal before the Privy Council Of course, an Act of the Imperial Parliament or a provision of the Letters Patent assued in pursuance of an Act of Parliament or an order issued by His Muesty in Council inight confer upon the High Court, or a Judge of that Court, not only power to admit or reject an appeal but might make the right to uppeal dependent upon that admission or rejection. But if that has been done in any case whatever it is only in the cases in which the High Court has power to declare that the case is a fit one for appeal. The Courts in India have no power to admit or allow an appeal upless expressly authorized to do so by competent authority (1) The admission of an appeal to the Privy Conneil is not a matter as to which the High Court bas any discretion provided that the requirements of the law are satisfied. All that the High Court has to do is to that the requirements of sect 110 ire satisfied. If they are an appeal hes under sect 100 is a matter of right. The application for a certificate that these requirements are satisfied is morely preliminary and ancillary to the idmission of the appeal (2)

"Amount or value"-Sec notes to sect 110 arte

'Otherwise '—By sect 10° and this rule an appel into be granted if the High Court certifies that the case is fit for appeal otherwise i.e when not meeting the conditions of sect 110. That is clearly intended to meet special cases, such for example as those in which the point in displite is not measure shie by money though it may be of great public or private importance. To certify that a crose is of that kind though it is left entirely in the discretion of the Court is a judicial process which cannot be performed without special exercise of that discretion evinced by the fitting certificate. In the absence of the conditions required by the Cot to give the right of appeal no certificate under this rule can be issued even with the assent of the other party (3). When the matter is under the appealable value there should be an application under this cluste before the proper Court in India for a certificate (1).

"Notice on the opposite party —If a respondent appears on a notice served of an intended application to have a petition of appeal to the Privy Council received but does not object his costs of that application will not

⁽I) But the king in Louncil possesses by vartue of the Royal Prirogative a clear appellate jurisdiction over the judgment of Il Courts of Justice established in any of the British dominions beyond the seas and it has been repeatedly held that notwith standing the Statutes which preserbe the time and mode of appealing and the limits in point of amount the power of the king in Council to entertain petitions for leave to appeal where the conditions imposed by the Statute have not been complied with remains in fill force Salth Rami Axim Alt SM I

A 270 2.2 (1852) note In the matter of the petition of Feda Hosein 1 C 431 444

^{(18&}quot;6) see seet 112
(2) 11 urai Rajah t Janulubilei 18 M

^{(2) 11} urai Rajah : Janulubi er 18 '

⁽³⁾ Banarsi Pissad t Ka hi Krishna 3 A 227 231 232 (1900) s c, 28 I t 11 Radha Krishon t Rai Krishen Chand 28 I A 182 184 (1901) s c 23 A 41a, 5 C W N 689

⁽⁴⁾ Mote Chand v Garga Prasad, 4 A 174, 176 (1901) s. c. 29 I A 40 6 C W > 362 4 Bom L R 159

be allowed (1) If after the filing of petition of appeal to the Privy Council and after the draft of the notice, to be served on the opposite party, has been sent to the petitioner's attorney for his approval no steps have been taken to prosecute the appeal, with the result that no notice was served on the opposite party under this rule, the opposite party may apply to have the petition of appeal struck off the file for want of prosecution, and such an application will be granted for the reason that as no formal notice of abundonment of the appeal has been given the Registrar may be called upon at any time to issue the notice upon the opposite party (2)

4 For the purposes of the pecuniary valuation, suits involving consolidation of suits substantially the same questions for determination and decided by the same judgment may be consolidated but suits decided by separate judgments shall not be consolidated, notwithstanding that they involve substantially the same questions for determination

Consolidation -Where several suits (the amount involved in each suit was under Rs 10 000 but the aggregate amount claimed exceeded that amount) were brought by the same plaintiff against the same defendants in respect of the same property and involving the same question of law, and one judgment and decree was pronounced in all the suits by the first Court and the Lower Appellate Court pronounced a judgment and decree in the first suit and appeal ouly stating that the decice of the first suit governed the four other suits on appeal leave to appeal to the Privy Council in these suits was granted by the Privy Council upon the undertaking that the parties consented to abide by the decision of the Privy Council in the first appeal as governing the appeals in other cases (3) Where several suits involving the same assue were filed by different plaintiffs against the same defendants and where the Lower Court ordered with the consent of all parties, that all legal evidence to be talen in one action should be evidence in the several other actions and the decision in one eas governed other cases and the appealable value in cach case wis below Rs 10 000 but the aggregate value of the suits was above that amount leave to appeal was granted on the ground that the appealable value involved indirectly in the claim was above Rs 10 000 (4) Leave was granted on the the mentioned ground in the following cases where three different pluntiffs channing through the same original title to be the owners of a certain Mal d su d the same defendant in separate suits for possession and for the me ! profits of their respective shares (each suit being for less than Rs 10 000, but the agreeaste value of the three suits amounted to more than that amount) in I the diffractived wisth some in all those ises and the creative heart

⁽²⁾ Moraje 1 (jv i Viralje 12 C 3 1 (18(8) 8-5 al Ajnas h 80 f (8(188) 1 ut fi 18 W 1 -1 (187-) Byjiath f

⁽³⁾ C (al bal thil are 1 lik Clentr Cides (1 C 710 71 (1855)

together, and the decree in one applying in principle to the other two suits,(1) is also where \(\) and \(B \) purchased the same properties deriving title from different persons. The value of the properties with messe profits was over \(R \) 8 10,000 \(B \) granted two path leaks of the properties to different persons. A was, therefore, obliged to bring two suits for the recovery of the properties and the value of the subject matter in each suit was less than \(R \) 8 10 000 (2) But where there were distinct causes, separate judgments given in each suit and the suits were not consolidated in Courts below, but were all along treated as separate and distinct actions such suits it was held could not be consolidated for the purpose of appeal to the Privy Council (3). These principles have been embodied in this rule, which is new. And it has been held under it that where the fundamental question is common to all the suits and the cases are tried together and decided by the same judgment, the suits will be consolidated for purposes of pecuniary valuation, even though a substantial question of law arises in some of the suits and not in others (4)

When an application for leave to appeal to the Privy Council is inade in under than one suit which have not been consolidated though the points to be decided are the same in all of them, it must be shown that in each of the suits the amount or value of the matter in dispute in appeal to His Majesty in Council is Rs 10 000 or upwards (5). But in a recent case a large number of suits for receivery of possession of distinct parcels of land where tried together dealt with in one judgment, and wero decreed in favour of the plaintiffs, of these some were for sums over Rs 10 000 and leave to appeal was granted, of the remaining cases, each taken separately, the value was below Rs 10 000 yet if taken collectively the aggregate reached that amount and all the cases were dependent on the same judgment, leave to appeal was granted in the suits where the value of the subject of each suit was below Rs 10 000 (6)

5. In the event of any dispute arising between the parties as Remission of dispute to the amount or value of the subject matter of to Court of first instance, or as to the amount or value of the subject matter in dispute on appeal to His Majesty in Council, the Court to which a petition for a certificate is made under rule 2 may, if it thinks fit, refer such dispute for report to the Court of first instance, which last mentioned Court shall proceed to determine such amount or value and shall return its report together with the evidence to the Court by which the reference was made

Inquiry as to value —Where there has been a contest us to the true value of the matter in dispute it has hitherto been the invariable practice to ascertain

⁽¹⁾ Ashanulla r Karoonamoyi 4 C L R 12 > 127 (1879)

⁽²⁾ Joogul Kishore t Jetindry Wohun 8 C 210 (1882)

⁽³⁾ Moofts Mohumin I Ubdoellah Moots Clan 1 1 M [\ 303 "65 (1834) s e 5

W R 34 (P C)

⁽⁴⁾ Banga t Jagat 13 (1 J 503 (1540)
(5) Poyal Insurance Coy t Akhoy
Coomar Dutt | C W N 41 (1501)

⁽⁶⁾ Deogram v Cum Sm. 1 31 C 400, 402 (1407)

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by evidence and inquiry what the true value is (1) The present rule now gives legislative sanction to this practice

6. Where such certaficate is refused, the petition shall be Effect of refusal of dismissed.

"Refused"—The High Court, in refusing a certificate for leave to appeal to His Majesty in Council should state their reasons for refusing it (2)

Restoration —After an appeal has been dismissed for default or for any reason removed from the file, the High Courts have power to restore an appeal (3) It may bring an appeal on to the file after it has struck it off the file on the application of the appellant himself (4)

7. (1) Where the certificate is granted, the applicant shall, security and deposit required on grant of certificate.

18 the later date.—

18 the later date.—

(a) furnish seemily for the costs of the respondent, and

(b) deposit the amount required to defray the expense of translating, transcribing, indexing and transmitting to His Majesty in Council a correct copy of the whole record of the suit, except—

 formal documents directed to be excluded by any order of His Majesty in Council in force for the

time being,

(2) papers which the parties agree to exclude,

(3) accounts, or portions of accounts, which the officer empowered by the Court for that purpose considers unnecessary, and which the parties have not specifically asked to be included, and

(4) such other documents as the High Court may duct to be excluded

(2) Where the applicant prefers to print in India the copy of the record, except as aforesud, he shall also, within the time mentioned in sub rule (1), deposit the amount required to definithe expense of printing such copy

"Certificate is granted"—In to the functions of a Court granting a certificate, see notes to r 3 as to The certificate under r 7 may be given by a

⁽¹⁾ Amrita Nather Abboy Claran 4C W N 30, 371 (1903) (2) Verganat Swaroopathil & Cleraken nath 23 M 134 (130) Rec 40 C W N 14 4C L. T 405

⁽³⁾ In the matter of the petition of Hall's Benode Masser, B. L. R. Superof "30 (180") sec "W. H. 173)

⁽¹⁾ Slaukar Hakshit Harl o Baksl 164 147, 103 a c 131 \ 71 3

single Judge called the "Judge of the Privy Council Appeal Department,"(1) and there is no appeal from the order of such a Judge, (2) or it may be given by a Bench consisting of more than one Judge hearing the applications for leave to appeal to the Privy Council The certificate and not the order for the certificate is the document which their Lordships are bound to consider and act upon, and unless the certificate upon which the leave to appeal is based is in such a form as to justify the leave, their Lordships will hold that leave has not been properly given. Thus where the order for the certificate was "Let certificate issue, that the case is fit one for appeal to Her Maiesty in Council,' but the certificate stated "The Court, having had before it an application for leave to appeal to Her Imperial Majesty the Queen in Her Priva Council presented on behalf of the appellant aforesaid, it is certified that though the valuation of the case is below Rs 10,000, yet as regards the value and nature of the case it fulfils the requirements of sect 596 (Act XIV of 1882)." held that the leave was granted without jurisdiction. Valuation is an essential part of the requirements under that section, and when the valuation of the case is below the amount mentioned in that section, leave cannot be granted under that section. An erroneous certificate to the effect that the case fulfils the requirements of sect 110 is ineffectual even if assented to by the respondent In cases below Rs 10,000, there must be a special certificate that the case is "otherwise" fit for appeal (3) under sect 109 (c) and r 3 Where in the petition for leave to appeal the prayer was that a certificate might be granted that, as regards value and nature, the case fulfilled the requirements of sect 596 (now sect 110), but the order on it was "Let a certificate be granted that this is a fit case for appeal to His Majesty in Council, and let the usual notices be issued ' held by the Privy Council that the leave was given pursuant to sect 595 (c) (now sect 109 (c)) and the latter alternative of sect 600 (now r 3), and was properly given (i) When the petition for leave stated "the appeal involved some substantial questions of law and the case fulfilled the requirements of sect 596, and was a fit case for appeal to His Majesty in Conneil," and the order was "we think on the whole that this is a case in which a cirtificate for leave to appeal to Ilis Majesty in Council ought to be granted," held that the certificate was properly given (5) But where the certificate was "eartified that the above case fulfils the requirements of sect 596 (now sect 110) as regulds value and nature masmuch as the value of the subject matter of the suit in the Court of first instance was unwards of Rs 10 000 and the value of the matter in dispute on appeal to His Wajesty's Privy Council also exceeds that amount

 ⁽¹⁾ Amirunnessa e Behary Lall 25 W R
 (22) (1877), Fara Chand e Radha Jeebun
 W R 148 (1875), Hurrish e Kali
 Sundari, 9 C 482, 443 (1882)
 (2) Lutf Hi Khan e Asgar Rira, 17 C
 455, 458 (1890), Kolaun Pershad e Thirk

⁽²⁾ Lutf Mt Khan r Asgar Rua, 17 C 455, 458 (1890). Krehen Pershad r Thuck dhari, 18 C 182, 186 (1890). Amrunnessa r Behary Lall, super, Tora Chan lr Radha Jeelun, sapera, Manky r Patterson, 9 C L R 166 (1881), a.c., 7 C 339

⁽³⁾ I'a iha Krishna r Rai Krishna Chand,

²⁸ I A 182, ISI (1991) w.c. 23 A 115, 5 C. W. N. 689, cf. Mot. Cland c. Garga Parshad, 29 I A 40, 42 (1991), w.c. 24 A 174, o.C. W. N. 302, Webb r Macpherson, 39 I A 238 (1993), w.c. 31 C. 57, Anar Chanler Seeb 31 C. 503 (1993) (4) Webb r Macpherson, 31 C. 57 (1933), w.c. 20 I A 255

⁽⁵⁾ Amar Chand r with 1 house, 31 (305, 310 (1 43).

single Judge called the "Judge of the Privy Council Appeal Department," (1) and there is no appeal from the order of such a Indge (2) or it may be given by a Bouch consisting of more than one Judge hearing the applications for have to appeal to the Privy Council. The eartificate and not the order for the certificate is the document which their Lordships are bound to consider and act upon, and unless the certificate upon which the leave to appeal is based is in such a form as to justify the leave their Lordships will hold that leve has not been properly given. Thus where the order for the certificate was "Let certificate assue, that the ease is fit one for appeal to Her Maiests in Council ' but the certificate stated 'The Court, having had before it an application for leave to appeal to Her Imperial Vajesty the Queen in Her Priva Council presented on behalf of the appellant aforesaid it is certified that though the valuation of the ease is below Rs 10,000 yet as regards the value and nature of the case it fulfils the requirements of sect 596 (Act XIV of 1882), ' held that the leave was granted without jurisdiction. Valuation is an essential part of the requirements under that section, and when the valuation of the case is below the amount mentioned in that section, leave cannot be granted under that section. An erroneous certificate to the effect that the case fulfils the requirements of sect. 110 is ineffectual even if assented to by the respondent In cases below Rs 10 000 there must be a special certificate that the case is "otherwise" fit for appeal (3) under sect 109 (c) and r 3 Where in the petitionfor leave to appeal the prayer was that a certificate might be granted that, as regards value and nature, the case fulfilled the requirements of sect 596 (now sect 110), but the order on it was 'Let's certificate be granted that this is a fit case for appeal to Ifis Majesty in Council and let the usual notices be issued held by the Privy Council that the leave was given pursuant to seet 590 (c) (now seet 109 (c)) and the latter alternative of sect 600 (now r 3) and was properly given (i) When the petition for leave stated "the appeal involved some substantial questions of law and the case fulfilled the requirements of sect 596, and was a fir case for appeal to His Majesty in Council" and the order was " w think on the whole that this is a case in which a certificate for leave to ann al to Hs Majesty in Council ought to be granted, ' held that the certificate was properly given (5) But where the ecrtificate was 'certified that the above case fulfils the requirements of sect 596 (now sect 110) as regards value and rature masmuch as the value of the subject matter of the suit in the Court of first instance was upwards of Rs 10 000 and the value of the matter in disnut' on appeal to His Majesty's Privy Council also exceeds that amount

1 R 166 (1881) s c 7 C 339

 ⁽¹⁾ Amirunnessa t Behary Lall 25 W R
 529 (1876) Tara Chand t Radha Jeebun
 24 W R 148 (1875), Hurrish t Kah
 Sundari 9 C 482 493 (1882)

⁽²⁾ Lutf Alı Khan t Asgar Rıza 1° C 455, 458 (1890) Kıshen Pershad t Tiluck dharı, 18 C 182, 186 (1890) Amurunnessa t Behary Lall supra, Tara Chand t Radha Jechun, suıra Manley v Patterson, 9 C

⁽³⁾ Radha Kri hna i Rai Krishna Chand,

²⁸ I A 182 194 (1901) s c 2° . *15, 5 C W N 689, cf Mott Chrid t Ganga Parshad 29 I A 40, 42 (19t1), s. c, 21 A 174 6 C W N 362 Webt Macpherson, 30 I A 239 (1903), s. , 31 C 57, Amar

Chand t Soshi 31 C 315, 310 (1903) (4) Webb t Macpherson, 31 C 57 (1903), s c 30 I A 238

⁽⁵⁾ Amar Chand t Soshi Bhusan, 31 (305, 310 (1903)

could not, it was held, be made before the High Court, but the Judicial Com inities might deal with the question when the whole case was before them (1)

For the rule as to transmission of evidence and other documents, see clause 42 of the Charter The Charters of the High Courts expressly require that the reasons of their decisions should be recorded by the Judges and trans mitted for the information of the Privy Council with the records (2) All costs and expenses unnecessarily occasioned by the inclusion in the transcript sent from India of matters improperly introduced therein will be disallowed (3) All petitions and applications connected with appeals to His Wajesty in Council except Mooltarnamas should be drawn up in the English language Security bonds are not made a part of the proceedings transmitted to England, and so need not be drawn up in that language (1) Where an appeal to the Privy Council has been admitted against a regular decree made in appeal such proceedings as applications for review of the judgment and the order of the Court should not form part of the transcript, and should not be sent to England with the record of the original appeal to the Privy Council (5) Nor will the appellant be allowed to refer to or read as evidence in the appeal to the Privy Council the documents tendered to the Court on the application for the review of judgment as the order refusing such application has not been appealed from (6) Where the Court of first instance framed and decided several issues, and the High Court on appeal confined their decision to the questions which in their opinion governed the case, leaving other issues undecided as not affecting the result of the suit, only so much of the original records as properly bore upon and might be natural for the decisions of the questions of law, decided by the High Court and the subject of the appeal, should, it was held, be printed and transmitted (7)

- 9 At any time before the admission of the appeal, the Revocation of accept- acceptance of security acceptance of any such security, and make further directions thereon
- 10 Where at any time after the admission of an appeal Power to order further but before the transmission of the copy of the security or payment accord, except as aforesaid, to His Majesty in Council, such security appears inadequate,

⁽¹⁾ Ratan Koer : Chetay Naram, 21 C 175 (1891) (2) Katcho Kaleyana : Kachinjaya 12

⁽²⁾ Katcho Kaleyana r Kachivijaya 12 M I A 195, 502 (180)), I nayet Hossem r Powshan Johan, 10 W R (P B) J. 1 (1808)

⁽³⁾ Taral ant 1 Pulloniones, 10 M I V 17(189(18(4), 8 c 5 W II P (63

⁽i) Meer Mahome I Inkee : Fuchine qut, 7 W. R. 11, 132 (1867). For rule as to transmiss in effective lines at lotter bount its, see el. 42 efft. charter.

^() Shikh halal Min K. thy Behuri,

³ M I 1 1, 7 (1811-42), I nayet Ho scin Rowshan Jelian, 10 W R (F B) I, I

^{(1808),} Fukhereoddeen Mahomed i Auj moonssa, 11 W. R. 145 (1809), in U a decision a case is cited in which such troceedings were sent for by the Pring Courtel in ker the special circumstances of that case (4) Shiekh Im Ind Ut i , bootty Beginn

⁽⁷⁾ Venkata Surya Malijatli v Court of Wirl and A 194 (1897), A.c., a0 M 30,

or further payment is required for the purpose of translating, transcribing, printing, indexing or transmitting the copy of the record, except as aforesaid

the Court may order the appellant to furnish, within a time to be fixed by the Court, other and sufficient security, or to make, within like time, the required payment.

Where the appellant fails to comply with such order. the proceedings shall be stayed, Effect of failure to comply with order.

and the appeal shall not proceed without an order in this behalf of His Majesty in Commel.

and in the meantime execution of the decree appealed from shall not be staved

When the copy of the record, except as aforesaid, of balance has been transmitted to His Majesty in Refund Council, the appellant may obtain a refund of the balance (if any) of the amount which he has deposited under rule 7

Security and deposit-See notes to r 7 ante

13. (1) Notwithstanding the grant of a certificate for the admission of any appeal the decree uppealed Powers of Court pendfrom shall be unconditionally executed unless the Court otherwise directs

(4) The Court may, if it thinks fit, on special cause shown by any party interested in the suit or otherwise appearing to the Court .-

(a) impound any moveable property in dispute or any part

thereof or

(b) allow the decree appealed from to be executed taking such security from the respondent is the Court thinks fit for the due performance of any order which His Majesty in Council may make on the appeal, or

(c) stay the execution of the decree appealed from taking such security from the appellint as the Court thinks fit for the due performance of the derive appealed from, or of any order which Hes Majesty in Council may make on the appeal or

(d) place any party seeking the assistance of the Court under such conditions or give such other direction respecting the subject-matter of the appeal, is it thinks fit, by the appointment of a Receiver or otherwise.

"The grant of a certificate"-It was evident from the express terms of sect 608 of the last Code that the intention of the Legislature was to confer on the High Court the powers therein indicated only in the event of the appeal having been already admitted The Calcutta High Court accordingly uniformly refused to grant any apphication under that section before an appeal was finally admitted (1) But the Bomhay High Court held that it could order stay of execution of its decree when only the necessary petition for admission had been presented, but that petition had not come before the Court and the appeal had not been declared admitted (2) Under the section as it now stands, the application may he made hefore the appeal is finally admitted under 1 8 It was formerly doubted whether the High Court could act under this rule where the appeal had not been certified by itself, but special leave had been granted by the Privy Council (3) But it has now been held by the Privy Council that the High Court has power to stay execution in such ? case (4) The Calcutta High Court has held that it has no power to stay proceedings in a suit following a preliminary decree for partition against which it has granted leave to appeal to the Privy Council, and that the latter alone can do so since it has seisin of the appeal (5)

Preservation of property pending appeal—The principle which underlies all orders for the preservation of property pending litigation is that the successful party in the litigation—that is, the ultimately successful party—is to reap the fruits of that litigation and not obtain merely a harren success (6) Property may be thus preserved either by taking possession of it when moveable, under clause (a), taking security for its restriction under clause (b), by stay of execution under clause (c), or by making such other order as may be necessary (and as to this the Court is given a complete discretion) under clause (d)

"Taking such security," clause (b)—The object of security being takin from the holder of a decree from which an appeal has heen preferred to the Privy Council is to indemnify the appellant for any loss he may suffix owing to the execution heing taken out by the decree holder during the pendency of the appeal in the Privy Council It is therefore only on the execution of the decree that the surety becomes liable If the decree holder, after applying for execution of the decree, does not take any further steps for execution, and the decree remains unexecuted, the terms of the security bond fills to the ground, and the surety cannot in any way be made table for costs or anything (see

⁽¹⁾ Jarao Kumarı i Gopi Chand 5 C W N 502 (1900) See Burra Lall i Court of Wirds, 16 W R 289 (1871), ver Paul, J

⁽²⁾ Dame Janbu t Sab Wah ned, 19 B 10 (1894)

⁽³⁾ Mohesh v Sitrughan, "6 f A 281, 283 (1809)

⁽⁴⁾ Nityamener Melloradau, P. C. 18 I. V 74 (1411). (C. 18 C. 315 (1911). and a Nanla Kishora Singher Ram C. Isin Salin, 10 (C. 155 (1412). relevant power to stay.

execution in view of an application for special leave to appeal to the Privy Council.

(a) Labiterium to Bhahessur, 13 (W)

^{630 (1909)} (6) Mt Brij Coomarco : Ramirak Da , 5

in the Indish description to stay and security have their approval.

swarded by the High Court (1) The Court may require security although nossession of the property in dispute has been already obtained without the Living of 8 curity (2) Security to the extent of the whole sum deereed need not always be taken from the decree holder. When security is taken for less than the full amount decreed, the decree holder should be restrained from issuing process of execution with a view to realizing any sum in excess of the amount for which security is given (3) The ordinary practice is that calculation is made for an amount sufficient to meet the mesne profits which are to go to the hands of the decree holder from the date of his obtaining possession to the probable date of the eventual execution of the decree of the Privy Council That period is generally taken to be three years (1) A Hindu widow's interest in her husband's estate has been refu ed as such security (5) Judges in reporting upon the securities, should state particulars of the documents which have been produced and proved before them and upon which the title of the surety inicars to he mide out but they need not transmit to the High Court the documents produced before them (6) The High Court under whose directions security has been taken can release a surety, a District Judge has no right to do so (7) A judgment dehter pending an appeal to the Privy Council. having been ordered by the High Court to furnish security within two months, put in a petition in the District Court on the list day allowed by the order, tendering a dur putni mehal is security and on the following day gave an unrelistered security hand, which was rejected by the Judge on the grounds that the bond was unregistered and 'there being no guarantee that the property pledged will turn out available Held that the bond offered as security was not required to be registered until the security had been accepted and before rejecting it the Judge should direct an investigation into the sufficiency or otherwise of the property tendered (8) In the case ested it was held that the provisions of the Contract Act relating to revocation of a surety were mapplicable to a person who had stood as a surety under this rule because there was no personal guarantee given by him (9)

Stay of execution, clause (c)—See ante 'Preservation of property pend injupped after the vianission of an appeal to the Privy Council, with leave granted by a High Court ipplication for stay of execution of a decree pending an uppert to His Viapesty in Council ought ilways to be made in the first instance at any rate to the Court in India which has ample power to deal with the matter according to the circumstances of the particular case and has knowledge of details which the Privy Council cumor bossess on an interlocutory

^{(1) \}uffer Chunder v Soorendro Vath Roy 14 W R 110 411 (1840)

⁽²⁾ Hukum Chanl Bail c Kamalananl Singh J C L J to 73 77-1J (1905) unl custs there etted including Jariut ool Begum t Hosseinee Begum 10 Moo I v 190 202 (1864)

⁽³⁾ Molka t Sumjut 6 W R Wase 62

⁽¹⁸⁶⁶⁾

⁽⁴⁾ An eero na sa t Dunne 11 W 1 361 (18 0)

⁽⁵⁾ Phool Koer t Dabee I rshad 12 W R 18 (1869) see also Indar Kuar t Lalta

Prasad 4 1 532 (1882) at p 542
(6) In the matter of Americanussa 11 W

R 91 (1870)

^(*) Medoomssa Khatoon t Ameeroomssa Khatoon 17 W R 464 (1842)

⁽⁸⁾ Dame v \mecroonissa Khatoon, 13 W R 41 (18 0)

⁽⁹⁾ Narayanan t Arunachellam IJ M

^{140 113 (189}a)

application Where, on in application, the High Court made in order "that" execution be stayed for three months from this date so is to give the defendants in opportunity to apply to the Privy Council for stay of execution," the Judici il Committee held that the application should have been made to the Court in India, but acting upon the suggestion of the High Court, their Lordships recom mended stay of execution on terms (1) The Privy Council stated that they could not stay execution, but where special leave was given they have idvised it (3) But where, after the declaration that an appeal has been admitted, an application for stay of execution was rejected (the Judges hearing the application differing in their opinion, and the adverse judgment of the Senior Judge prevailing) on a petition for special leave to appeal, the Judicial Commuttee, being of opinion that as the two judges in the High Court had differed in opinion, the discretion of the High Court had not in fact been exercised, made an order for stay of execution (3) And where the High Court refused to make an order for want of jurisdiction in an appeal not certified by itself, the Judicial Committee advised the grant of an order of stay (4) The under mentioned case dealt with the procedure to be followed, where there was an order of Comt to stay the execution of a decree obtained by a party who had appealed to the Privy Council from another decree against himself if the holder of the decice which was appealed against attempted to execute it (5) Where a judgment debtor who has appealed to the Privy Council obtained a rule miss from the High Court suspending execution until security was given, which was subsequently made absolute, it was held not to operate against the decree holder in the matter of time, limitation not running against him until the result of the appeal was known, or the rule otherwise fell to the ground (6) An application for staying execution for costs pending an appeal is not granted as a matter of course unless evidence be adduced to show that the respondent to the appeal will be unable to repay the amount levied by execution, if the appellant be successful, such an application is in England not granted (7)

"Such other direction," clause (d)—the words "by the appointment of a receiver or otherwise" have been added, thus authorizing the High Courts in India to grant such relief when necessary. This provision as well as the others would appear to apply to appeals certified by the High Court itself, when a certificate was refused, but special leave was granted by the Judicial Committee. The latter said that it was impracticable that they should directly interfree to continue the manager of to appoint receiver. "Interference have the feeted in cases where the Courts in India had jurisdiction over the subject matter, and an intimation to them would be effective, or where, the appellant

⁽¹⁾ Vasudova Modeliar r Shadageja 29 M 373 (1906), s c 1 C L J 101, 10 C W \ 115

⁽²⁾ Mahirani Inder Kumari r. Maharani Jaij di Kumarl, 14 I. V. J. v. C., 14 C. 250 295 (1880), and see Nityamont r. Mall husudan, P. C., 39 I. V. 74 (1911)

⁽³⁾ Chutrajut Nigh i Duarka Nath Chish 211 \ 100 s . 22 C. I (1891)

⁽¹⁾ Mohesh Chandra & Satrughan Dhal 26 I A . 31, 253 (1853), and see Nityamoni & Madhusu lun P C, J8 I A 74 (1311) (5) Dwarl anath & Wooda So of Line

¹⁴ W R 325 (1870)

⁽⁶⁾ Gun sh Dutt Singh t Manager Rate Chewdhra, 19 W R 186 (1873)

⁽⁷⁾ I triker t Lavery (1885) 11 Q B D

being in possession, a stay of proceedings would keep the position of things intert. Where the High Court had no jurisdiction it could not be directed to act, but their Lordships ordered a stay of proceedings (1). The High Court can, it would seem, make an order for restitution under this clause as to that part of the decree which has been executed (2).

14. (1) Where at any time during the pendency of the formation of security appeals the security furnished by either party appeals madequate, the Court may, on the application of the other party, require further security

(2) In default of such further security being furnished as

required by the Court,-

(a) if the original security was furnished by the appellant, the Court may, on the application of the respondent, execute the decree appealed from as if the appellant had furnished no such security.

(b) If the original security was furnished by the respondent, the Court shall, so far as may be practicable, stay the further execution of the decree, and restore the parties to the position in which they respectively were when the security which appears madequate was furnished, or give such direction respecting the subject matter of the appeal as it thinks fit

15. (1) Whoever desires to obtain execution of any order | Procedure to enforce of His Majesty in Council shall apply by orders of King in Council petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Count from which the appeal to His Majesty was preferred

(2) Such Court shall transmit the order of His Majesty in Council to the Court which passed the first decree appealed from, or to such other Court as His Majesty in Council by such order may direct, and shall (upon the application of either party) give such directions as may be required for the excention of the same, and the Court to which the said order is so transmitted shall exceute it accordingly, in the manner and according to the provisions applicable to the excention of its original decrees.

() When any monies expressed to be payable in British currency are payable in India under such order, the amount so

⁽¹⁾ Wohesh v Satrughan, 27 C 1, 4, s c, are wider than those of the Regulation of 20 Ashanulla : Karoonamoy, 4 C L R Dabee, 6 W R Mac 111 (1876)

⁽²⁾ Ashanulla i Karoonamoyi, 4 C L R 125, 129 (1879) The provisions of this rule

the amount is realized or paid or execution taken out, and not the year in which the decree was passed. Oldfield, J, said in that case "the rate of exchange heing fixed yearly by the Sceretary of State for Iudia in Council, the rate of exchange on the date of the appheation for execution was the proper rate of exchange the decree-holders were entitled to." But this ruling was dissented from by the Calcutta High Court, and it was held (1) that the words "for the time being" have reference only to the time at which the order of the Privy Council was passed. This case has been followed in several other cases in Calcutta, (2) and the matter is now settled by the adoption of the rulings of the Calcutta High Court

Costs -The costs assessed in England are only the costs incurred before the Privy Council, and do not include the costs of translation, etc., incurred in India (3) In almost all the appeals which go to the Privy Council there are costs incurred here for translating and preparing the record for transmission to England, and it has never been the practice of the Privy Council to make any order in specific terms as to these costs, and that whenever a specific sum is allowed by the Privy Council as costs of appeal, that is considered to cover the costs of appeal in England only, and it has always been assumed that an order drawn in this form covers the costs in India though they are not men tioned (4) When the Privy Council decrees not only a certain specified sum as the costs of the appeal in England, but also awards the costs incurred in the Courts in India, the decree-holder is cutifled to the costs for translating the record of the appeal and for transmitting it to England (5) Where only one defendant appeals successfully to the Privy Council and obtains his costs, his co defendants who did not appeal are not cutitled to their costs (6) If costs are occasioned by the introduction of unnecessary and urrelevant matter into the second, they will be disallowed by the Privy Council (7) Where an order of the Judicial Committee is silent as to interest upon the costs decreed, the Judge of the lower Court which has to exceute the decree has no power to direct payment of those costs with interest (8) Where the deeree of the first Court, confirmed by the Privy Council, allowed interest on costs incurred, the decree holder was held entitled to interest on the costs incurred on account of translation and printing, hecause the Pilvy Council had adopted the decice of the local Court and made it a dominant decree as regards costs in all Courts The effect of that decree is that the Privy Council decree became a decree for

⁽¹⁾ Dakhna Mohun v Saroda Mohun, 23 C 357, 359 (1890) , Lukhpatty z Leela nund, I I 1 137 (1877) , s c , 3 C 161

distinguished
(2) Mahomed Abdul Hvc i Gapral, 25 C

²⁵³ a. c. 2 C W N 89 (1537)
(3) Comatool Fatima t. Azhar Ah, 15 W R 356 (1871)

⁽⁴⁾ Sharada Pershada Luchmeej ut, 18 W 1 SJ, Jt., 8 c, 9 B L, R Ap 2J (1872) (5) A nat Alia Napendra, 2J W R 16J

⁽⁵⁾ Your Mr. Magendra, 23 to R. 165 (1879) Mu Hun Thakoore Wirrson 16 W. 3- 203 (1872). Octatool Litana C. Azher Mr.

¹⁵ W R 356 (1871), Ram Coomar 1

Prayanno 10 C 106 (1853)

(6) Brojo Soundarco t Anund W.)...,
16 W R 302 (1871)

⁽⁷⁾ Beshemmun Singh t Land Morts & Bank of India 121 A 7, 12, s.e., 11 C 45 (1881), and see Khirodamoyee Dasi t Prodyol Kumar, 18 C L J 122 (1913), I fair 105 s nght to exclude irrelevant docur enter

⁽⁸⁾ Percator a Secretary of State 4.1 A 137-141 (1877), s. c., 3.6 Tel, 170, and the cases cate i there, of Rum 8 d or Burk of larged 8.1 and (1886)

costs and interest expressly. But if no provision for interest on the specific sum mentioned, as costs in the Privy Council, is made in the order of the Privy Council, then no interest will be allowed on that sum (1) On the other hand, if the decree of the Privy Council and the decree of the local Court, confirmed by the Privy Council, are silent on the question of interest, no interest will be illowed (2) Where a decree of the Privy Council gives interest, but does not clearly specify the rate, the Court should ascertain if possible, from other parts of the deere itself, or from other documents which may be read in conjunction with the decree, what rate was intended to be given (3) When an appeal to the Privy Council was allowed by the High Court in a suit instituted by a Hiudu widow as the guardian of her husband's adopted son, then a minor, but who on attaining majority petitioned for the withdrawal of the appeal, this petition also referred to the Judicial Committee. and on the petition of the respondent the appeal was dismissed by the Proxi Council, the costs incurred by the widow being ordered to be recounsed from the adopted son's estate (4) If a suit is dismissed on a preliminary point in the Court of the first instance, and this decree is confirmed by the Appellate Court in India, but set aside by the Privy Council, and the ease is remanded for the trial of the suit, a refund of the costs which have been taxed and paid under the reversed decrees may be ordered by the Court of first matanee, on motion (5) The third and fourth paragraphs of the former section as to the execution of a decree for costs against a surety have been omitted. The Legislature by Act VII of 1888 made express provision with regard to matter coming under seets 549, 610 of the former Code by declaring that the liabilities of a surety for costs might be enforced in execution of a decree of the particular Court to the same manuer as if he were a party to the appeal, but the Calcutta High Court held that a security bond given by a third party for the due performance of the decree of the Appellate Court under sect 516 of the last Code could not be enforced in execution of that decree (6) The matter is now regulated hy seet 145, ante See notes thereto A surety is not precluded from questioning

⁽¹⁾ Muddim Taakoor & Morrison, 18 W Rt 253 (1872), sc. 9 B L R Ap 22, cf Dakhina Mohun : Saroda Mohun, 23C 357, 306 (1836), following Forester v Secretary of State, cf, however Ail Madhub t Bs sumbhur, 21 W R 411 (1874), where Jackson, J, allowed interest, though the Privy Council decree was substant about it

⁽²⁾ Lekhraj i Maintab Chand, 21 W K 147 (1874) Dikkima Mohun t Saroda Mohun, 23 C 357 (1896) In this case it is not mentioned whether the decree of the local Court, confirmed by the Preyr Council, allowed interest or not See also Broja Sundarce i Anund Moyee, 16 W R 302 (1871)[cited in Forster i Secretary of State, 3 C 104, 170 (18771), Amerecom sa i Meer Valuomed, 18 W R 103 (1872), Mahtab Lunder, Juan Lall, 3 C 351 (1877).

Gooroo Dass Roy v Stephens, 21 W R 195

<sup>(1874)
(3)</sup> Ameeroonntssa z Veer Mahomed, 18
W R 103 (1872)

⁽⁴⁾ Bistoopria v Nund Dhul, 13 M I A 602 (18,0)

⁽³⁾ Dorab Ally t Abdool \(\text{local}_{\text{2}}\) \(2 \) \(2 \) In this case 3.8 (1871), \(r \) o, 4 C 220 \(1 \) In this case interest was allowed on the amount to be refunded at the rate of 6 per cent from the date of the order made on motion till realization. But interest from the time when the money was pand was not allowed.

⁽⁶⁾ Surpoo Dass t Balmukund, 23 C 212, 215 (1894) The decision in the case of R 402 Pershad Singh t Phuljuri Koer, 12 R 402 was superseded by Act VII of 1888 sect 58 amending sect 610 of the last Code

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the validity of the security bond in execution proceedings, as he was not a party to the order of the High Court, and if the bond is invalid it cannot be enforced against the surety, (1)

Mesne profits, interest.—It is settled law that where a decree is silent touching interest on mesne profits subsequent to the institution of the suit, the Court executing the decree cannot assess or give execution for such interest or mesne profits.(2)

The orders made by the Court which executes the 17 order of His Majesty in Council, relating to Appeal from order relating to execution. such execution, shall be appealable in the same manner and subject to the same rules as the orders of such

Court relating to the execution of its own decrees Appeal.—An appeal to the Privy Council will be as of right from the order

of a single Judge of the High Court as to execution of a decree of the Privy Council when the property is over Rs 10,000 (3) Whether or not an order under the rule is a ministerial proceeding, if a judicial discretion is exercised thereunder, it may amount to a "judgment" under sect 15 of the Charter and may he appealable If in such exercise of judicial discretion a Judge usurps jurisdiction that alone would be a valid ground of appeal (4)

Везоу

Latt Kooer t Sobadra, 3 C. 720, 725 (1873), Gogun Chunder r Latllw, 5 C. L. R. 18), J , Manly e Paterson, 7 C 339 (1581).

191 (1879) Arunachellam : Arunachellam,

(3) Lilanand v Luckmiput Sing, 3 B L R

000, 600, et, 13 M. L. 4. 400 (1870), and

cf. L-lanund r Lalchmiput, 14 W R P C

15 VL 203 (1891)

" Meane Profits. "

See ndex, sub roc

⁽¹⁾ Girindra Nath Mukerjee t Gopal, 26 C 246, 249 cc., 3 t W > 54 (1595) (2) Sada Siva Pillai e Ramalinga Pillai, 2 I A 219, LB LR 353, 24 W R 193

⁽¹⁸⁷⁵⁾ Ram Kanve t Gooroo Prasunnoo, 16 W R 30 31 (1871) Fakharuddin t Official Trustee of Bengal, S C. 178 (1881). Chander Coomar : Gonesh, 13 C. 283, 290 (1880), but see Leclanund Singh : Takehim put, 14 W R P C. 23, a c, s B L R 605 13 M. I A. 490, 490 (1870), Gooroo Das Roy r Stephens, 21 W R. 195 (1874), Tara monec : Radha Jeebun, 14 W R. 455 (1570).

²³ (4) Hurrish Chunder r Kalı Sundarı, 10 L. A. 4, 16, 17, a. c., 9 C. 452 (15.2) weh cases to be distinguished from those in which a single Judge grants a certificate for leave to appeal to the Privy Council and which are not at pealable Lutf 4h Khan r Asgur Reza 17 C. 450, 457 (1890) per Wiben,

ORDER XLVI.

Reference.

- 1. Where, hefore or on the hearing of a suit or an appeal to Reterence of question in which the decree is not subject to appeal, or to High Court. where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Comit trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the ease and the point on which doubt is entertained, and refer such statement with its own opinion on the point for the decision of the High Court.
- 2. The Court may either stay the proceedings or proceed is counting pass decree of High Court.

 In the case notwithstanding such reference, and may pass a decree or make an order contingent upon the decision of the High Court on the point referred.

but no decree or order made shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference.

Reference —Any Judge may make a reference provided the terms of the rule are complied with (1). This rule applies only when doubts arise in the hearing of a suit, or appeal, or execution or other proceeding. It was not intended to apply to supposititious cases, which do not actually arise in a proper proceeding before the Court (2). It does not authorize a reference except on a point arising in a litigation between parties, or in a matter wherein the Court is called on to adjudicate, that is, to pronounce, on the opposite pretensions of contending parties (3). So it has been held not to apply to an application by the alleged trustee of a mosque for permission to grant a lease of lands alleged

⁽¹⁾ See Abdul Gafur t Albyn, 30 C 713 (1903) [reference by Munsif], Mahamad Ilaji Zakeria t Ahmadbhai, 25 B 327 (1900) freference by District Judge]

⁽²⁾ Mahamad Haji Zakeria v Ahmadhhai, supra, s c, 3 Bom L R 268 S 28, Act

XXIII of 1861, was held not to apply to applications for review Bonomally Dec t Rum Sadov, 17 W P. 95 (1872)

⁽³⁾ Yashvant Narayan t De Souza, 12 P.

^{78 (1597)}

First Schid О 45, г 16

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Appeal —An appeal to the Privy Council will he as of right from the order of a single Judge of the High Court as to execution of a decree of the Privy Council when the property is over Rs 10,000 (3) Whether or not an order under the rule is a ministerial proceeding, if a judicial discretion is exercised thereunder, it may amount to a "judgment" under sect 15 of the Charter and

may be appealable If in such exercise of judicial discretion a Judge usurps

jurisdiction, that alone would be a valid ground of appeal (4)

⁽¹⁾ Girindra Nath Mukerjee i Bejoy Copal 26 C 240, 249, s c 3 C W N 54 (18981) (2) Sada Siva Pillai v Ramalinga Pillai, 2 I A 219, 15 B L R 383, 24 W R 193 (1875), Ram Kanye ι Gooroo Prasunnoo, 16 W R 30, 31 (1871), Pakharuddin ι Official Trustee of Bengal, 8 C 178 (1881), Chunder Coomar v Conesh, 13 C. 283, 290 (1886) but see Leelanund Smgh : I al chm put, 14 W R P C 23, a c, 5 B L R 605, 13 M. I A 490, 496 (1870), Gooroo Dass Roy t Stephens, 21 W R 195 (18"4) . Tara monce v Radha Jeebun 11 W R 485(1870). Latt Moocr & Sobadra 3 C 720, 725 (1873), Gogun Chunder : Landlay, 5 C L R 18J,

^{191 (1879)} Arunachellam i Arunachellam, 15 VI 203 (1891) See index, sub toc "Mesne Profits

[&]quot;Mesne Profits
(3) Lilanand v Luchmiput Sing 5 B L P
605, 608, s. c., 13 M I 1 490 (1870), and
cf Leelanund v Lakchmiput, 14 W R P (

of Leelanund v Lakehmiput, 14 W R P C

23

(4) Hurnish Chunder v Lah Snudar

10 I A 4, 16, 17, a c, 0 C 482 (18-1)

Such cases to be distinguished from the cir which a single Judge grants a certificate for leave to appeal to the Prvy Council and March a root appeal by Luff 14 hkhail lagur Reza, 17 C 455, 447 (1890) 47 Whice

ORDER XLVI.

Reference.

- 1. Where, before or on the hearing of a suit or an appeal reference of question in which the decree is not subject to appeal, or where, in the execution of any such decree, any question of law or usage having the force of law arises, on which the Court trying the suit or appeal, or executing the decree, entertains reasonable doubt, the Court may, either of its own motion or on the application of any of the parties, draw up a statement of the facts of the ease and the point on which doubt is entertained, and refer such statement with its own opiniou on the point for the decision of the High Court.
- 2. The Court may either stay the proceedings or proceed in the case notwithstanding such reference, and may pass a decree or make an order con of the point referred, on the point referred,

but no decree or order made shall be executed in any case in which such reference is made until the receipt of a copy of the judgment of the High Court upon the reference

Reference—Any Judge may make a reference provided the terms of the rule are complied with (1). This rule applies only when doubts arise in the hearing of a suit or appeal or execution or other proceeding. It was not intended to apply to supposititious cases, which do not actually arise in a proper proceeding before the Court (2). It does not authorize a reference except on a point arising in a litigation between parties or in a matter wherein the Court is called on to adjudicate that is to pronounce on the opposite pretensions of contending parties (3). So it has been held not to apply to an application by the alleg of trustee of a mosque for permission to grant a lease of lands alleged.

⁽¹⁾ See Abdul Cafur t Mbvn, 30 C. "13 (1903) [reference by Munsif] Mahamad Haji Zukeria t Ahmadbhai 25 B 327 (1900) [reference by District Judge].

⁽²⁾ Mahamad Haji Zakeria v Ahmadbhai, cipra s. c., 3 Bom L. l. 208. > 25 Act

XXIII of ISol was hell not to apply to applications for review Bonomally Deo r Ram Sadov 1" W. P. 95 (1872)

⁽³⁾ Yashrant Narman i De Nouza 12 1 "5 (155")

to belong to the mosque,(I) or to an order fining a pleader (2) The proceeding in which the reference is made must be one in which there may be a decree,(3) and in which such decree, when passed, is final (4) For in appealable cases a remedy to cornect possible error is provided by the appeal. The question must be one of law, and the Court cannot make a reference on a point merely on the application of the parties unless it entertains a reasonable doubt upon the matter, (5) nor on a point on which a Division Bench of the High Court has expressed an opinion (6) A Judge cannot ordinarily entertain a reasonable doubt on a point clearly decided by the rulings of the High Court of his Presi dency, unless the authority of the decision can be questioned by virtue of any thing said or decided in the Privy Council (7) In r 1 the words " or the construction of a document which construction may affect the merits" have been omitted as they are sufficiently covered by the power to refer any question of law. The alterations in r 2 are verbal only It has been held that a Collector hearing an application under sect 23 of the Bombay Mamlatdar's Court Act, 1906, has no power to make a reference to the High Court, not being a Court trying a suit or appeal or executing a decree (8)

Presidency Small Cause Courts -Sect 69 of Act XV of 1882 provides for a compulsory reference where the Judges differ in opinion as to any question of law or construction of a document affecting the merits, and also where, in suits exceeding Rs 500 in amount or value, any such question arises upon which the Court entertains reasonable doubt, and either party so requires (9) The provisions of rr 3-5, so far as they are applicable, are deemed to apply as if such reference had been made under the present rules It was formerly said (10) not to be an easy matter to make sect 69 dovetail with the present rules, and divergent views (11) were entertained upon the question whether

(now 47), Rangh & Bhang 11 B 57 (1886)],

On atal Lova Association 1 Hafeh, 17 B 735

(1892) [a juestion arising in execution camet

⁽¹⁾ Mahamad Hau Zal cria : Ahmadbhai, 25 B 327 (1900)

⁽²⁾ Yashvant Narayan : De Souza, 12 B 78 (1887) (3) See Ramphul v Durga, 7 A 815 (1885)

⁽⁴⁾ Krishna Nath v Ram Kumar, 7 C L R 144 (1880) [where the matter referred could be made subject of second appeal). Secretary of State : Fazal Ah, 18 C 234, 236, 239 (1891) [objection overruled], Mahant Ishwargar r Chudusama Manabhar, 12 B 30 (1887) [amount of security required on grant ing stay (feacention, a question unders 244, and therefore appealable, and see as los 244

boref relexcept where the decree is final] In re Monohur Mo kergee 5 C 756 (1674) f rl r on at plicate a for Probate not lan. fullconnet bereferred], a c, 6C I R 2.4 (5) Of Hursh Chuntry O Bren 11 W R _48 (1570)

⁽⁶⁾ Naru Kehr China Blot, B B 53,

^{55 (1588)} (7) Bhanap t De Brito, 30 B 226 (1905),

Fillingham : Dunn, 8 P R 22 (1914) (8) Dalpat Zopiloo : Mahadu Uka 11

Bom L R 259 (1911)

⁽⁹⁾ See Benode I all 1 River Steam Navi gation Co , 1 C W N 143 (1897) , Ishwardas Tribhovandas : Kalidas Bhaidas, 20 B 779 (1996), Ralli Bros v Goculbhai Mulchand, 15 B 376 (1890), Oakshott i British India Steam Navigation Co , 15 W 179 (1881). Seshammal : Munusumi 20, M 358 (1890), Bank of Bengal : Vyabhoy Gangu, 16 B 618 (1832), Ishan Chunder : Haran Si lar H W R 625 (1869)

⁽¹⁰⁾ Griding : Secretary of State, 20 C 4 d

^{(1903),} at p 161 (11) See B no lo Lall r Brief Steam \all ation Co, supra, Cirling & Secretics ! State, 30 C 1.3 (1 103), contra, Ralli Br at G cull has Molchan I, 15 B 376 (18 9) at (

is No Le Mathers Day, 17 Cat 1 2 3 ([555]

sect. 63 was controlled by them — It is now unnecessary to further consider the matter, as by Act IV of 1906 the Presidency Small Court Act was amended with a view to remove the difficulties which had been experienced.

3. The High Court, after hearing the parties of they appear and desire to be heard, shall decide the point so referred, and shall transmit a copy and case disposed of its judgment, under the signature of the Registrar, to the Court by which the reference

was made; and such Court shall, on the receipt thereof, proceed to dispose of the case in conformity with the decision of the High Court.

"After hearing the parties."—The rule has here been altered, as the language of the former section might, if strictly interpreted, require a hearing of the parties even though they had not appeared

"Dispose of the case."—The word "case" in the last part of the rule refers to "the case" in the first part showing that what is intended is the suit and not the subject of the reference (1). Where the Small Cause Court passed a decree for the plaintiffs, but contingent on the opinion of the High Court, and on the reference the latter decided that upon the plaint before the Court the plaintiffs could not recover, it was held that the Small Cause Court had no jurisdiction to allow the suit to be withdrawn, but on receipt of the copy of the judgment of the High Court was bound to enter judgment for the defendants. Had the case heen referred in an intermediate stage, the fluid judgment heing withheld until the decision on the point referred to the High Court, the Small Cause Court would then have been in possession of the case, but having pronounced judgment contingent upon the opinion of the High Court, which opinion was against that judgment, there was odd one course to take (2)

Review.—The judgment passed by the High Court is not a decree or order within clause (b) of O XDVII r I but simply a statement of the grounds in conformity with which the Subordinate Judge is to dispose of the case as provided by this rule (3). A review is expressly given by that order and rule in the case of a judgment on a reference from a Court of Small Causes, but not one from a Subordinate Judge exercising the powers of a Small Cause Court (1)

4. The costs (if any) consequent on a reference for the Costs of reference to decision of the High Court shall be costs in the case.

Costs.—Costs "in the case" means costs of the suit or appeal, as in r l, this rule being the one under which the costs are dealt with, and the costs being

⁽¹⁾ Yule & Co. Mahomed Hossain 24 C. (3) Ramehandra Babaji i Sitaram Vina-129 (1896) AL, 10 B 68 (1885)

^{(2) 116 (4) 116}

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made costs in this case.(1) Under this rule the costs of a reference cannot be dealt with separately, but must be dealt with when awarding the costs of the suit. They are, however, in the discretion of the Court, and need not necessarily follow the event of the suit.(2)

Where a case is referred to the High Court under rule 1, the High Court may return the case for Power to alter, etc., decrees of Court making amendment, and may alter, cancel or set reference. aside any decree or order which the Court making the reference has passed or made in the case out of which the reference arose, and make such order as it thinks fit.

"Amendment."-The case may be returned for amendment, as in the decision noted below.(3)

١., (1) Where at any time before judgment a Court in which a suit has been instituted doubts Power to refer to whether the suit is eognizable by a Court of High Court questions as to jurisdiction in Small Small Causes or is not so eognizable, it may Causes.

submit the record to the High Court with a statement of its reasons for the doubt as to the nature of the suit. (2) On receiving the record and statement, the High Court

may order the Court either to proceed with the suit or to return the plaint for presentation to such other Court as it may in its order declare to be competent to take cognizance of the suit.

(1) Where it appears to a District Court that a Court subordinate thereto has, by reason of errone-Power to District Court to submit for revision ously holding a suit to be cognizable by a proceedings had under Court of Small Causes or not to be so mistake as to jurisdiceognizable, failed to exercise a jurisdiction tion in Small Causes. vested in it by law, or excreised a jurisdiction not so vested, the District Court may, and if required by a party shall, submit the record to the High Court with a statement of its reasons for considering the opinion of the subordinate Court with respect to the nature of the suit to be erroneous.

(2) On receiving the record and statement the High Court

may make such order in the case as it thinks fit.

(3) With respect to any proceedings subsequent to decice in any case submitted to the High Court under this rule, the

⁽¹⁾ Nicol c. Mathoora Das Dumani, 15 C. 507 (1888), at p. 510.

^{(2) 16.}

^{158 (1903) [}on the point dealt with the S^{\prime} C C. Act has been since amended by Act It, of Itent).

⁽³⁾ Gurling v. Secretary of State, 30 C.

High Court may make such order as in the circumstances appears to it to be just and proper.

(4) A Court suboidmate to a District Court shall comply with any requisition which the District Court may make for any record or information for the purposes of this *rule*.

Power to refer.—Act VII of 1888, sect 60 Rule 6 applies only to a case before judgment (1)

Submission for royision -It has been held by the Madras (2) and Calcutta (3) High Courts that the Judge is bound to make a reference if one of the parties requires him to do so The Allahabad Court has, however, held that the word "shall" in the former section was not mandatory but directors, and that before a District Court could make a reference under it, it must be of opinion that the Suhordinate Court has erroneously held upon the point of jurisdiction in regard to the particular suit before it, and that therefore the matter was one in which the interference of the High Court should be sought (1) When a reference is made to the High Court under r 7, the Court which makes it should state its reasons for considering the opinion of the Subordinate Court with respect to the nature of the suit to be erroneous (5) Notwithstanding sect 16 of the Provincial Small Cause Courts Act, the High Court has, on a case being submitted to it under this rule, full power to consider tho matter of purisdiction or to deal with it on the merits, so as to do substantial justice without putting the parties to the expense of a fresh trial Where a suit cognizable by a Small Cause Court was tried both in the Munsif's and District Judge's Court without objection to the jurisdiction, held, on a second appeal to the High Court that the former section must be read with sect 19 of the Provincial Small Cause Courts Act so as to modify its full effect in a case wrongly tried by an ordinary Civil Court and taken in appeal to the District Court both parties having submitted to the jurisdiction it was not competent to either of them on second appeal to plead the want of jurisdiction so as to render the proceedings taken in the suit void (6) In a suit for damages on account of use and occupation of land brought in a Court of Small Causes exception was taken to the plaintiffs title. The plaint was returned by the Judge under sect 23 of the Provincial Small Cause Courts Act (IX of 1887). for presentation in the ordinary Civil Court and it baying been presented to the Munsif, who tried the suit and passed a decree in favour of the plaintiff On appeal the Subordinate Judge reversed that decree, holding that the Munsif had no jurisdiction to try the suit Held that under sect 23 of the Provincial Small Cause Courts Act the order of the Small Cause Court Judge was regularly made and the Munsif had, therefore, jurisdiction to entertain the plant Semble

⁽¹⁾ Diwalibar v Sadashivdas, 24 B 310 (1899), a. c. 1 Bom. L. R 836

⁽²⁾ Simson: VcMaster, 13 M 344 (1890), and the fact that an appeal lay to the District Judge from the order made by the District Vunsif did not preclude him from making the reference ib, at p 346

⁽³⁾ Suresh Chunder v Aristo Rangini, 21 C 249, 251 (1893)

⁽⁴⁾ Madan Gopal t Bhagwan Das, 11 A 304 (1888)

^{304 (1888)} (5) Chhotu v Jawahir, 28 A 293 (1304)

⁽⁶⁾ Suresh Chunder v Kristo Rangim, 21 C 249 (1893)

tribunal (3)

(2) Ram Lal v Kabul Singh, 25 A 135

It is doubtful whether the Appellate Court would have been right in dismissing the suit for want of jurisdiction, even supposing that the order made under sect 23 of the Provincial Small Cause Courts Act had not expressly conferred jurisdiction upon the Munsif (1) This rule does not apply to every case in which a Court of Small Causes has failed to exercise a jurisdiction vested in it by law, but only to a restricted number of such cases, namely, those cases in which a Court of Small Causes has erroneously beld a suit to be, or not to be, cognizable by it. Where no question as to the Court's jurisdiction was raised by either party, and the Court of Small Causes proceeded to judgment as if the case was propelly cognizable by it, the High Court refused to interfere upon a reference made by the District Judge purporting to be made under the former section (2) The rule is an enabling one, and does not cut down the jurisdiction of the appellate

drayya, 30 M 41 (1906)

⁽¹⁾ Mahamaya Dasya t Nitya Hari, 23 C (1992) 425 (1895) (3) Sri Raja Simhadri v Chelasaue Bha-

ORDER XLVII.

Review.

1. (1) Any person considering binnelf aggreed—

Application for review (a) by a decree or order from which of judgment.

an appeal is allowed, but from

which no appeal has been preferred,

(b) by a decree of order from which no appeal is hereby allowed, or

(c) by a decision on a reference from a Court of Small

Causes.

and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some imistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(') A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the applicant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review.

Application for review of judgment—This rule corresponds with sect 376 of Act VIII of 1859. That section was modified by sect 623 of Act X of 1877, by which Act the sub clauses (a), (b), and (c) were substituted for "by a decree of a Court of original jurisdation from which no appeal shall have been preferred to a Supreme Court, or by a decree of a District Court in appeal from which no appeal shall have been admitted by the Sudder Court, or by a decree of the Sudder Court, from which either no appeal may have been preferred to Her Majesty in Council, or an appeal having been preferred na proceedings in the suit have been transmitted to Her Majesty in Council," the wards "and important" "after the exercise of due diligence," "or order made or an account of some mistale or error appurent on the face of the record," "or order made" ind the second clause were

added, and " produced" substituted for "adduced," " any other sufficient reason" for "any other good and sufficient reason," "desires to obtain" for "may be desirous of obtaining," "decree passed" for "judgment passed," and "review of judgment to the Court " for " review of judgment by the Court " The present Code substitutes "decision" for "judgment" in suh clause (c), adds the words "or order" in the second clause and omits the words "hereby" before "allowed" in clause (a), and " or to the Court, if any, to which the business of the former Court has been transferred," which had been added at the end of the first clause by Act X of See sect 114. ante

No Court has the power of setting aside an order which has been properly made, unless it is given by statute (1) The High Court has no power to amend its own decree except under the provisions of sect 206 (now sect 152) or sect 114 or this rule, (2) and inferior Courts in the Mofussil have no jurisdiction to review their own judgments except under the circumstances and with the limitations set forth in this Code (3) A Court for the relief of insolvent debto: has jurisdiction to review its own orders, (4) so had a Provincial S C Court (The former section did not apply to proceedings before the Special Judge unde the Dekkhan Agriculturists' Rehef Act (XVII of 1879) (6) but he had power to review an ex parte order made hy him, (7) nor was it affected by sect 42 o the Lower Burma Courts Act 1900 It was held that the former section die not admit of an application that a case be re instated where, the suit having heen dismissed under sect 93 (now O 1X r 3) for non appearance of the parties the plaintiff had by his own negligence allowed his rights under sect 99 (now O IX r 4) to be barred, (8) hut where a suit had been dismissed under sect 102 (now O IX r 8) and no application had been made under sect 103 (now O IX r 9), an application for review was held admissible (9) It has been held that an application for review is not a suit within the meaning of sect 13 of the last Code (now represented by sect 11) and therefore cannot operate as constructive res judicata (10)

The section was held to include an order in execution of a decree, (11) such as one dismissing an execution case, (12) even after satisfaction of the decree, the decree holder could re open the matter under sect 244 (now sect 17) and sect 623 (r 1), on the ground that he had acted under a mustake of calculation in fixing the amount that was due, (13) as also an order disallowing a

N 318 (1896)

(1599)

(1913)

47 (1567)

(9) Paj Narain : Ananga Mohan, 26 C / Pa

(10) Sred Chindra Pal Chowley

Iriguna Prusad Pal Choudry, 10 C '41

(11) Haradhun t Chunder Mehun, W R

Spec No p 6 8 (1862), Lott the Court of

Wards, 6 W It Mis 127 (18(6) Nara

⁽¹⁾ Drew t Willis, L R 1 Q B D (IS91) 152

⁽²⁾ Kota hiri t Vellanki, 1 C W N 725,

²¹ M 1, 27 I 1 197 (1900)

⁽³⁾ Burra I ul cer t I ukcer Doss, 20 W R 150 (1873), and see Chands Charan : Monranjan, 17 C L J 415 (1913)

⁽¹⁾ In the matter of Phucker Bhagyandas, Insolvent, Crelitor, Murary, & B 183(1883) (a) Isan Chun I rr I uchun Geps, 5 C 6 #1

⁽¹⁵⁵⁰⁾ (6) Pabaja e Babaja 15 B 659 (1891)

⁽¹⁵¹⁾ (a) holish W the Vil thing 21 W

⁽⁷⁾ Ramchantra t Drang att, 20 B 281

Janblen : Gingakrishna, I B II (,) ((12) Yoka Kumara Khattram m 2 (W N 1498 (1834)

⁽¹³⁾ Mirstan r Ram Rutten, St. B N

^{(27 (1} ю))

claim to property attached, (1) and an application to amend a sale certificate (2) An order refusing leave to sue as a pruper under sect 409 (now O XXXIII r 7) may be reviewed. (3) also an order giving leave to appeal to the Privy Council. (4) and au order refusing such leave , (5) and an ex parte order admitting an appeal under sect 5 of the Limitation Act. (6) and an order under sect 76 of the Registration Act of 1871 rejecting an application for registration, such order being in the nature of a decree within the meaning of the corresponding section of the Code of 1859, (7) also au order made on an application under sect 63 of Act II of 1874, such application being a suit, (8) and an order dismissing for default an application under O XXI r 89 (9) It applied to proceedings under Act XXVII of 1860 in Bengal and the N W P (10) hut not in Madras (11) But a decision under sect 5 of the Court Fees Act is not open to revision , (12) nor did the former section apply to proceedings under Bengal Acts VII of 1868 or VII of 1880, (13) nor to suits and proceedings under the N W P Rent Act, 1881, (14) but it did apply to proceedings under sect 103 of the Bengal Tonancy Act as being suits between landlord and tenant (15) It has recently been held by the Privy Council that a Revenue Commissioner acting under Act XI of 1859, as amended by Bengal Act VII of 1868 had no power to review his own order setting aside a sale held for arrears of revenue, for such an order even if bid in law, was good and final as an order, and could not be altered by him (16)

"Any person considering —Where a decree against several defendants has been treated as separate decrees for the purposes of special appeal, the Court was held to have no power to modify the decree on review in respect of defendants who had not applied for review otherwise if the decree were common to all (17)

"Decree or order' —An ex paste order may be reviewed, (18) so may an ex paste decree although it is open to be dealt with under sect 108 (now O IX

(1911)

(15"0)

(1590)

(1572)

ر(1537) چين

156 (1530)

(10) In the matter of Poona Lover IC 101

(11) Sivu t Chenamina o VI H (417

(12) Lafk rath Cobind Nath 12 \ 1-9.

(13) Lala Iryaga Jas Varayan ... (113

(14) Wazir Singh v Thakur Ki bori, 13 A

(15) Schha Mi n r Durga Churn, ... C

(1875) 24 W R 376 Hamceda Beebee t Noor B ebec 9 W R 351 In the matter of

Rukmin 1 \ 287 (1576)

146. _C W \ 137 (163")

(16) Bannath Ram Goods r \and

Kumar Sirsh, P. C., 40 C. and (1913) 117, Pegoo r. Wanzooddeen, 18 W. L. 4 d.

⁽I) Cochrane v Heera Lat " W R "J (186")

⁽²⁾ Boojha Roj t Ram Kumar 3 C W N

<sup>374 (1893)
(3)</sup> In the matter of Umasundari 5 B L.
R 111 23 (1870) Adarp t Manifor 4 B

<sup>414 (1880)
(4)</sup> I cr Princip J in G parther Goldel

¹⁶ C -91 note (1884) co fra Ameerumssa t Indurject 6 W R Mis 97 (1866), en re Woomatara 6 W I Mis I-0 (1866)

⁽⁵⁾ Nand Kishore t Ram Golam 3) C 1037 (1J12), 16 C W V 1083

^{1037 (1}J12), 16 C W V 1083 (6) Venkatrayudu t Nagadu, 3 W 4.0

^{(1880),} Mashaullah : Ahmedullah 13 (73 (1880)

⁽⁷⁾ Reasut t Abdoollah, 2 C. 131 , 3 1 A 221 (1870)

<sup>221 (1870)
(8)</sup> Smith t Secretary of State, 3 C. 340

^{(1878) (18)} thur Halan t thinal th, J 1 36

⁽⁴⁾ Swammatha r Laul, -2 M, I. J 145 (1886)

r 13) (1) When an appeal has been dismissed under sect 551 (now O XLI 1 11), the Lower Court has no jurisdiction to review its judgment or decree,

that decree having merged in the decree of the Appellate Court (2) The Code of 1859 only referred to review of decrees, but where a Judge had reviewed an order passed confirming a sale in execution of a decree, the Privy Council did not treat that review as a nullity, but dealt with the case on its merits (3)

Clause (a). - The admission of a special appeal debarred a review, even though the person applying did not prefer the appeal, (4) likewise if the special appeal has been tried and disposed of (5) In such a case the Lover Court could not review so as to modify the substance of its decree, but it might for the purpose of correcting a clerical error; (6) but if a review be applied for in proper time and before an appeal has been preferred, the Judge was held not prevented from proceeding upon the application for review by the subsequent presentation of an application to appeal to the Privy Council, and he had full power and was bound to proceed under the application for review, (7) but in that case the application for leave to appeal had not been granted, and the Madras High Court formerly held that the preferring of an appeal subsequent to the application for review, stays the review proceedings (8) But the Allahahad High Court apparently hold a contrary opinion, for there an order passed on review, purporting merely to amend the original decree, was held to amount to a new decree superseding the original decree, and an appeal filed pending review could not be heard as the decree under appeal had ceased to exist (9) A bull Bench of the Madras High Court has now held that the icview proceedings are not stayed by the preferring of an appeal (10) An applicant may withdraw his appeal and apply for a review,(11) as by the cancellation of the order for admission of the appeal it may be taken that no appeal had been admitted or preferred, but not where the appeal instead of heing withdrawn is actually dismissed (12)

Clause (c).—This does not include a judgment on a reference from a Sub ordinate Judge exercising the powers of a Small Cause Court (13) The Madras

(1) Bibi Mutto v Hahi Begam, 6 A 65 (1583), Harshar v Buddu, 13 C L R 254 (1883), Porcsh Nath v Khettro Monce, 20 W R 281 (1873), Mi Azun e Ram Manick, 12 W B 195 (1563), Hakruger v Busdeo, 17 C W N 031 (1911) , Lil Chet Narain :

Rampal, 16 C W N 643 (1911) (2) Peary Mohan v Molendra, 4 C I J JUU (1JUU)

(3) Gir lhari Singh r Hurdeo Naram, J I

1 .30, 26 W R 14 (1876) (1) Lucas r Stephen, 9 W R 01 (1868)

() Raj Dhine i M hales, H W R 5H

(e) Comanum I : Suttah 9 W L 471

(7) Bhurrut Chia I re barr Garge 5 W b >(18), B lake 1 B 3 2 | H | sr lr ate Bala a lat La C La 1 (1984). It of a section to the fact that the last the last 100 feets and 100 fee

(1883)

(8) Ramanadhan : Narayanan, 27 M 602 (1904), overrul d m Chema Reddi t Pel daobi Reddi, F B , 32 M 410 (1904)

(9) Kanhaiya t Baldeo, 28 1 240 (1905) (10) Chema Rellit Ped laobi Red h P B, 32 W 116 (1909), overruling Ramadh in t

Naray in, 27 M 602 (1901)

(11) Sanabhrer Sathebhal, 9 B H C 1 C 59(1572), Panlut Devp., 7 B 257(18-3) (12) Rimajja e Bharmi, 30 B 0.5, 5

4- m L. R 812 (1000) Rica Kutti (Mama I, 15 M 481 (1819), Jut see Pan lu rang t M 10, 6 B H C, 1 C () (180) white the special appeal was their 140 enable an application for vivil to be in 1

to the Lower Curt po B 15 (13) Lar Lucher State (155.)

Hi_oh Court has held that seet 17 of the Provincial Small Cause Court Act is merely directory and not mandatory (1) but the Calcutta High Court has held the contrary (2)

'Discovery of new and Important matter or evidence —Though review is allowed out this ground the Pray Council have recently pointed out that the Code exacts strict conditions so as to prevent litigants lying on their ears when they ought to be looking for evidence (3). It must be shown that it is prima facie evidence in the cause (4). The new evidence must be clear and conclusive. (a). It used not be sufficient perse to show that the previous decision was wrong or be such as to cause an overpowering balance of evidence in favour of the applicant (6). But the discovery of evidence not originally available tending to prove that a decree had been obtained by perjury is ground for an application for review (7). A judgment on special appeal cainnot be reviewed merely on the ground that new evidence to prove a fact had been discovered (8) maximuch as it would have been madmissible to impeach the decree on the hearing of the special appeal itself, (9) though it might be good ground for an sunheation for review to the Lower Court (10).

There has been a conflict of decisions as to whether a new and authoritative exposition of the law is or is not new and important matter justifying the granting of a review. On the one hand it has been held that the publication of a decision subsequent to the cass sought to be reviewed being decided was ground for a rotiew (11) that where a review was sought on the strength of a Full Bench decision it should have been made within mirety days of that decision (12) and that where a review had been properly granted the case should be governed by any new exposition of the law laid down since the date of the original decision (13) also that the decision of the Prvy Council in an appeal is new and important matter for the purposes of an application for review in respect of a decree made on a subsequent accrual of the same cause of action as that on which the decree appealed against was based (14). Ou the other hand it has been held that a subsequent Full Bench case overruling the authority on

Ramasamı t Kurisu 13 M. 1 8 (1689)
 Jogi Yhir t Bishen Dayal 18 C 83 (1890)

⁽³⁾ Lessowji Issur v G I Rv Co 11

C W N _1 (190)

⁽⁴⁾ Ram Dhun : Joy Vara n L W R 336 8 B L R App 36 note (1869)

⁽c) Herra Lall t Ram Taruck 23 W R
3.3 (18-5) see Mahabu Prasadt Collector
of Mlahabad 36 A.277 (1914) where a sunt
had been dismissed on two grounds new
evidence on one alone is not ground for
review

⁽⁶⁾ In re 1ppa Rao 10 M 3 13 I 1 155 (1866)

⁽⁷⁾ Vunshi Mosuful e Surendra 16 C W \ 1002 (1912) \ \text{1bdul Huq : \ \text{1bdul}} \]
Hafiz 14 C W \ Co (1910) \ \text{Laki mi}

Nur 1h 38 C 936 (1911) 15 C W \ 1010 (8) Bhyrub \ath t Kally Chunder 16 W

^{1 112 (13 1)} (9) Jackammal t Palacapia J M C

⁽⁹⁾ Jackammal t Palncapja 5 M H C 461 (18 0)

⁽¹⁰⁾ Panchanan r Radha Nath 4 B L I 213 (18 0) Na id hi hore in rethe Pet tion of) 32 A. 71 (1909)

⁽¹¹⁾ Achuta τ Vammavu 10 M. 357 (1886) Banco I r had τ Radha P rsha! 15 W R 143 (1671)

⁽¹²⁾ Forbes t Dyanutoollah 10 W R 415

⁽¹³⁾ Shama Churn t Bindahun 9 W R 151 (1868) Bura Boodho r Koylash

Chunder 6 W R 100 (1866) (14) Wa_ohela t Masludin, 13 B 330 (1888) Ram Lal e Kalka 33 A 565 (1911)

which the judgment sought to be reviewed had been hased,(1) or the discovery of a fresh authority,(2) were not grounds for granting an application for review In the last cited case it was, however, held that when a Court is satisfied that its judgment had proceeded upon an erroneous view of the law this rule allows a review A new exposition of the law is, however, not a just and reason able cause for not having applied for a review within the time prescribed for such application (3)

"After the exercise of due diligence "-This is the effect of the decisions in the cases cited (4) in the second of which it was held that although the petitioner stated he did not know of the existence of the evidence at the time the suit was tried, it hy no means followed that he ought not to have known of it, and that if he had made due search he might not have discovered it

"Could not be produced "-This must be proved to the satisfiction of the Court before it grants an application for review, (5) hut an application for review having been admitted on other grounds, fresh evidence may be received, though no reason has been assigned for its non production at the original trial (6)

"At the time when the decree was passed "-This rule does not authorize the review of a decree which was right when made, on the ground of the happening of some subsequent event (7)

"Mistake or error"—If the mistake of error is on the face of the judgment, or if it is shown that the decision has proceeded upon a mistaken view of the law,(8) or if the error be on the face of the record,(9) or or the face of the judgment or the decree, it is clear that it is irregular and incorrect or not in compliance with the provisions of the law, a reviewlies (10) The absence of a formal finding on an issue tried and decided by a High Court is not an error calling for review of judgment (11)

"Any other sufficient reason."-Whilst an error on a point of law is a ground for review, (12) the reason is not confined to either positive error in 1 in

^{(1) \}mrst Lal : Madho Das & A 202 (1881), see also Ma thub Chunder: Radhil a. 7 W R 105 (1867), Dwarl anath t Manick Chunder, 9 W P 102 (1868)

⁽²⁾ Vollaya t Jaganatha, 7 M 207 (1883), see also Bance Pershad t Rullin I r-had 15 W R 113 (1871), Chandi Charan t Monoranian, 17 C L. J 416 (1013)

⁽³⁾ Sharia Churn e Bir labun, 3 W R 181 (1863), Bura Bootho t Koylash (hundr, 6 W 1, 100 (1866), Pun hanan : Garains J.B. L. R. 187, 18 W. R. J17 (187-)

^{(1) &}quot; tanath t " am Soonduree 14 W L. _). AB L.P M; J7 (18 0), H are I all (I a 1 Jaruck - J W 1 J-3 (15")

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^{(1863),} Omrao Phaloor : Gocool Mundul 16 W I. 7 (1871), Suboki lore : Jadub

Chunder, 20 W R 426 (1873) (6) Biliari Lal t Trailable may 1, 3 B I. B 1 C 316 (1569)

⁽⁷⁾ Kotaguri i Vellanl 1, -1 V I -71 V 197. 1 C W V 7.5 (1500), 2 Bom L R

⁽⁸⁾ Sharup Chand : Pat Dassee, 14 C. b. 7

⁽¹⁵⁵⁷⁾ (9) Husum t C lict rof Muzaffarna,21

^{11 1 176 (1883)} (10) Burhatti o e Bamarel, 3 C I. J 110

⁽¹ w1)

^{(11) &}quot;al quathic Subraya, 2 11 " (1874) (1-) Kch P he Meun, I is 10 W 1 143

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or new evidence to be brought forward which could not be produced on the first hearing (1) And the cases do not hmit the discretion of the Court, in saving what reason is good and sufficient or what may he so far requisite to the ends of justice as to support an application for review (2) The Court must decide this in each case on its own circumstances. The reason must be one sufficient to the Court before which the application for review is made It may depend upon a question of law or upon a question of fact or of mixed law and fact. It is not limited only to the cases in which the right to review is extended in England (3) It cannot, moreover, he treated as an universal rule that up point cau be raised on an application for review which has already been discussed and decided on the original hearing or that no new point which was not rused on the hearing can he argued on the application for review In each case the Court must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for the ends of justice (4) The following cases therefore are cited, as instances only, of the exercise of the power, which however is not limited to such cases. Where a Court wrongly excluded material evidence . (5) or refused to admit additional ovidence on appeal, (6) or the parties and the Judge were under a misapprehension as to the contents of a document, or the Judge alone was misled on the point . (7) or the Judge in deciding the case omitted to consider the effect of important documentary cyclence filed with the plaint which was not taken assue upon and which materially affected the merits of the case, (8) or tho question of limitation , (9) or discredited material documentary evidence with out inspecting it, or declared the report of a Commissioner unworthy of reliance because he was a muharrir (10) or omitted to try a point which was urged before him (11) hy mistake, (12) or had placed the onus of proof on the wrong party, (13) it was held that there was sufficient ground for granting a review. As also in the case of omission to serve the respondent with notice of appeal and his consequent absence at the hearing, (14) or the dismissal of a suit for non joinder of parties necessary under sect 85 of the Transfer of Property Act , (15) or the dismissal on the technical ground that the stamp was originally insufficient, but which was subsequently found to have been sufficient . (16) or

Reasut Hossein t Abdullah, 2 C 131,
 A. 221 (1876)

⁽²⁾ Ib As to the generality of these terms, see Gopal Chandra Lahri v Solomon 13 C 62 (1886), and the case in next note

⁽³⁾ Amir Hasan : Ahmad Ali 9 A 36 (1886) (4) Chintamani v Pyari Mohan, 6 B L.R.

^{176 (1870), 15} W R F B 1 Bhawabal r Rajendra, 5 B L R 321 (1870), Huree Pershad v Nund Kishore, 17 W R 479 (1872), Kalu t Vishram, 1 B 543 (1877)

⁽⁵⁾ Reasut : Abdullah, 2 C 140 3 I A 221 (1876)

⁽⁶⁾ Ram Lall v Rung Lall, 17 W P 47 (1871)

⁽⁷⁾ Gopal Chandra v Solomon, 13 C 62

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⁽¹⁸⁸⁶⁾ (8) Mahadeva : Sappani, 1 M 398 (1878)

⁽⁹⁾ Ramu Rai t Dayal Singh 16 4 359, 394 (1894)

⁽¹⁰⁾ Abdul Rahim t Racha Rat 1 A 363 (1877)

⁽¹¹⁾ Bussun Alı v \asirooddeen, 16 W R 134 (1871) Beharec Lall ı Troyluckho 12 W R 223 (1869) 3 B L R, A C 346

⁽¹²⁾ Wheer Huro Lall 16 W R. 150 (1871) (13) Harthar : Madab Chandra, S B L. R ,

P C 580 (1871)
(14) Ghansham t Lal Singh, 9 A. 61 (1886)

⁽¹⁵⁾ Gursh Chunder v Juramoni, 5 C W \ 83 (1900)

⁽¹⁶⁾ Ah Akbar v Khurshed, 27 A. 695, 2 A L. J. 465 (1905)

which the judgment sought to be reviewed had been based.(1) or the discovery of a fresh authority, (2) were not grounds for granting an application for review In the last cited case it was, however, held that when a Court is satisfied that its judgment had proceeded upon an erroneous view of the law this rule allows a review A new exposition of the law is, however, not a just and reason able cause for not having applied for a review within the time prescribed for such application (3)

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"Any other sufficient reason."—Whilst an error on a point of law is a ground for review (12) the reason is not confined to either positive error in law

⁽¹⁾ Amrit Lal t Madko Das, t A 292 (1881), see also Madhub Chunder v Radhika, 7 W R 105 (1867), Dwarkanath t Maniel Chunder, 9 W R 102 (1868)

⁽²⁾ Vellaya e Jaganatha, 7 M 307 (1883) s c also Bance Pershad t Radha P rehad 15 W R 143 (1871), Chandi Charan t Monoranjan, 17 C L. J 416 (1913)

³⁾ Shama Churn t Bindabun, 9 W R 181 (1863), Bura Boodho t Koylash (hun! r 6 W R 100 (1866), Punchanan Guru lus 9 B L. R 187, 18 W R 317 (1572)

^{(1) 5} ctanath r 5 iam 500ndurce, 11 W I _6, SB L. b. Mr J7 (1870), Heers I all r Pap Laruck, ad W R 323 (1575)

^() Du srkanath r Isisl (nlill Marsh, " 1

^{(1863),} Onn to Thakour a Gocool Mundul, 16 W R 7 (1871), Nubokishore t Jadub

Chunder, 20 W R 126 (1873) (6) Bihari I al v Irailal homayi, 3 B L. b.

V C 316 (1869) (7) Kotagiri i Vellanli, 21 M 1, 27 I 1

^{197, 1} C W N 725 (1900), 2 Bom L l.

⁽⁸⁾ Sharup Chand : Pat Dasce, 11 C bei (1887)

⁽⁹⁾ Hus am a Collector of Mazaffarns out 11 A 176 (1883)

⁽¹⁰⁾ Barhandeo : Banarsi, 3 C L J 11)

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⁽¹¹⁾ Sabaj athle Subraya, 2 M 78 (1877) (12) Koh Peh : Mourg I v., 10 W R 143

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or new evidence to he brought forward which could not be produced on the And the cases do not limit the discretion of the Court, in saving what reason is good and sufficient or what may he so far requisite to the ends of justice as to support an application for review (2) The Court must decide this in each case on its own circumstances The reason must be one sufficient to the Court before which the application for review is made It may depend upon a question of law or upon a question of fact or of mixed law and fact It is not limited only to the cases in which the right to review is extended in England (3) It cannot, moreover, be treated as an universal rule that uo point can be raised on an application for review which has already hen discussed and decided on the original hearing or that no new point which was not raised on the hearing can be argued on the application for review In each case the Court must consider and decide whether a review is necessary to correct any evident error or omission or is otherwise requisite for the ends of justice (1) The following cases therefore are cited, as instances only, of the exercise of the nower, which however is not limited to such cases Court wrongly excluded material evidence, (5) or refused to admit additional evidence on appeal, (6) or the parties and the Judge were under a misapprehension as to the contents of a document, or the Judge alone was misled on the point. (7) or the Judge in deciding the case omitted to consider the effect of important documentary evidence filed with the plaint, which was not taken issue upon and which materially affected the merits of the case, (8) or the question of limitation , (9) or discredited material documentary evidence with out inspecting it, or declared the report of a Compussioner unworthy of reliance hecause he was a muharrir, (10) or omitted to try a point which was urged hefore him,(11) hy nustake, (12) or had placed the onus of proof on the wrong party, (13) it was held that there was sufficient ground for granting a review. As also in the case of omission to serve the respondent with notice of appeal and his consequent absence at the hearing , (11) or the dismissal of a suit for non joinder of parties uccessary under sect 85 of the Transfer of Property Act. (15) or the dismissal on the technical ground that the stamp was originally insufficient, but which was subsequently found to have been sufficient, (16) or

⁽¹⁾ Reasut Hossein : Abdullab, 2 C 131, 31 A. 221 (1876)

⁽²⁾ Ib As to the generality of these terms, see Gopal Chandra Lahiri v Solomon 13 C 62 (1886), and the case in next note

⁽³⁾ Amir Hasan t Ahmad Ab 9 A 36 (1886)

⁽⁴⁾ Chintamani v Pyari Mohan 6 B L R 176 (1870) . 15 W R F B 1 Bhawabal v Rajendra, 5 B L. R 321 (1870), Hurce Pershad v Nund Kishore, 17 W R 479 (1872), Kalu t Vishram, 1 B 543 (1877)

⁽⁵⁾ Reasut : Abdullah, 2 C 140 3 I A 221 (1876)

⁽⁶⁾ Ram Lall : Rung Lall, 17 W R 47 (1871)

⁽⁷⁾ Gopal Chandra v Solomon 13 C 62

⁽⁸⁾ Mahadeva : 'appans, 1 M 398 (1878) (9) Ramu Rat t Dayal Sough, 16 1, 359, 394 (1894)

⁽¹⁰⁾ Abdul Rahim r Rach, Rai, 1 A 363 (1877)

⁽¹³⁾ Hussun Ah v Nasara ddeen, 16 W R 134 (1871) Behareo Lally Troyluckho, 12 W R 223 (1860) 3 B L. R, A C 346

⁽¹²⁾ Whet Huro Ld, 16 W R 150 (1871)

⁽¹³⁾ Harshar t Malab Chandra, 8 B L R. P C 580 (1871)

⁽¹⁴⁾ Ghanshain, Lal Singb, 9 A 61 (1886) (15) Girish Chinder v Juramoni, 5 C W A

^{83 (1900)}

⁽¹⁶⁾ Ala Mar v Khurshed, 27 A 695, 2 A L J 495 (1905)

where the point was raised for the first time in delivering judgment; (1) or the Judge had made an error in calculation; (2) or had based his decision on a decree which was subsequently set aside on appeal.(3) The production of an authority, which ought to have been but which was not cited at the first hearing, laying down a view of the law contrary to that taken by the Judge, is sufficient ground, (4) though formerly it was held otherwise. (5) So where the Privy Council had given an authoritative exposition at variance with the decision of the High Court on which the decree sought to be reviewed had been based a review was allowed (6)

A decree against a minor properly represented in the suit cannot be reopened on review by the minor on attaining majority, on the ground that the decree did not reserve an opportunity to him to show cause against it on attaining inajority, (7) but otherwise where the Court passing the decree in terms of a compromise against a minor did not inquire into the circumstauces which led to the filing of the petition of compromise nor granted any leave to compromise under sect. 462 (now O. XXXII. r. 7).(8) Where, however, he seeks to set aside a decree on the ground that the compromise made by his guardian and on which the decree was based was fraudulent, his remedy was formerly held to be by suit and not by way of review.(9) But by a later decision it was held that fraud practised upon a party in connection with a petition of compromise was a good ground for roviewing the decree made thereon.(10) A mistake in copying out a petitiou of compromise may not itself be a good ground for review, but coupled with an allegation of fraud it is.(11)

A review has been refused to be allowed on the ground that if the facts had been better or more fully placed before the Court the decision would have been different,(12) even coupled with the fact that there was a subsequent decision of the Privy Council on the point, the petition being seven years after the decision sought to he reviewed; (13) or merely to supply defects on the part of pleaders in their conduct of appeals; (14) or to enable the Court to reconsider its judgment on the same evidence; (15) or on the ground that the Court improperly neglected to examine a witness, if the objection was not taken when the case was heard by the Court of Appeal; (16) or that the Court's decision is contrary to the

⁽¹⁾ Gungapershad e, Maharani, 12 I. A. 51 (1881); Sulhman & New Oriental Bank, 15 B 271 (1890)

⁽²⁾ Mirza Akbur v. Mullick, 25 W. R. 63

⁽³⁾ Moorarco v. Mahomed Akmal, 22 W. R.

^{161 (1871).}

⁽¹⁾ Muhamma I Yusuf r, Abdul E 16 L. A. 101 (1889) \ Jatra t. Aul '

JJ6 (1596). (5) Ellem t. Bisheer, J C. 185;

^{352 (1575).}

tic D'as P (6) Banco Per

W. IL 143 (187)

⁽⁷⁾ Curvanda 15 (5)

⁽⁸⁾ Barhamdeo v. Banarsi, 3 C. L. J. 119 (1901); see also Aushoutesh r. Tara Prasanni.

¹⁰ C. 612 (1881).

⁽¹⁰⁾ Rasik Chandra e. Rajani Ranjan, le C. W. N 286 (1905).

^{(11) 16} (1 . C . br Churn e. Loodunram, 23

W.

am v, Ram Lochun, 19 W. B

¹⁴th c. Indoonath, 9 W. B.

^{605 (1579)} W. D. 129

weight of ovidence (1) The Privy Council has, however, held that the decision in the last mentioned case does not himt the discretion of the Court in saying what reason is good and sufficient or what may be so far requisite to the ends of justice, as to support an application for review (2). That the Appeal Court's decision was based on a ground first raised in appeal was held no reason for granting a review (3). And grounds which virtually disclose reasons for an appeal from a diction enhance, it has been said he the bases of a review (4). It has also been held that a point raised on appeal but abandoned in argument cannot ordinarily he a ground for review, (5) and that the fact that one Divisional Bench of the High Court has decided a point at variance with the decision of another Divisional Bench is not such a ground (6)

"May apply"—The proceedings taken to obtain a review pass through three stages. In the first place the pirty applies for a rule, which application is either granted or rejected. This is the first stage. If the rule is granted the other side shows cause upon which the rule is made absolute or discharged. This is the second stage. The last stage is where if the rule is made absolute, the case is directed to be reheard, and an order or decree passed upon such hearing. The application should it possible be to the Judge who passed the decree or order sought to be reviewed, or as the Privy Council has put it.—

"We do not say that there might not be cases in which a review might take place before mother and a different Judge, because death or some other un expected or unavoidable cause might prevent the Judge who made the decision from reviewing it but we do say that such exceptions are allowable only ex necessitate We do say that in all practicable cases the same Judge ought to review ' (7) Expedition in presenting a petition for review is indispensable (8) A party applying must show that there is good and sufficient cause for granting the review before he can be heard to argue that the decision is erroneous (9) There may be exceptional circumstances which will warrant the Judicial Committee in allowing even after an order of His Majesty in Council has issued upon their report a re hearing at the instance of one of the parties hut this is an indulgence with a view mainly to provent irremediable injustice when by some accident without any blame the party has not been heard and an order has been made madvertently as if he had been heard (10) An application for review is the proper method of setting aside adecree made on a compromise (11) is to whether a second application can be made for review see r 9 post

⁽¹⁾ Nasıruddin v Indronarayan B L R F B 367, 5 W R 93 (1866)

F B 367, 5 W R 93 (1866)
(2) Reasut v Abdoollab 2 C 140 3 I A

^{221 (1876)} (3) Cowell 1 Mohadeb 17 W R 182

<sup>(1872)
(4)</sup> Shoo Ratan t Lappu Kuar, 5 1 14
(1882) but see in ir Hasan t ihmad ih 9

⁽¹⁸⁸²⁾ but see \n ir Hasan : \text{\text{him d}} \text{\text{h}} \text{ } 4 \text{ 36 (1886)} \\
(5) \text{ Sabapathi : Subraya 2 M 58 (1878)}

⁽⁶⁾ Nobeen Lishen t Shib Pershad 9 W

R 161 (1868) (7) Moleslur Singh : Government of

India 3 W R 45 7 Moo I \ 304 (1809) followed in Surut Soondarco v Rajendur Lishore, 9 W R 120 (1869) and see O

Aushore, 9 W R 12o (1868) and sec O XLVII r 2 (8) Moheshur Singh t Government of

India 3 W R 45, 7 Moo I A 30 (1859)
(9) Bhowabal t Rajendra 5 B L R 32I
(18 0)

⁽¹⁰⁾ In re Appa Rao, 10 M 73, 13 J A

^{1.5 (1885)} (11) Aushootosh : Tara Prasanna 10 C 612 (1884)

suit under Art 5, School I of the Court Fees Act, (1) but the Bombin High Court have held that the Court fee need only be sufficient to cover the amount of the claims in regard to which review was sought (2) In calculating the eighty-nine days within which an application for review may be presented on payment of half the fee leviable on the plaint or memorandum of appeal under Art 5, Sched I of the Court Fees Act, 1870, the time during which the Court is closed for vacation cannot be excluded (3)

2. An application for review of a decree or order of a To whom applications Court, not being a High Court, upon some for review may be made ground other than the discovery of such new and important matter or evidence as is referred to in rule 1 or the existence of a clerical or anthmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree or made the order sought to be recrewed; but any such application may, if the Judge who passed the decree or made the order has ordered notice to issue under rule 4, sub rule (2), proviso (a), be disposed of by his successor

To whom applications for review may be made -This rule combines sect 621 of Act X of 1887 and the last clause added to ect 626 of Act XIV of 1882 by Act VII of 1888 The wording has been changed, and the rule has been framed to include orders as well as decrees, the words "or the existence of a" have been substituted for "same 'and the word" arithmetical mistale" idded

"Upon some ground other than "-1his does not include supported errors of judgment, (4) nor the ground that the order complained of was made in the absence of or without notice to a party (5) But where a minor on attain ing majority applied to set aside a decree made on a compromie during his minority on the ground that the Court did not inquire into the circumstances which led to the faling of the petition of compromise, and that the record showed no leave to compromise had been granted under sect 162 (now O XXXII r 7) it was held that the successor to the Subordin ite Judge who heard the origin if case was competent to entertain the application for review (6)

"New and important matter'-1 decision of the Privy Council in " appeal has been held to be new and important matter for the purpo es of an application for icens in respect of a decree made on a nil equent nerval of the time cruse of action is that on which the decree appraised is first was bred (7) See il onetes tor 1

(15 1)

⁽¹⁾ N bin Clir lea r M hinel Leir, 3 CW N = 12 (15 s)

⁽⁻⁾ In re Mat 1 or to to baker, \$ 15 -(157.)

⁽³⁾ Inr hola, 1 1 131 (155) (4) In str Le le Mur, In a h of 110

⁽⁾ Klein Kuipi Dlapitup HB 101 (1553) (i) 1 ari 3 1 1 1 1 1 1 ara 3 (la J 11) (1 + 1)

⁽⁷⁾ Wast In Malalin, 13 H and (1888) Latt Lair Kills 13 1 500 (1311)

'Shall be made "-The remarks of the Privy Council in recard to expedition in presenting applications for review should be horne in mind Lordships said, 'We do not say that there might not be cases in which a review mucht take place before another and a different Judge, because death or some other unexpected and unavoidable cause might prevent the Judge who made the decision from reviewing it, but we do say that such exceptions are allow able only or necessitate. We do say that in all practicable cases the same Judge ou ht to review, and that for the attainment of that object. expedition in pre-enting a petition for the review is indispensable, and the only practical course for attaining that end is by accelerating the hearing of the review before accident or unexpected events shall have removed the original Judge " (1)

"Made'-Where a petition for review of judgment is presented to the Judge who delivered it and he directs notices to issue thereon (2) or directs the application to be entered on the register and that the fees for service of notice he deposited and is then transferred his successor has jurisdiction to make the order sought to be revised (3) In such cases the grounds for review are not confined to those mentioned in this rule. But it would be otherwise where the Judge to whom the petition was presented merely ordered a copy of the decree to he produced and did not issue notice (4) The Allahahad High Court, however, have construed made 'to juclude a hearing and determination of the application for review (3) This variance of opinion has been set at rest by the concluding clause of this rule which has affirmed the decisions of the High Courts of Calcutta Madras and Bombay

"Only to the Judge '-The primary intention of granting a review is a reconsideration of the same subject by the same Judge as distinguished from in appeal which is a hearing before another tribunal (6) If a Court has been abolished and its husiness transferred to another Court presided over hy another Judge, the latter cannot entertain an application for review except in the cases mentioued in this rule (7) nor can a Judge by transferring a case to his own file confer on himself the power to review an order of dismissal pronounced by a Judge suhordinate to him (8) A Judge of a Mofussil Small Cause Court has jurisdiction to review a case tried by his predecessor subject to the provisions of this rule (9)

The movisions as to the form of preferring appeals shall is apply, mutatis mutandis, to applications for Ferm of applications for review review

⁽¹⁾ Moheshur Singh v Government of In ha AW R 45 " Moo I A 3J4 (1859) (...) Karoo Si igli Deo Narain 10 C 80 13 C J R 261 (1883) Ramasamı v Kuri u 13 M 178 (1889) Ganjat v Jivan 16 B 603

⁽³⁾ Fazel Biswas e Jamadar 13 C 231

⁽¹⁸⁸⁶⁾

⁽⁴⁾ Cheru t Cheru 12 M. 509 (188J) (5) Pancham v Jhinguri 4 A. -78 (1882)

⁽b) Moleshur Singh & Government of Indra 3 W P 45 7 Noo I 1 304 (1853)

Shamser Ah & Jagamath 17 U N 403 (1912)(7) Sarat gapani v Narayanasai ii, 8 M

ას7 (158ა) (8) Golam v Hurrish Chunder, W I. (1864) Mrs. 23 Ram Nath v Gowhur, 2

N W P IL C _30 (1870)

⁽⁹⁾ Shumsher v Kurkut, 6 C, 236 (1880)

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Form of applications for review -This rule corresponds with sect in the Codes of 1877 and 1882, save that "provisions ' has been substituted for "rules hereinbefore contained" and "preferring" for "making ' Applies tions for review should be drawn up in the same manner as applications for the admission of special appeals, and should set forth concisely the grounds of objection to the decision sought to be reviewed (1) The Bombay High Court has held that the petition for review must be accompanied by a copy of the decree sought to be reviewed, (2) but the Allahabad High Court has held the contrary (3) If the grounds of review are certified they should be certified by the pleader who appeared originally in the appeal (4) In granting a review the Court should not travel beyond the grounds mentioned in the application for review (5)

(1) Where it appears to the Court that there is not Application where re- sufficient ground for a review, it shall reject the application

(2) Where the Court is of opinion that the application for Application where review should be granted, it shall grant the granted same

Provided that—

(a) no such application shall be granted without previous notice to the opposite party, to enable him to appear and be heard in support of the deerce or order, ? review of which is applied for and

(b) no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree of order was passed or made, without strict proof of such allegation

Applications where rejected and when granted—this rule embodies part of sect 378 of Act VIII of 1859, and conesponds, save for the words in italics and the omission noted below, with sect 626 of the Codes of 1877 and 1882 In Act VIII of 1859 the first clause ran, "If the Court of all be of opinion that there are not any sufficient grounds for a review, it shall reject the application," the present wording of that clause was adopted by Act A of 1877 In the second clause that Act added the words "application for the before "review" and substituted ' should be granted " for " desired is necessary to correct an evident error or omission or is oil cruise requisite for the ends of justice

(1673)

⁽I) Mahadaji t Vithal, 1 B H 6. 185 (1561)

⁽⁻⁾ Adarji Edulji v Manikji Ldulji, 4 B

^{114 (1550)} (3) Wajil the Naval Kishon, 17 1 213

⁽⁴⁾ Romerau t 1 mto 10 W R 51 (1905). Loons Ounge British Indicateur Mar gatic Co, _1 W R 130 (1875)

⁽a) Lurna Chanlra t 1 Madlul "

C 11 \ 185 (1001)

and "grant the same" for "grant the review" Proviso (b) was added by the Code of 1877. The present Code has substituted "uhere" for "f' and added the words "or order" and "or made" appearing in italies, but has onnited the words "and the Judge shall record with his own hand his reasons for such opinion" before the first proviso (1). Clause (c) of the former section has been embodied in r. 2, ante. The form of Notice is given in the First Schedule, Appendix G, No. 14.

This rule applies to orders rejecting or admitting reviews and not to judg ments on review (2). A decree of a Division Bench of the High Court dismissing an appeal for default in depositing the estimated costs of preparation of the paper hook can only be set aside by an order under this rule (3).

An application for review involves three stages It commences ordinarily with an ex parte application under sect 623 (now O XLVII r 1) The Court then may either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the application may either be admitted or rejected, and it is obvious that the hearing of the rule may involve, to some extent an investiga tion into the merits. If the rule is discharged, then the case ends. If, on the other hand the rule is made absolute, then the third stage is reached, the case is heard on the ments and may result in a repetition of the former decree or in some variation of it. Though in one aspect the result is the same whether the rule is discharged or on the re hearing the original deeree be repeated. in law there is a material difference, for in the latter case the whole matter having been re-opened there is a fresh decree. In the former case the parties are relegated to and still rest on, the old decree (4) In practice these three stages are not always kept distinct, but are semetimes combined (5)

"Shall reject the application"—Such rejection cannot after the judgment sought to be reviewed or the decree founded upon it and nothing which the Judge says with reference to his refusal to grant the riving can be binding so as to after such judgment or decree (6). Where on special appeal the case was remanded for trial of a particular ine, and an application for review was made in order that the suit might be remaided for the trial of another issue, it was held that as that would involve going through the record again the application could not be granted as it would in fact by to grant a second special appeal (7)

"Shall grant the same"—Under the Code of 100 which provided that where an application for review was beyond the prescribed time a Judge should record his reasons for admitting it such proceeding and the order

⁽¹⁾ See Thakur Shurk r Bulsh r Bal 7 Beal L R, 64 want bingh 4 C W N 203 (1-99), s e 27 (b) Lakiraj r Kauhya Sulah 15 W Le C 333 494 (15-2)

⁽²⁾ Spear: Hough Hye I Ind. Jun (6) Ramburrer Mothor V. Lun 20 W. R. 237 (1861)
(7) Fatigung Spear: Decki Pershad 4 C. (7) Fatigung Spear (12 W. L. 4.)

⁽³⁾ Falimunnasa i Becki Pershad L4 C (7) Jia pobata 200 r Ware, 12 W in 4 (30) (18 a)

Form of applications for review—This rule corresponds with sect 625 in the Codes of 1877 and 1882, save that "provisions" has been substituted for "rules hereinbefore contained" and "preferring" for "making" Applications for review should be drawn up in the same manner as applications for the admission of special appeals, and should set forth concisely the grounds of objection to the decision sought to be reviewed (1) The Bombay High Court has held that the petition for review must be accompanied by a copy of the decise, sought to be reviewed, (2) but the Allahabad High Court has held the contrary (3) If the grounds of review are certified they should be certified by the pleader who appeared originally in the appeal (4) In granting a review the Court should not trivel beyond the grounds mentioned in the application for review (5)

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Applications where rejected and when granted.—Ihis rule embodies part of sect 378 of Act VIII of 1859, and corresponds, save for the words in italies and the omission noted below, with sect 626 of the Codes of 1877 and 1882. In Act VIII of 1859 the first clause ran, "If the Court shall be of opinion that there are not any sufficient grounds for a review, it shall reject the application;" the present wording of that clause was adopted by Act X of 1877. In the second clause that Act added the words "application for the before "review" and substituted "should be granted" for "desired is necessary to correct an evident error or omission or is otherwise requisite for the ends of justice,"

(1893)

⁽¹⁾ Mahadaji v Vithal, 1 B H C 185 (1864) (2) Adarji Ldulji v Manikji Edulji, 4 B

⁽²⁾ Adarji Ldulji v Manikji Edulji, 4 B 414 (1880) (3) Wajid Ali t Nawal Kishore, 17 A 213

⁽⁴⁾ Rousseau v Pinto, 10 W R 54 (1868), Loong Oung v British India Steam Nav gation Co. 24 W R 430 (1875)

⁽⁵⁾ Purna Chandra t Nil Madhub, o

C W N 485 (1901)

and "grant the same" for "grant the review" Proviso (b) was added by the Code The present Code has substituted "uhere" for "if" and added the words "or order" and "or made" appearing in italies, but has omitted the words " and the Judge shall record with his own hand his reasons for such opinion" before the first proviso (1) Chuse (c) of the former section has been embodied in r 2, ante. The form of Notice is given in the First Schedule, Appendix G. No 11

This rule applies to orders rejecting or admitting reviews and not to judgments on review (2) A decree of a Division Bench of the High Court dismissing an appeal for default in depositing the estimated easts of preparation of the paper book can only be set aside by an order under this rule (3)

An application for review involves three stages - It commences ordinarily with au ex parte application under sect \$23 (now O XLVII r 1) The Court then may either reject the application at once, or may grant a rule calling on the other side to show cause why the review should not be granted. In the second stage the application may either be admitted or rejected, and it is obvious that the hearing of the rule may involve, to some extent, an investigation into the merits. If the rule is discharged, then the ease ends. If, on the other hand, the rule is made absolute, then the third stage is reached, the case is heard on the ments, and may result in a repetition of the former deerce or in some variation of it. Though in one aspect the result is the same whether the rule is discharged or on the re hearing the original deerce be repeated, in law there is a material difference, for, in the latter case, the whole matter having been re opened, there is a fresh decree In the former ease the parties are relegated to, and still rest on, the old decree (4) In practice these three stages are not always kept distinct, but are sometimes ecinbined (5)

"Shall reject the application"-Such rejection cannot alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree (6) Where on special appeal the case was remanded for trial of a particular issue, and an application for review was made in order that the suit might be remanded for the trial of another issue, it was held that as that would involve going through the record again the application could not be granted, as it would in fact be to grant a second special appeal (7)

"Shall grant the same "-Under the Code of 1809 which provided that where an application for review was beyond the prescribed time a Judge should record his reasons for admitting it, such proceeding and the order

7 Bom. L. R 664

494 (1S72)

450 (1873)

(5) Lelbrai t Kanhya Singh, 18 W R

⁽I) See Thakur Shunker Buksh : Bal want Singh, 4 C W N 203 (1899), s c, 27 (2) Apcar t Howah Bye, I Ind. Jur \ S

^{237 (1866)} (3) Fatimunnissa i Deoki Pershad, 24 C

^{350 (1896)}

^{(4) \}addal r Fulchand, 30 B 56 (1.00).

⁽⁶⁾ Ramhurry r Mothoor Mohun, 20 W R (7) Juggobundhoo r Wisc, 12 W R. 409 (1869)

idmitting the review could be made in one and the same proceeding (I) An order intended to operate as an order for review is not invalidated by an irregu larity in its form by reasons of which it purports to be an order made on an application to set aside the decree and restore a suit for trial (2) The order made under this rule is not one on the re hearing of the case on review that comes later (3) Although a District or Assistant Judge of Special Judge under sect 74 of the Dekkhan Agriculturists Relief Act is not governed by this Code, he has discretion to grant a review on the ground of mistake (4) or non service of notice, (5) and he may review an ex parte order, (6) but notice of the application must be served on the other side (7) The Codes of 1877 and 1882 required the Judge granting an application for review to record with his own hand his reasons for his opinion, and it was held that this should be done before the review of judgment was granted (8) The failure to do so did not necessirily make the act one without jurisdiction, (9) but such an order was bad and the ease must be remanded (10) This was not a hard and fast rule, the words were directory, and the order was not necessarily invalid though their might be cases in which it was necessary in the interests of justice that the reasons should be recorded, and in such cases the recording would be essential to the validity of the order (11) In granting a review the Court should not travel beyond the grounds mentioned in the application for review (12)

Clause (a) —Notice must be served on the opposite party to appear before a suit can be revived, (13) but not in the case of a review of an application for the admission of a special appeal, as such application being ex parte, a review of the same is also ex parte (14) In the Codes of 1877 and 1882 this clause only made mention of decrees and not orders. The omission has been rectified by the present rule

Clause (b)—Loid Romilly, M.R., said, "Re hearing a cause upon obtaining fresh evidence is a most dangerous practice. It is the duty of suitors to bring forward all their evidence at the first and nothing would be more mischievous than to allow the principle to prevail, that a person should endeavour to get a case heard upon imperfect evidence, and trust to succeeding on that evidence and then, when it is found that he has not succeeded, to bring forward furtler evidence." (15) When a Judge wrongly construed a document, an application

⁽¹⁾ Aujonnissa v Sarj Kant, 11 W R 56 (1869), s c 2 B L R A C 181

⁽²⁾ Manicka i Gurusami, 23 M 196 (1899)

⁽³⁾ Rajendro Protab v Bhowabul, 14 W R 105 (1870)

⁽⁴⁾ Badaricharya v Ramchan ira, Lib 113 (1843)

 ⁽⁵⁾ Ramsing v Babu 10 B 116 (1853)
 (6) Ramchandra v Draujah 20 B 281

⁽¹⁸⁹⁵⁾ (7) Rupchand v Balvant, 11 B 591 (1887)

⁽⁸⁾ Bhairon i Ram Saliai, 3 A 316 (1888) (9) Ashrafannissa v Inact Hossem 13 W

R 139 (1870) 5 B L R 316

⁽¹⁰⁾ Gyanund t Bepin Mohun, 22 C "34

⁽¹⁸⁹⁵⁾ (11) Manicka v Guiusami 23 M 130

⁽¹⁸⁹⁹⁾ (12) Purna Chandra v Nil Madla

C W N 185 (1901)

⁽¹³⁾ In re Huro VI hun Mooletjee, 10 W R 135 (18 1)

W R 135 (18 1)
(14) Joy Koomai v Eshace, 18 W R (")

^{(1872) 10} B L R 155 (15) Land Gredit Company: I ord Lern v) I R 5 Ch A C 768 (1870), and see hea

I R 5 Ch A C 768 (1870), and see hesowij Issur; G I P R; Co 11 C W N 721 (1907) P C

for the purpose of correcting the error on review accompanied by another similar document to assist the Court was held not to be an application coming within this rule (1) When the new evidence was available to the applicant and might, with anything like diligence, have been produced by him, the application for review was refused, (2) but where the applicant produced with his application for review certain documents to show that the Judge's decision was erroncons on the evidence originally before him, it was held that he was not in fault in not producing them previously, as they were not originally necessary to the proof of his claim (3) The applicant must also show that the new evidence is prima facie evidence in the cause (4)

"Strict proof"-The Privy Council have recently emphasized this con dition (5) Want of such proof is a ground of appeal, (6) and the decision on seview must be reversed, (7) but where a party had no opportunity of giving such proof owing to the opposite party, who had notice, not appearing and making no objection, the opposite party cannot afterwards be allowed to object (8) Strict proof means proof according to the forms of law, that is, with close adherence to rule (9) It is not sufficient to make an affidavit that the applicant was not aware of the existence of a document, but he must also show that he used due diligence and made inquiries to ascertain its existence and found it was not available, (10) but an applicant for review on the ground that he had not been afforded sufficient time to produce a document at the original hearing has not to prove the document was not within his knowledge (11)

Where the Judge or Judges, or any one of the Judges, is who passed the decree or made the order, a Application for review neview of which is applied for, continues or in Court consisting of two or more Judges continue attached to the Court at the time when the application for a review is presented, and is not or are not precluded by absence or other cause for a period of six months next after the application from considering the decree or order

(1) Gunesh Ram v Rohince, 14 W R 236 (1870)

(2) Brojendro v Wise, 19 W R 130 (1873), Ram Dhun t Joy Narain 12 W R 36 (1869, 8 B I R App 36, note

(3) Gunesh Ram v Rohmee, 14 W R 236

(1870)(4) Ram Dhun t Joy Naram 12 W R 536 (1863) . 8 B L R App 36 note

(5) Kessown Issuit G l P Ry (o 11 C W N 721 (1907) (6) Shamsheir : Rim Chunder, 2 W R

174 (1865) . Khelut Chunder : Prankisto, 11 B L R 428 note, 12 W R 461 (1863), Bhyrub Chunder : Madhub Ram, 20 W R 84 11 B L R 423 (1873)

(7) Naffar Chand 1 Sandes, S B L. R App 35. 10 W R 432 (1808), Umrao : Goalul S B L R App 34, 16 W F " (1871), Nudarchund : Reedoy 11 B L R 424 note . 17 W R 458 (1872) . Nassa Bibco t Abdoor Ruhman 18 W R 413 (1872),

see also Jhubhoo v Jusoda, 17 W R 230 (1872) and Brojendro t Wise, 19 W P 130 (1573)

(8) Ram Joy e Jagodessurree 22 W R 393 (1874)

(3) Ahir Kond Kar v Mohendra Lal De, App 26 of 1911 (Letters Patent), 31 March, 1915, Calcutta (cor Jenkins, CJ, an i Wood roff(J)

(10) Sectanath e Shama Soonduree, 14 W P 26 8 B L R App 37 (1870) (11) Guer Dyal t Deka Noonya, 22 W R

446 (1574)

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to which the application refers, such Judge or Judges or any of them shall hear the application, and no other Judge or Judges of the Court shall hear the same.

Applications for review in Courts consisting of two or more Judges -This rule is a modified form of sect 379 of Act VII of 1859 section commenced, "If the Court to which the application for a review of its judgment has been presented, be a Court consisting of two or more judges whenever the judge or judges who may have passed the decree, or of the decree have been passed by two or more judges, when any of such judges shall" By sect 627 of Act X of 1877 these words were altered to the form the rule now takes, save for the words in italies, down to the words "continues or" That Act also substituted "is not or are not" for "shall not be," "considering the decree or order ' for "considering the judgment," and the concluding words as they now appear from " such judge " for " it shall not be competent to any other judge or judges of the same Court to enter upon a consideration of the merits of the application and record an order or opinion thereon" The present Code substituted "Where" for "If' and added the words "made the" appearing in italies An application for the re admission of an appeal dismissed by two Judges for default in depositing the estimated amount of costs for the preparation of the paper book was held not an application for review, and could not be disposed of by one of such Judges under this rule , (1) but a later decision of the Full Bench, has overruled that decision so far as it held it was not an application for review, (2) and presumably therefore the rest of that decision is not law

"Attached to the Court"-A Judge absent on leave and for whom another is officiating is not "attached to the Court," and the review may be disposed of by the remaining Judge who heard the appeal originally (3)

shall hear the same "-A review may be "No other Judge admitted by the sole remaining Judge of the Bench which heard the case origin ally (4) If it be admitted by the two Judges who originally heard the case it may be disposed of by the sole remaining Judge The Chief Justice cannot appoint a Bench to do so (5)

(1) Where the application for a review is heard by more than one Judge, and the Court is Application where reequally divided, the application shall be rejected

(2) Where there is a majority, the decision shall be according to the opinion of the majority.

⁽¹⁾ Rumbari v Madau Mohan, 23 C 339 (1583)(1) Jardine Skinner & Co e Dl un Kish n (1530) (2) Patimunnissa t Deoki Persha l, 24 C 13 W R 82 (18"0) (5) Aubhoy Churn v Shamont 16 C 785

^{3.0 1} C W N 21 (1836)

⁽³⁾ Aubhoy Churn t Shamont, 16 C 788 (1830)

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"Application where rejected "-This rule was introduced into the Code by sect 628 of Act X of 1877 By the present Code the word "Where" has been substituted for "If" and " is " for "be"

7. (1) An order of the Court rejecting the application is shall not be appealable; but an order granting Order of rejection not an application may be objected to on the Objections appealable

ground that the application wasto order granting appli

(a) in contravention of the provisions of rule 3.

(b) in contraveution of the provisions of rule 4, or

(e) after the expiration of the period of limitation prescribed

therefor and without sufficient cause.

Such objection may be taken at ouee by an appeal from the order granting the application or in any appeal from the final decree or order passed or made in the suit.

(2) Where the application has been rejected in consequence of the failure of the applicant to appear, he may apply for an order to have the rejected application restored to the file, and, where it is proved to the satisfaction of the Court that he was prevented by any sufficient cause from appearing when such application was called on for hearing, the Court shall order it to be restored to the file upon such terms as to costs or otherwise as it thinks fit, and shall appoint a day for hearing the same.

(3) No order shall be made under sub rule (2) unless notice of the application has been served on the opposite party.

Order of rejection not appealable objections to order granting application -This was introduced by sect 629 of let A of 1877. The words "An order of the Court rejecting the application shall be final (the form they then took) were taken from sect 378 of Act VIII of 159 That action alo provided that an order granting the review should be final. This provision was repealed by sect 629 of Act X of 1877. The prient rule corresponds with that section save that the words 'net be appealable have been substituted for be final' and the application for it taken for "from" for 'ajuinst and select it is for efitbe the words procedur added, the wording of sub rule (3) rearranged and the last characteristics section which now forms the based O XLVII r 9 or ated

"Shall not be appealable. The wording u ed in the earlier Coles was shall be find and wis fell to preclud app als (1) It it dec in was in reference to the wording is it appeared in set 375 of the Code of 1500 hat

and (1968), I ame I am r If as as had II (I) Nus vendlan e lilmistan, 5 W 1 3 (ISO), RLR F B 3 7 Sec W P. 184 (1803), Note tyr 1 . . . t. al 1 \ lin Clunter Grahame, H W R. 13 W L. 10" (1:

the word "final" in the late Code has been similarly interpreted (1) No appeal hes, even if the application he rejected by a single Judge on the Original Side of the High Court, (2) or if the application he for the review of an order dismissing an execution for non payment of process fees (3) An opinion was expressed under the last Code that an order of rejection was not open to revision (4) It must, however, be now noted that the order is not now "final" but "not appealable" The effect of an order rejecting an application for review is not to alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree (5) When an order is made rejecting a review, the time allowed for appeal to the Privy Council against the judgment sought to be reviewed runs from the date of the judgment and not that of the order rejecting the review (6)

" May be objected to."-The appeal may he on the grounds mentioned in this rule and on no other (7) An order admitting a review is not a judgment within the meaning of sect 15 of the Letters Patent so as to admit of an appeal from it save on the grounds mentioned in this rule, (8) but it may be dealt with under sect 622 (now sect 115) (9) Where a Court with materials before it comes to the conclusion that a review which has been applied for is necessary to correct an evident error or omission or for the ends of justice and grants the application accordingly, the order so made is not open to be questioned on special appeal, (10) nor is an order, directing the parties to examine the persons who had sworn the affidavits on which the application for review was based as also to produce other evidence, being an interlocutory order neither granting nor rejecting the review, appealable (11) That there is no sufficient reason for granting the review is no ground of appeal (12) No second appeal lies from in

(1) Gobinda Ram v Bholanath, 15 C 432 (1888)

- (2) Achaya v Ratnavelu, 9 M 253 (1885)
- (3) Pudmanund v Doorga Pershad, 4 C W N 39 (1899)
- (4) Ram Lalv Ratan Lal, 26 A 572 (1904) But see Ramanadhan Chetty : Narayanan Chetty, 27 M 602, 607 (1904), where it was held that if there was no appeal the Court could interfere in revision
- (5) Ramhury v Mathoor Mehun, 20 W R 150 (1873)
- (6) Soudamince v Dhern Mohatab, B L R , P B 585 (1866)
- (7) Bombay and Persia Steam Navigation Co v 5 S Zuari, 12 B 171 (1887), Abhov Churn t Shamont, 16 C 788 (1983), Har Van lan v behatt Singh, 22 C 3 (1891), Baroda Churn : Gobind Prosha l, 22 C 954 (15J5), Mahabir i Nathin, I C W N 338 (189a) Dary H + Badrs, 18 A 44 (189a). Munne Rem e Bishen Perkash, 21 C 878
- (1897), Lalit Mohun v Purna Chandra, 3 C W N exxer (1899), Ramanadhann Chefty v Narayanan Chetty, 27 M. 602, 607 (1904), Srimath Daivasi Kamani t Noor Vahomed, 31 M 47 (1907), Tholan : Kunhikutty, 21 M L J 93 (1912), and see Gopala Asyar t Ramasami Sastrial, 31 M 49 (1907), and Sadaruddin v Ekramuddin, 19 C. L J 2's (1913), p 228, if an order is made without purisdiction, the remedy is by way of revil a
- under sect 115 (8) Aubhoy Chun : Shamout, 16 C 788
- (9) Chumlal t Sombar, 21 B 328 (18%) (10) Sihebjan : Sufdur, 22 W R . 35
- (11) Du nka Nath r Bhahatarim, I C W
- (12) Muum Ram e Bishen Perkash, 24 C 978 (1897), Ali Albar t Khurshi l, 27 4 635, 2 1 L J 165 (1905)

order granting an application for review.(1) but it does from an original decretal order as amended on review (2) An appeal under this rule is not controlled by sect 101, sub-sect (2) An appeal against an order granting a review would he under sub rule (1) of this order, even where no appeal would he against the final decree disposing of the case (3)

Clause (b) - Appeals have been allowed where the Judge has not recorded his reason for granting an application for review. (1) or where he has granted a review without inquiry or proof that the new evidence was not within the knowledge of the applicant at the hearing or could not be adduced by him before the decree was passed, (5) or on the ground that by going through the evidence a second time the Judge might come to a different conclusion , (6) or merely to enable the case to be re argued (7) Upon an appeal it may be open to the Court of Appeal to say that the Judge ought not to have admitted a review (8) The clause does not refer to the weight or sufficiency of evidence. and an Appellate Court cannot set aside an order of review merely because in its opinion the prohative force of the evidence is insufficient to establish the allegations made in support of the application for review, though such evidence had such prohative force to the Court granting the review (9)

Clause (c) -This is the effect of the decisions cited (10) The object of placing a limitation on the time within which applications for review may be made is that the finality of a decision should be lelt in doubt no longer than the requisites of justice imperatively demand (11) Though an appeal lies in such cases, an application under sect 15 of the High Court Charter Act does not necessarily he (12) Unless the delay was accounted for (13) and the Court was satisfied as to there being good and sufficient cause for the delay the applica tion for review ought to have been rejected, (14) and the review and

Woodroffe, J)

P 316

(1572)

(2) Bala Natha t Bhina Natha 13 B 496 (1889)

(3) Shamseir Alex Jagannath 1" (W)

403 (I912) (4) Gyanund : Bepin 22 C 734 (1895)

(5) Bhyrub Chunder : Madhub Ram, 11 B L. R., I B 423, 20 W R 84 (1873) Jhubhoo Sahoo t Jussoda, 17 W R 230 (1872), Nubokishore t Jadub 20 W R 426 (1673)

(6) Chunder Churs : Londuntan W R 321 (15°6)

(7) Koleemood I an . Heerun, 24 W R.

186 (1875) (8) Reasut r Abdoollah 3 I A 21. 2 C 131 (1876) and see Vanuraira : Balaram,

(13) ha beenath r Luckbeenaram, W H (1561) 91, Jhubhoo Sahoo r Juscia, 17 W R. 250 (1572)

(14) Assur Mr Woolfutoones. 3, 13 W. R.

App 20 of 1911 (Letters Patent), Calcutta.

31 March, 1915 (cor Jenkins, C.J. and

(10) Shama Churn r Bindabun, 9 W R

181 (1868) Kristo Gobir d v Jugobundhoo 12 W R 91 (1865), Geur Pershad : injub

W 24 W R 291 (1875), Madho Das c Rukman 2 A 287 (1819) Purna Chan Ira

(11) Moheshur Sing v Bengal Government.

7 W I A. 2 3, 301 (18,9), 3 W R. P C 45

(12) Ashrafannassa e Inact Hossein, 5 R L

13 W P 433 (1570), lut sco See nath r Aritatio Invie 18 W R 250

t Ail Madhub 5 C W N 455 (1501)

33. Jegulhi lerer O gur Narain, 6 W 1: 453

⁽¹⁾ Than Singh & Chundun Singh 11 C 296 (1885) Papayya t Chelamayya 12 M. 125 (1888), Gopal Das e Maf Khan, 11 1 383 (1889)

¹¹ C. L. J 161 (1909) (9) Ahir Kond Kar t Mchendra Lali De

the word "final" in the late Code has been similarly interpreted (1) No appeal hes, even if the application be rejected by a single Judge on the Original Side of the High Court, (2) or if the application be for the review of an order dismissing an execution for non payment of process fees (3) An opinion was-expressed under the last Code that an order of rejection was not open to revision (4) It must, however, be now noted that the order is not now "final" but "not appealable". The effect of an order rejecting an application for review is not to alter the judgment sought to be reviewed or the decree founded upon it, and nothing which the Judge says with reference to his refusal to grant the review can be binding so as to alter such judgment or decree (5). When an order is made rejecting a review, the time allowed for appeal to the Privy Council against the judgment sought to be reviewed runs from the date of the judgment and not that of the order rejecting the review (6)

"May be objected to "—The appeal may be on the grounds mentioned in this rule and on no other (7) An order admitting a review is not a judgment within the meaning of sect 15 of the Letters Patent so as to admit of an appeal from it save on the grounds mentioned in this rule, (8) but it may be dealt with under sect 622 (now sect 115) (9) Where a Court with materials before it comes to the conclusion that a review which has been applied for is necessary to correct an ovident error or omission or for the ends of justice and grants the application accordingly, the order so made is not open to be questioned on special appeal, (10) nor is an order, directing the parties to examine the pursons who had sworn the affidavits on which the application for review was based as also to produce other evidence, being an interlocutory order neither granting nor rejecting the review, appealable (11) That there is no sufficient reason for granting the review is no ground of appeal (12) No second appeal has from an

⁽¹⁾ Gobinda Ram v Bholanath, 15 C 432 (1888)

⁽²⁾ Achaya v Ratnivelu, 9 M 253 (1885)

⁽³⁾ Pudmanund v Doorga Pershad, 4 C W N 39 (1899)

⁽⁴⁾ Ram Lulv Ratan Lal, 26 A 572 (1994) But see Ramanadhan Chetty v Narayanan Chetty, 27 M 602, 697 (1994), where it was held that if there was no appeal the Court could interfere in revision (3) Ramhurry v Mathoor Mohun, 20 W R

^{450 (1873)}

⁽⁶⁾ Soudamnee : Dheraj Wohatab, B L R, T B 585 (1806)

⁽⁷⁾ Bombay and Preva Stean Navigation Co τ S S Zuari, 12 B 171 (1887), Abboy Churri τ Shamont, 10 C 788 (1889), Har Nan Iau τ Behart Smgh, 22 C 9 4 (1891), Beroda Churu τ Gol ml Prosbad, 22 C 984 (1857), Milabur τ Nathin, 1 C W N 348 (1857), Dury at Budre 18 A 44 (1892), Manu Run τ Behen Prekawh, 24 C 878

^{(1897),} Laht Mohun v Purna Chandra, 3 C W N exexy (1899), Ramanadhann Chetty v Narayanan Chetty, 27 M 603, 007 (1991), Semath Dantasi Kamani i Noor Mahomed, 31 M 47 (1907) Tholan v Kunhlutty, 21 M L J 93 (1912), and soe Gopala Alyar (Ramasami Sastral, 31 M 49 (1907), and Sadaruddin v Ekramuddin 10 C L J 2-2-(1913), p 223, if an order is made without pursidetion, the remedy as by way of rexion under seet 115

⁽⁸⁾ Author Churn v Shamont, 16 C 78

⁽⁹⁾ Chumlal : Sombai, 21 B 328 (1690) (10) Sahebjan : Sufdur, 22 W R - S

<sup>(1874)
(11)</sup> Da 11ka Nuth t Bhal atann, 1 C W

N vii (12) Munii Ram e Bishen Perlash, al C 978 (1857), Mi Akbar e Khurshel, 27 t 695, 2 t L J 405 (1905)

or let granting an application for review (1) but it does from an original decretal order as an ended on textew (2). In appeal under this rule is not controlled by sect 101, subject (2). In appeal against an order granting a review would be under subject (1) of this order, even where no appeal would be against the final decree depoing of the case (3).

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Clause (e) — This is the effect of the decisions cited (10). The object of pincing a limitation on the time within which applications for review may be made is that the findity of a decision should be left in doubt no longer than the requestes of justice unpertively demand (11). Though an appeal like in such case an application under sect 15 of the High Court Charter Act does not necessarily in (12). Unless the delay was accounted for (13) and the Court was satisfied as to there being good and sufficient cause for the delay the application for review ought to have been rejected, (14) and the review and

(1) Than Singh t Chun lun Singh 11 C 230 (1884) Papayya t Chelamayya 12 M 125 (1888) Gopal Das t Maf Khan, 11 M 3-3 (1884)

(2) Bala Natha e Bhiya Natla 13 B 496 (1889)

(3) Shamsur the Jagannath 1" (W \ 403 (1912)

403 (1912)
(4) Gyaunad v Bepin 22 C 734 (1895)
(5) Bhyrub Chunder e Madhub Ram, 11

B L R, F B 423, 20 W R 84 (1873) Jhubhoo Sahoo v Jussoda, 17 W R 230 (1872), Nubokishore t Jadub 20 W R 420 (1873)

(6) Chunder Churn e I oodunram 25 W R 324 (18"6)

W R 324 (18"6)
(7) kolcemooddeen : Heerun, 24 W R

186 (1875)
(8) Reasut v Abdoollah, 3 I A 221, 2
C 131 (1876) and see Manindra v Balaram
11 C L J 161 (1909)

(9) Ahir Kond Kar t Mohendra Lall De

App =0 of 1911 (Letters Patent), Calcutta, 31 March, 1915 (cor Jenkins, C.J., and Woodrofft, J.)

(10) Shama Churn t Budabun 9 W R 181 (1869) Arato Gobu d t Jugobundhoo, 12 W R 91 (1869), Gour Pershad t Anjub th 24 W R 201 (1875), Madhe Das v Rukman 2 A 287 (1879) Purna Chandra t Ml Madhub 5 C W V 485 (1901)

(11] Moheshur Sing v Bengal Government, 7 M I A 283 304 (1859), 3 W R, P C 45 (12) Ashrafannissa i Inact Hossein, 5 B L R 316 13 W R 439 (1870), but eto

R 316 13 W R 439 (1870), but the Specialt t Arithtic Inico, 18 W R 286 (1872) (13) Kasheenath t Luckheenarain, W R

(1864) 91, Jhubhoo Sahoo t Jusoda, 17 W R 230 (1872)

(14) Assur Ahv Woolfutoonessa, 13 W R 33, Joogul Kishore v Oogur Varain, 8 W R 483

all subsequent proceedings under it are invalid (1) But if there be just and reasonable cause for the admission of the application for review even after two years, the High Court will not interfere under sect 15 of the Charter Act (2) It has been held that ignorance of the legal effect of the judgment is not a justifica tion of delay , (3) nor ignorance on the part of legal advisers of the contents of a document, copy of which was in their possession at the time of the original hearing , (1) nor that an application presented in time was refused as not properly stamped, (5) nor the omission of contentions and arguments which might have been adduced within proper time, (6) nor where the applicant was a minor till shortly before the making of the decree sought to be reviewed, (7) or even till after it was made, (8) nor is the pendency of a special appeal, (9) nor the pendency of an appeal dismissed on the ground of want of jurisdiction (10) The time occupied in the appeal should not be deducted, (11) nor can the time occupied in prosecuting a prior application for review be deducted in calculating limitation (12) A new exposition of the law was held not to be a just and reasonable cause for not baying presented the application for review within the prescribed time (13) When, however, a suit was disinissed as wrongly framed, and the plaintiff brought a second suit in which the Full Bench held that the course taken in the first suit was the paoper one, the plaintiff was allowed a review in the first case though out of time, that being a very different thing from interfering with previous decisions of the Court in other cases between other parties (14) The period of limitation is now prescribed by Art 173, Sched I, Division III, Limitation Act IX of 1908 Under the Code of 1859 it was governed by sect 377 of that Code, which fixed the period at ninety days

"Such objections may be taken "-The provision, that objection can be taken by appeal against the order or on appeal against the final decree, has been held not to be controlled by sect 591 (now sect 105) (15) The fact that a party on the re hearing of the case produced fresh evidence himself did not debur him on appeal from objecting on the same ground, namely, that the opposite party had not established that with due diligence he could not have

⁽¹⁾ Gunganaram t Gonomoonce, S W R 131 (1867), Luchmon Singh t Shumshere Singh, 3 I A 58, 69 (18"1), c c, 14 B L. R

⁽²⁾ Ajontussa v Surja Kant, 2 B L R, A

C 181 (1869), 11 W R 56 (3) Gulam Husen : Sayad Musa S B 260

⁽¹⁹⁸⁴⁾

⁽⁴⁾ Gopal Chandra : Solum n 13 C 62 (1886)

⁽⁵⁾ Munro : Campero Muni ti il Bour l. 12 1 57 (1889)

⁽⁶⁾ Madho : Rukman, 2 \ 257 (1579) (7) Gopal Nathar t Hanmant, 6 B 107

⁽⁸⁾ Inre Appa Ras, to M 71(1581) [P C L bit well aht no Polley, L. R 18 J 1 573

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⁽⁹⁾ Lucas v Stephen, 9 W R 301 (1868), Fal mar Basapa, 8 B H. C. A C 281 (1871) (10) Gulam Husen : Sayad Musa, S B 200

⁽¹⁸⁸⁴⁾ (11) 16

⁽¹²⁾ Vaman : Ma'hari, 26 B 187 (1 02) (13) Onoop Chunder t Lkkowree, 6 W R.

^{167 (1860).} Shama Churn : Bindabun Chunke, 9 W R 151, 185 (1868), Pran Kirden i Bukal e Cazee, 10 W R 20 (1808) Runkus url sia Damedhar, 6 B H C, 1 (

⁽¹¹⁾ lonnery v 1 Dr money, v 6, 700

^{(15) (}examinat a Reput M hun, 22 (* 31

^{116 (150)} (151)

adduced the new evidence on which his application for review was based, as he had urged in opposition to such application (1) Where in the opinion of the Privy Council the High Court had wrongly allowed a review and had admitted additional evidence, their Lordships did not consider it right to exclude that evidence from their consideration (2)

Registry of application granted, and order for re-hearing. as it thinks fit.

When an application for review is granted, a note [thereof shall be made in the register and the Court may at once re-hear the case or make such order in regard to the re-hearing

Registry of application granted, and order for re hearing.-This rule corresponds with sect 380 of Act VIII of 1859 That section after the word "register" ran " of suits or appeals (as the ease may be) and the Court shall give such order in regard to the re-hearing of the suit as it may deem proper in the circumstances of the case" The present wording was adopted by sect 630 of Act X of 1877 There has been some diversity of decision ou the question ns to what may be gone into at the re-hearing The Calcutta High Court formerly held that the applicant was only entitled to go into the points on which the rule granting the review was allowed, and that matters not mentioned when the rule was argued could not be gone into, (3) but later the same Court held it was discretionary with the Court to re-hear the whole ease or only the particular point on which the review was granted (4) The Bombay High Court has, however, held that when a review has been admitted the whole case is reopened (5) And it has recently been held by the Calcutta High Court that the expression "rehear the case means "rehear the whole case," and that if the ease is to be reheard only upon special noints, the order must he made under the last words of the section, which enable the Court to make such orders as it thinks fit (6) It has been held that where a case is admitted to review by the deciding Judge and is afterwards tried by another Judge, the new Judge must try the point directed by the order of review, (7) and that a Judge grauting a review on one point has no power to go into or to decide a matter already decided finally and as to which no application for review was made (8) When a plaintiff obtained a review on the ground that he was entitled, upon the allegations and proofs on the record to the full relief which

⁽¹⁾ Pran Nath : Sree Kant, 2 C L R 257 (1878)

⁽²⁾ Radukhee a Gokool Chunder, 12 W R 47 (1869), 13 Moo 1 A 209, 226, but see Pran Nath : See Kant, 2 C L R 25" (1875)

⁽³⁾ Dhuromidhur t 1,ra Bank, 5 C. 56, 59 (1879) This case was recently discussed in Sadaruddin e Lkramud lin, 19 C. L. J. 225 (1913), pp. 229, 230, when it was suggested by Mookernee, J , that the real intention was to decade that the Court had a discrets n to

refuse to entertain a new question. (4) Hurbans r Thakoor Purshad 9 C 209 13 C I R 285 (1882) Thacor Prosal r

Baluck Ram 12 (1 P el 45) Samal Ranchhod r Dullath 10 B H (

^{360 (1573).}

⁽b) Sadaruddin e Ekrar ald n. 13 C. L. J

^{225 (1913),} Jenkins, (J , an 1 M . L r. . . J (7) Hurro Chunder e Bato ha sere, W. R. (1564) 141

⁽⁵⁾ Bejanthe Water, 24 W R 427(1575).

he had sought, it was held not to be open to the defendant on the re-hearing to adduce evidence he ought to have done at the hearing (1) A Court should in its judgment on the re hearing give reasons for coming to a different con clusion from that which it had previously formed (2) When a case is re heard on review the order on the rehearing is a new decree whatever the result is, (3) even though on the application for review coming on for re hearing the Judge allowed it on a comparatively insignificant point and forthwith directed a clerical error in the decree to be rectified, and the time within which to appeal on the decree runs from the date of such order (4)

Practice -See notes to rr. 1 and 4. ante

9. No application to review an order made on an application for a review of a decree or order passed Bar of certain appli or made on a review shall be entertained. cations

Review of review -- With verbal alterations and a transposition this rule is the same as the last paragraph of sect 629 of the former Code first portion of the rule refers to the second, and the second portion refers to the third, stage of the proceedings through which an application for a review may pass (5) It has been a question whether these words are tantamount to saying "no second application for review shall be made," that is, whether such an application is barred in all cases (6) As regards this, it is clear that if an application for review is allowed at the second stage, then the order allow ing the application cannot as being an order made on an application for review be itself reviewed Similarly an order made in the third stage after the admission of the application for review and after the case has been re heard, whether that order confirm, alte, or leverse the decree sought to be reviewed, is a new decree (7) There is here a decree or older, as the case may be, passed or made upon a review, and this rule prohibits a further review (8) There remains a third ease, viz where the application for review is rejected at the first or second stage, and the case is in consequence not re heard. In this case the order itself rejecting the application for review cannot be reviewed But the question then arises whether a second application for review of the original order or decree may be made on different grounds For instance, does the rejection of an application based on the ground of illeged error apparent on the face of the record preclude a subsequent appli cation based on the ground of the discovery of new evidence? It may be

Bhatta, 15 C 432 435 (1888), Vaman !

⁽¹⁾ Bance Midhub : Pakaktur, 20 W R 225 (1973)

⁽²⁾ Chund Moyce t Kalu Koomar, 6 W R 13 (1866)

⁽³⁾ Son lammeet Mahatab Chand Bahadur, B L. R. F B 585 (1866)

⁽⁴⁾ Joykishen t Ataoor Rohoman 6 C _2 (1550) (') See as to thee stares Validal 1

Fulchan I, 30 B 56 at 1 60 (1905) () 5 (limba Rara Mondala Blobanath

Malhari, 26 B 485 191 (1302), and casts there ested (7) Vadikil t Tulchand 30 B 56 to

^{(1990).} Joylashen Moolerjee t At out Rob man 6 C 22 (1880) Son lammeo Dessee . Wahatab Chan I B dia for, B 1 R, I B 792 598 (1566)

⁽⁸⁾ Muhamma I Yusuf r Mdul Rahan an, 161 1 101 105 (185), a c, 16 C 71), 7 2

the second application is not for a review of the order made on an application for review, nor is it for a review of a decree or order passed or made on a review. On the other hand, though the original order is directly attacked by such a subsequent application, the effect of the latter of successful, is to grant the review which, though on different grounds was previously refused It has been said (1) that the present provision was first inserted in the Code of 1877 to meet the decision of the Full Bench in Nasiruddin Khan v Indro marayan Chowdhry (2) that the Court may admit a review even after a prior order rejecting it On the other hand the Calcutta High Court has held (3) that though the order of rejection is final in the sense that it cannot be made the direct subject of review, these provisions do not prohibit the admission of a subsequent application for review of the original decree on a different ground from that which was the basis of the previous application which was

refused (1) Vaman + Malhari 26 B 45 491 (1902) s c 4 Bom L. R 121 (2) B I R I B 367 (1906)

(3) Gobinda Ram Mondal v Bholanath Bhatta 15 C 432 (1888) and the care cited in last note

ORDER XLVIII.

Miscellaneous.

1. (1) Every process issued under this Code shall be Process to be served at served at the expense of the party on whose behalf it is issued, unless the Court otherwise directs.

(2) The court fee chargeable for such service shall be paid within a time to be fixed before the process

is issued.

"Unless the Court otherwise directs"—In the matter of H C Studd, (I) Rampin, J, said. "This provision of the Civil Procedure Code does not appear to me to give a Court any power to depart from the rules of the High Court on the subject of the levy of process fees, or to remit those fees. The section relates to the payment of process fees by the parties to a suit, and gives the Court, acting judicially, power to inke an order, hetween party and party only, as to who should pay the process fees. It does not expressly give power to remit the fees, or, what comes to the same thing, to order that the process should be served free, or, in other words, at the expense of Government, and in the present case we cannot, I think, make such an order under sect 93, C P C, seeing that the Government is no party to the suit." Ghose, J, however, declined to express any opinion upon the question, "whether or not the Court has the power to relax in any case the process fee rules," and Rampini, J, himself pointed out that some Benches readily grant a relaxation of these rules.

Within a time to be fixed by the Court—If no time is fixed, there is no obligation to pay the court fee, and where processes could not be served on witnesses for non payment of the court fee, in such a case it was held that the suit could not be dismissed for default of evidence (2)

2 All orders, notices and other documents required by orders and notices this Code to be given to or served on any person shall be served in the manner provided for the service of summons.

4.1

^{(1) 3} C W N 82 (1838)

⁽²⁾ Purshadec Laf t Umbika Pershad, t B I R App 25, * c, 11 W R 2.00 (1819) and see Mohun Mundur t Brij Bhookun, 9

W R 127 (1868), where it was held that if e party was not bound to pay into Court until the latter lad fixed what was re wonabl

Services of notices—This includes service by post where the person resides out of British India, as provided by O V r 25, ante (1)

3 The forms given in the appendices, with such variation is used forms in appendices as the circumstances of each ease may decest therein mentioned.

Forms —It is fair to assume that those forms do not exceed that which is permissible (2)

⁽¹⁾ Ghamshamlal v Bhansali, 5 B 249, (2) Achalabala Bose v Surendra Nath, 24 2-1 (1881) C. 766, 772 (1897)

ORDER XLIX.

Chartered High Courts

- 1 Notice to produce documents, summonses to witnesses, who may serve processes of High Court.

 High Court, and of its matrimonial, testamentary and mtestate jurisdictions, except summonses to defendants, writs of execution and notices to respondents may be served by the attorneys in the suits, or by persons employed by them, or by such other persons as the High Court, by any rule or order, directs
- Nothing in this schedule shall be deemed to limit or other-Saving in respect of wise affect any rules in force at the commence that the fourts ment of this Code for the taking of evidence or the recording of judgments and orders by a Chartered High Court

High Courts—This rule, which embodies sect 633 of the last Code, impowers the Court to determine whether the judgments should be given or in writing, or according to any mode which nught appear to it best in the interests of justice, and where rules have been made the rules and not sect 574 (now O \(\text{LI}\) 1 31) apply (1)

- Application of rules and Chartered High Court in the exercise of its ordinary on extraordinary original civil jurisdiction,
 - (1) rule 10 and rule 11, clauses (b) and (c), of Order VII,
 - (1) rule 10 and rule 11, clauses (b) and (c), of Order Y^{11} . (2) rule 3 of Order X,
 - (3) rule 2 of Order XVI,

36 1

- (4) rules 5, 11, 8, 9, 10, 11, 15, 11, 15 and 16 (so far is relates to the manner of taking evidence) of Order XVIII,
- (a) rules 1 to 8 of Order AA; and
- (4) rule , of Order XXXIII (so far is iclates to the making of a memorandim),

and rule 17 of Order XLI shall not apply to any such High Court in the exercise of its appellate jurisdiction.

ORDER L.

Provincial Small Cause Courts.

1. The provisions heremafter specified shall not extend to Provincial Small Cause Courts constituted under the Provincial Small Cause Courts Act, 1887, or to Courts exercising the runsdiction of a Court of Small Causes under that Act, that is to sau-

(a) so much of this schedule as relates to-

(1) suits excepted from the cognizance of a Court of Small Causes or the exceution of decrees in such suits, (11) the execution of decrees against immoveable property or

· the interest of a partner in partnership property, (111) the settlement of usives, and

(b) the following rules and orders-

Order II, 1 (frame of suit),

Order X, r , (record of examination of parties) ,

Order XV, except so much of rule & as provides for the pronouncement at once of judgment,

Order XVIII, rules , to 1 ' (evidence) ,

Orders XLI to XLV (appeals) ,

Order XLVII, rules 1 3, 1, 1, 7 (review) , Order LI

ORDER LI

Presidency Small Cause Courts.

1. Save as movided in rules 22 and 23 of Order V, rules 4

Presidency Small Cause and 7 of Order XXI, and rule 4 of Order

XXVI, and by the Presidency Small Cause

Courts Act, 1882, this schedule shall not extend to any suit or

proceeding in any Court of Small Causes established in the towns

of Calcutta, Madras and Bombay.

Appendices to the First Schedule: Forms.

APPENDIX A

PLEADINGS.

(1) Titles or Suits.

A. B (and description and residence) Plaintiff,
against

(2) DESCRIPTION OF PARTIES IN PARTICULAR CASES

Defendant

The Secretary of State for India in Council

The Advocate General of

The Collector of

C. D (a ld description and resulence)

The State of

IN THE COURT OF

The A B Company, I united, having its registered office at

A. B , a public officer of the C D Company

A B (add description and residence), on behalf of himself and all other creditors of C D, late of (add description and residence)

A B (add description and residence), on behalf of himself and all other holders of debentures issued by the Company, Limited

The Official Receiver

A B, a minor (add description and residence), by C D [or by the Court of Wards], his next friend

I IRST SCHED (3), Nos 1 2

A B (add description and residence), a person of unround mind [or of werk mind] by C D, his next friend

A B, a firm carrying on business in partnership at

A B (add description and residence), by his constituted attorney C D (adl description and residence)

A B (add description and residence), Shebait of Thakur.

A B (udd description and residence), executor of C D, deccased

A B (ald description and residence), heir of C D, deceased

(3 PLAINES

 $\lambda_0 = 1$

MONEY LENT

(Pulle)

A B, the above named plantiff, states as follows -

1 On the day of 19 , he lent the defendant

day of rupces repayable on the

rupees paid on the 2 The defendant has not paid the same, except

day of

[If the plaintiff claims exemption from any law of limitation, say -]

3 The plamtiff was a minor [or insane] from the day of till the day of

4 [Facts showing when the cause of action arose and that the Court has jurisdiction] 5 The value of the subject matter of the suit for the purpose of jurisdiction is

rupees and for the purpose of court fees is rupees per cent from 6 The plaintiff claims rupees, with interest at the day of

No 2

MONEY OVERPAID

(Title)

A B, the above named plantiff, states as follows -19 , the plaintiff agreed to buy and 1 On the day of annas per tola of fine burs of silver at the defendant agreed to sell

silver 2 The plaintiff procured the said bars to be as syed by L. I., who was paid 15 the defendant for such assay, and L I declared each of the bus to contain 1,500 telas

of time silver, and the plaintiff accordingly paid the defendant 3 I reli of the said bars contained only 1,200 toles of fine silver, of which fact the

plantiff was ignorant when he made the payment I the defendant has not repaid the sum so over and

[Is in I tras I and J of Form No I and Relief claimed]

GOODS SOLD AT A LINED PRICE AND DELIVERED

(Title)

A B, the above named plaintiff, states as follows -

1 On the day of 19 . L' I sold and delivered to the defendant [one hundred harrels of flour, or the goods mentioned in the schedule hereto annexed, or sundry goods]

2 The defendant promised to pay rupees for the said goods on delivery for on the day of some day before the plaint u as filed]

3 He has not paid the same

i L F died on the day of 19 By his last will be appointed his brother, the plaintiff, his executor

[As in paras I and s of Form No 1]

7 The plaintiff as executer of E F claims [Relief claimed]

No 4

GOODS SOLD AT A REASONABLE PRICE AND DITIVLIED

(Title)

1 B, the above named plaintiff states as follows -

1 On the day of 19 , plaintiff sold and delivered to the defendant [sundry articles of house furniture], but no express agreement was made as to the price

2 The goods were reasonably worth rupces

J The defendant has not paid the money

[1s in paras I and o of Form No 1, and R hef claim []

No. 5

GOODS MADE AT DEFENDANT'S REQUEST AND NOT MICEPIED

(Tatle)

1 B, the above named plantall, et etcs as follows

1 On the day of 19 L F is reed with the plaintiff that the plaintiff should make for him [six tables and tflj chairs] and that I F hould pay for the goods on delivery rupces

2 The plaintiff made the goods, and on the day of 19 officed to deliver them to E. F., and has ever since been ready and with a sector do

3 E I has not accepted the goods or paid for them

(Is in page 4 and 5 f I rm No I and Relief class d)

No 6

Directives they a Ressal [Goods some at Accres

(Tatle)

! B, the above named plaintul, tates as follows -

I On the day of 13 , the plantal put up at an true sundry [gwds], subject to the condition that all goods not pull for aid removed by the

F1831 БСИКО (3), Nos 7-9

purchaser within [ten days] after the sale should be re sold by auction on his account, of which condition the defendant had notice

2 The defendant purchased [one crate of creel ery; at the auction at the price of

rupees 3 The plaintiff was ready and willing to deliver the goods to the defendant on the date of the sale and for [ten days] after

4 The defendant did not take away the goods purchased by him, nor pay for them withm [ten days] after the sale, nor afterwards

, the plaintiff re sold the [crate of 5 On the day of 19 crockery], on account of the defendant, by public auction, for rupees rupees

6 The expenses attendant upon such re sale amounted to 7 The defendant has not paid the deficiency thus arising, amounting to rupees

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 7

SERVICES AT A REASONABLE RATE

(Title)

A B, the above named plaintiff, states as follows -

day of , and the I Between the day of , pluntiff [executed sundry drawings, designs and . at diagrams] for the defendant, at his request, but no express agreement was made as to the sum to be paid for such services

rupces

2 The services were reasonably worth

3 The defendant has not paid the money

[As in paras I and 5 of Form No 1, and Relief claimed]

No 8

SERVICES AND MATERIALS AT A REASONABLE COST

(Title)

A B, the above named plaintiff, states as follows -

, the plaintiff built day of 19 , at I On the], and furnished the materials therefor, house [known as No , m for the defendant, at his request, but no express agreement was made as to the amount to be paid for such work and materials rupces

2 The work done and materials supplied were reasonably worth

3 The defendant has not prul the money

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 9

USE AND OCCUPATION

(Title)

! B , the above named plantiff, executor of the will of $\lambda - 1$, deceased, states as follows -

Streetl, by per 1 that the defendant occupied the [house No (1) until the russien of the said A 1, from the

First Schld (3), Nos. 10-12

 $\mbox{\sc day}$ of $\mbox{\sc 19}$, and no $\mbox{\sc recement}$ was made as to payment for the use of the said premises

2. That the use of the said promises for the said period was reasonably worth rupees

3 The defendant has not paid the money

[As in paras 4 ard 5 of korm No 1]

6 The plaintiff as executor of X 1. claims [Relief claimed]

No 10

On an Award

(Title.)

A B, the above named plaintiff, states as follows -

1 On the day of 19 , the plantiff and defendant, having a difference between them concerning [a few and of the plantiff for the price of ten barriels of oil, which the defendant refused to payl, agreed in writing to submit the difference to the arbitration of F F and G H, and the original document is nuneved hereto

2. On the day of 19, the arbitrators awarded that the

defendant should [pay the plaintiff rupees]
3 The defendant has not paid the money

[4s in paras 4 and 5 of Form No 1, and Relief claime]

No 11

ON A FOREIGN JUDGMENT

(Title)

1 B the above named plaintiff, states as follows --1 On the day of 19 at in the

[or kingdom], of the Court of that State [or Kingdom], in a suit therein pending between the plaintiff and the defendant, duly adjudged that the defendant should pay to the plaintiff rupees with interest from the sud date

2 The defendant has not paid the money

[As in paras 4 and 5 of Form Vo I, and Relief chimed]

No. 12

ACHINET SURETY FOR PAYMENT OF RENT

(Title)

4 B, the above named plaintiff states is follows -

I On the day of 19 . E. P. bired from the plaintiff for the term of vears, the [house No Street] at the annual rent

of rupees, payable (monthly).

2 The defendant agreed, in consideration of the letting of the premises to E. F., to

guarantee the punctual payment of the rent.

3 the rent for the month of 19 amounting to rupet.
has not been raid

[I], b) the terms of the operement, notice as required to be given to the sarety, all -1 4 on the day of 19, the planning save notice to the defendant of the non-payment of the rent, and detanal ked payment thereof

5 The defendant has not paid the same {4s In paras. 4 and 5 of Form No. 1, and I disfelaimed.}

BREACH OF AGREEMENT TO PURCHAST LAND.

(Title.)

A B, the above named plaintiff, states as follows -

1 On the day of 19 , the plaintiff and defendant entered into an agreement, and the original document is hereto annexed

[Or, On the day of 19, the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant and that the defendant should purchase from the plaintiff forty highest of land in the village of for rupees i

2 On the day of 19, the plantiff, being then the absolute owner of the property [and the same being free from all incumbrances as was made to appear to the defendant], tendered to the defendant a sinflicient instrument of transfer of the same [or, was ready and willing, and is still ready and willing, and offered, to transfer the same to the defendant by a sufficient instrument] on the payment by the defendant of the sum agreed upon

3 The defendant has not paid the money

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No. 14

Nor delivering Goods sord

(Title)

4 B, the above named plantiff, states as follows .-

agreed that the defendant should deliver fone hundred barnels of flour to the plaintiff on the day of 19 , and that the plaintiff should pry therefor

rupees on delivery

On the [said] day the plaintiff was read, and willing, and offered, to pay the

[As in paras 1 and 5 of Form No 1, and Relief claimed]

No 15

WRONGFUL DISMISSAI

(Title)

A B, the above named plaintiff, states as follows -

1 On the day of 19 agreed that the plumtiff should serve the defendan

of foreman, or as the case may be , and that the decend me should employ rupees (monthly) assuch for the term of [one year] and pay him for his services rupees (monthly)

2. On the day of 19, the plantiff intered upon the service of the defend at and has ever since been, and still is, ready and willing to continuo in such service during the renaunder of the said year, whereof the defendant all ways has hard notice.

3 On the day of 11 , the defendant wrongfully discharged the plantall, and refused to permit to serve as aforesaid, or to pay him for his service.

(Is in | trus I and 5 of Form Vo 1, and Relief claimed)

No 16.

BREACH OF CONTRACT TO SERVE

(Title)

1 B, the above named plaintiff, states as follows -

1 On the day of the plaintiff and defendant minually are all that the plaintiff should employ the defendant at an [animal] salary of rupees, and that the defendant should serve the plaintiff e. fan artist] for the term

of [one year].
2 The plantiff has always been ready and willing to perform his part of the agree

ment [and on the day of 19 offered so to do]

J The defendant (intered upon) the service of the plantiff on the above mentioned day, but afterwards, on the day of 19, he refused to serve the plantiff as storeadd

[le in paras I and a f Form No I, and Pelief claime !]

No. 17

AGAINST A BUILLER FOR DEFECTIVE WORKMANSHIP

(Trife)

1 B the above named chantiff states as follows —

1 On the dry of 19, the plaintiff and defendant entered an agreement and the original document is hereto annexed [Or state the tenor of the contract]

(2 It e plaintiff duly performed all the conditions of the agreement on his part 1. 3. The defendant [built the house referred to in the agreement in a bad and in workmanils i namer 1.

[1 cm paras In 15 f Form to I and Relief claired]

No 18

ON A BOND FOR THE PIDELITY OF A CITER

(Title)

1 B , the above named plantiff states as follows \longrightarrow

1 On the day of 19 the plaintiff took E F into his employment as a clerk

2 In consideration thereof on the day of 19, the defendant agreed with the plaintiff that if I F should not faithfully perform his duties as a clerk to the plaintiff or should fail to account to the plaintiff for all mones evidences of debt or other property received by him for the use of the plaintiff the defendant would pay to the plaintiff whatever loss he might sust in by reason thereof, not exceeding ranges

[Or, 2] In consideration thereof, the defendant by his bond of the same date bound that if E F should faithfully perform his dutes as clerk and casher to the condition

humseit to pay too plannit too penal sum of that if E F should faithfully perform his duties as elerk and cashier to the plaintiff and should justly account to the plaintiff for all momes, evidences of debt or other property which should be at any timo held by him in trust for the plaintiff, the bond should be vid]

[Or, 2 In consideration thereof, on the same date the defendant executed a bond in favour of the plaintiff and the original document is hereto annexed]

3 Between the day of 19 and the day of 19 LF received money and other property, amounting to the value of rupees, for the use of the plantiff, for which sum be bas not accounted to him and the same still remains due and unpaid

[As in paras 4 and 5 of Form \o I and Relief claimed]

3

No 19

BY TENANT AGAINST LANDLORD, WITH SPECIAL DAMAGE

(Title)

A B, the above named plaintiff, states as follows -

1 On the , the defendant, by a regis day of 19 tered instrument, let to the plaintiff [the house No Street], for the term of years, contracting with the plaintiff that he, the plaintiff, and his legal representatives should quietly enjoy possession thereof for the said term

2 All conditions were fulfilled and all things happened necessary to entitle the

plaintiff to maintain this snit

3 On the during the said term, E F, who was the day of lawful owner of the said house, lawfully exicted the plaintiff therefrom, and still withholds the possession thereof from him.

4 The plaintiff was thereby [prevented from continuing the business of a tailor rupees in moving, and lost the at the said place, was compelled to expend custom of G H and I J hy such removal]

[4s in paras 4 and 5 of Form No 1, and Relief claimed]

No 20

ON AN AGRLEMENT OF INDEMNITY

(Title)

A B, the above named plaintiff, states as follows -

, the plaintiff and defendant being 1 On the day of 19 partners in trade under the style of A B and C D, dissolved the partnership and mutually agreed that the defendant should take and keep all the partnership property, pay all debts of the firm and indemnify the plaintiff against all claims that might be made upon him on account of any indehtedness of the firm

The pluntiff duly performed all the conditions of the agreement on his part , [a judgment was recovered against 3 On the day of 19

the plaintiff and defendant by E F, in the High Court of Judicature at upon a debt due from the firm to E F, and on the rupces [in satisfaction of the same] the plaintiff paid

4 The defendant has not paid the same to the plaintiff

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 21

PROCUBING PROPERTY BY TRAUD

(Title)

A B, the above named plaintiff, states as follows -

, the defendant, for the purpose of 1 On the day of 19 inducing the plaintiff to sell him certain goods represented to the plaintiff that [he, the rupees ever all his habilities] defendant, was solvent, and worth 2 The plaintiff was thereby induced to sell [and deliver] to the defendant [dr)

rupees goods] of the value of

3 The said representations were false [or, state the particular falsehoods] and were then known by the defendant to be so

1 The defend int has not paid for the goods [Or, if the goods were not delivered] The plaintiff, in preparing and shipping the goods and proguring their restoration expended rupees

[is in paras I and a of Form Vo 1, and Relief claimed]

No. 21

I RAUDULLATELY IT OCCUPING CREDIT TO BE GIVEN TO ANOTHER PERSON

(Title)

1 B, the above numed | launtiff, states as follows -

1 On the day of 19, the defendant represented to the plaintiff that F F u is solvent at d in good credit, and worth rupees over all his habilities for, that L F then held a responsible situation and was in good circum stances, and might salely be trusted with goods on credit?

2. The plaints I was thereby induced to sell to E f [rice] of the value of

rupoes months credit]

3 The said representations were false and were then known by the defendant to be so, and were made by him with intent to deceive and delraud the plaintiff for, to deceive and mure the rlamingl

4 L I [did not pay for the said goods at the expiration of the credit aforesaid, or] has not paid for the sail rice, and the Lambiff has whelly lost the same,

[lain paras I and J of Form No 1, and Lelief claimed]

No 23

POLLUTING THE WATER UNDER THE PLANTIFI'S LAND

(Totle) t B, the above named plantiff at ites as follows -

I the plaintiff is, and at all the times heremalter mentioned was possessed of certain land called nu i situato in and of a well therein, and of water in the well, and was entitled to the u e and benefit of the well and of the water therem, and to have certain springs and streams of water which flowed and ran into the

well to supply the same to flew or run without being fouled or polluted 2 On the day of 19 , the defendant wrongfully fouled and polluted the well and the water therein and the springs and streams of water which

flowed into the well. 3 In consequence the water in the well became impure and unfit for domestic and other necessary purposes, and the plaintiff and his family are deprived of the use and henefit of the well and water

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No. 21

CARRYING ON A NOXIOUS MANUFACTURE

(Title)

B, the above named plaintiff, states as follows -

1 The plaintiff is, and at all the times heremafter mentioned was, possessed of , situate in certain lands called

2 Ever since the day of 19 , the defendant has wrong fully caused to issue from certain smelting works carried on by the defendant large quantities of offensive and unwhelesome smoke and other vapours and nexious matter, which spread themselves over and upon the said lands, and corrupted the air, and settled

on the surface of the lands 3 Thereby the trees, hedges, herbage and crops of the plaintiff growing on the lands were damaged and deteriorated in value, and tho cattle and live stock of the plaintiff on the lands became unhealthy, and many of them were possened and died

of the lands as he otherwise would have bad

[As in paras 1 and 5 of Form No 1, and Relief claimed]

Ng 25

OBSTRUCTING A RIGHT OF WAY

(Tttle)

1 B, the above named plaintiff, states as follows -

1 The plaintiff is, and at the time hereinafter mentioued was, possessed of [a house n flor Magon of

servants [with vehicles, or on foot] at all times of the year

, defendant wrongfully obstructed the 3 On the day of 19 said way, so that the plantiff could not pass [with vehicles, or on foot, or in any manner] ulong the way [and has ever since wrongfully obstructed the same]

4 (State special damage if an j)

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No. 26

OBSTRUCTING A HIGHWAY

(Title)

110

and was prevented from attending to his business for a long time, and incurred expen for medical attendance

[As in puras 4 and 5 of Form No 1, and Relief claimed]

No 27

DIVERTING & WATLR COURSE

(Title)

! L. the above named plantiff, states as follows -

1 The plaintiff is, and at the time heremafter mentioned was possessed of a mill . district situated on a [stream] known as the , in the vulage of 2 By reason of such possession the plaintiff was entitled to the flow of the stream for

working the mill

19 , the defendant, by cuttu, the day of 3 On the bank of the stream, wrongfully discreted the water thereof, so that less water ran mto the pluntiff's mill Fichs

1 By reason thereof the plaintiff has been until to a rind more than s cho per day, where is, before the said diversion of a ster he was at le to grand

I last jaras I and seffort No 1, and hele felter al]

OBSTRUCTING A RIGHT TO USE WATER 10R IBRIGATION

(Title)

A B, the above named plaintiff, states as follows -

l Plantiff is, and was at the time hereinafter mentioned, possessed of certain lands situate, etc., and entitled to take and use a portion of the water of a cert in stream for prigating the said lands

2 On the day of 19 , the defendant prevented the plaintiff from taking and using the said portion of the said water as aforesaid, by wrongfully obstructing and diverting the said stream

[As in paras 4 and 5 of Form No 1 and Relief claimed]

No 29

INJURILS CAUSED BY NEGLIGENCE ON A RATEROAD

(Tatle)

A B, the above named plaintiff, states as fellows -l On the 19 , the defendants were common curicis of passengers by radiusy between and

2 On that day the plaintiff was a passenger in one of the carriages of the defendants on the said railway

3 While he was such passenger, at for near the station of

d on the said ants, wherehv , and state the and is perma

nently disabled from earrying on his former business as (a salesman)

[As in paras 4 and 5 of Form No 1, and Relief claimed]

[Or thus -2 On that day the defendants by their servants so nechaculty and unskilfully drove and in inaged an engine and a train of earnages attached thereto upon and along the defendants railway which the plaintiff was then lawfully crossing, that the said engine and train were driven and struck against the plantiff, whereby, etc., at in para 31

No 30

INJURIES CAUSED BY NEGLIGENT DELVING

(Title) 1 B, the above named plaintiff states as follows --

- I The plaintiff is a shoemaker, carrying on business at
- The defend int is a merchant of
- 2 On the day of , the plaintiff was walking southward slong Chowrunghee, in the City of Calentia, at about 3 o clock in the alternoon. He was obliged to cross Middleton Street, which is a street running into Chowringhie at right angles While he was crossing this street, and just before he could reach the loot payement on the lurther side thereof, a carriage of the defendant s, drawn by two horses
 - 3. By the blow and fall and tramping the plaintiff shift arm was broken and he was

brused and injured on the side and back as well as internally, and in consequence thereof the plaintiff was for four months iff and in suffering, and unable to attend to his business, and incurred heavy inedical and other expenses, and sustained great loss of business and profits

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 31

FOR MALICIOUS PROSLCUTION

A B, the above named plantiff, states as follows—

1 On the day of 19, the defendant obtained a warrant from [a Magistrate of the said city, or as the case may be] on a charge of , and the plaintiff was arrested thereon, and imprisoned for

[days, or hours, and gave bail in the sum of rupes to obtain his release]

2 In so doing the defendant acted maliciously and without reasonable or probable cause

3 On the day of 19, the Magistrate dismissed the complaint of the defendant and acquitted the plaintiff
4 Many persons.

and supposing the pla or, in consequence of the

or in consequence the plaintiff suffered pain of body and mind, and was prevented from transacting his business, and was injured in his credit, and incurred expense in obtaining his release from the said imprisonment and in defending himself against the said complaint.

[As in paras 4 and 5 of Form No 1, and Relief claimed]

No 32

MOVEABLES WRONGFULLY DETAINED

(Title)

1 B, the above named plaintiff states as follows -

I On the

day of 19 plaintiff owned for state facts

reto anaexed

.... has detailed

the same from the plaintiff.

3 Before the commencement of the sait, to wit on the day of the pluntiff demanded the same from the defendant, but he refused to deliver them

[As in paras 1 and 5 of Fort No 1]

6 The plantiff claims—
(1) delivery of the said goods, or rupees, in be had.

rupees, in case delivery cannot

(2) rupees compensation for the detention thereof

I he Schedule

No 33

AGAINST A HAUDDILLM PURCHISER AND HIS TRANSFERLE WITH NOTICE (Title)

1 B, the above named plaintiff states as follows -

- 2 The plaintiff was hereby induced to sell and deliver to C. D., [one hundred boxes
- of teal, the estimated value of which is rupees 3 The said representations were false, and were then known by C D to be so for, at the time of making the said representations, C D was insolvent, and knew himself
- to be sol 4 C D afterwards transferred the sud goods to the defendant E F without con
- sideration for who had notice of the falsity of the representation] [As in paras 4 and 5 of Form No. 13
 - 7 The plaintiff claims-
 - (I) dehvery of the said goods, or rupecs in care delivery cannot be had .
 - (2)rupees compensation for the detention thereof

RESCISSION OF A CONTRACT ON THE GROUND OF MISTAKE

(Tytle.)

- A B, the above named plaintiff, states as follows --
- 1 On the day of the defendant represented to the plaintiff that a certain piece of ground belonging to the defendant situated at , contained (ten bighas).
- 2 The plaintiff was thereby induced to purchase the same at the price of rupees in the belief that the said representation was true and signed an agreement, of which the original is heroto annexed But the land has not been transferred to him day of 19 , the plaintiff paid the defendant
 - rupees as part of the purchase money
 - 4 That the said piece of ground contained in fact only [five highas]

[As in paras 4 and 5 of Form No 1]

7 The plaintiff claims—

(1) rupees, with interest from the day of

(2) that the said agreement be delivered up and cancelled

No. 35

AN INJUNCTION RESTRAINING WASTE

(Title)

- A B . the above named plaintiff, states as follows -
- 1 The plaintiff is the absolute owner of [describe the property]
- 2 The defendant is in possession of the same under a lease from the plaintiff
- 3 The defendant has [cut down a number of valuable trees, and threatens to cut down many more for the purpose of sale] without the consent of the plaintiff

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims that the defendant be restrained by injunction from committing or permitting any further waste on the said premises.

[Pecuniary compensation may also be claimed]

No 36.

JAJUNCTION I ESTRAINING MUISANCE.

(Title)

- 1 B , the above named plaintiff, states as follows -
- 1 Plantiff is, and at all the times heremafter mentioned was, the absolute owner Street, Calcuttal of the house No

Tirat Sched (3), Nos 37 39

 $2\,$ The defendant is, and at all the said times was the absolute owner of [a plot of ground in the same street $\,$

nas been unable to rent the same]

[As in paras 4 and 5 of Form No 1]

 $7\,$ The plantiff claims that the defendant he restrained by injunction from committing or permitting any further nuisance

No 37

Public Nuisance

(Title.)

A B, the above named plantiff, states as follows —

1 The defendant has wrongly heaped up earth and stones on a public road known as Street at so as to obstruct the passage of the public slong the same and threatens and intends, unless restrained from so doing to continue and repeat the said wrongful act
2 The plantiff has obtained the consent in writing of the Advocate General [or of

the Collector or other officer appointed in this behalf to the institution of this suit.

[As in paras 4 and 5 of Form No 1]

The plaintiff claims-

(1)

(2)

the earth and stones wrongfully heaped up as aforesaid

No 38

INJUNCTION AGAINST THE DIVERSION OF A WATER COURSE

(Pitle)

1 B, the above named plaintiff, states as follows -

[As in Poim No 27]

The plaintiff claims that the defendant be restiained by injunction from directing the water as aforesaid

No 39

RESTORATION OF MOVEMENT PROFERENT THREATENED WITH DESTRUCTION AND FOR AN

(1 tile)

f B, the above named plantaf, states as follows

1. Plannill is, and at all times heremafter mentioned was the owner of [s] street classes in this excludes we secured by an enmunty anner) and of which no duple to exist [or, state in j just sleen) if it if a just just sleen that can obtain the just just sleen in just sleen).

(12 cone)

2 On the keeping with the defendant.

day of

3 On the

day of 19 , he deposited the same for safe

. he demanded the same from the

19 defendant and offered to pay all reasonable charges for the storage of the same, 4 The defendant refuses to deliver the same to the plaint iff and threatens to conceal.

di pose of, cut or mjure the same if required to deliver it up 5 No pecuniary compensation would be an adequate compensation to the plaintiff for the loss of the [naming]

[As in paras I and 5 of Form No 1]

5. The plaintuf claims-

(1) that the defendant he restrained by injunction from disposing of, injuring or concealing the said [nainting].

(2) that he be compelled to deliver the same to the plaintiff.

No 40.

INTERPLE CHEE.

(Title)

A B, the above named plaintiff, states as fellows -

1. Before the date of the claims heremafter mentioned G II deposited with the plaintiff [describe the property] for [safe Leeping]. 2 The defendant C D, claims the same funder an alleged assignment thereof to

him from G. $H \setminus$ 3 The defendant E F also claums the same funder an order of G H transferring

the same to hun] 4 The plaintiff is ignorant of the respective rights of the defendants.

5 He has no claim upon the said property other than for charges and costs, and is ready and willing to deliver it to such persons as the Court shall direct.

f The suit is not brought by collusion with either of the defendants [Is in paras 4 and 5 of Form No 1]

O The plaintiff claims-(I) that the defendants be restrained, by injunction, from taking any proecedings against the plaintiff in relation thereto,

(2) that they be required to interpleed together concerning their claims to the said property.

[(3) that some person be authorized to receive the said property pending such htigation .1

(4) that upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto

No. 41

Administration by Creditor on behalf of himself and all other Creditors.

(Title)

A B, the above named plantiff, states as follows -

1 E F, late of , was at the time of his death, and his estate still is, indebted to the plaintiff in the sum of there insert nature of debt and security. if any]

2 E F died on or about the By his last will. day of , he appointed C D his executor [or devi ed dated the day of his estate in trust, etc , or died intestate, as the case may be].

3 The will was proved by 6 D for letters of administration were granted, etc 1.

By

- 4 The defendant has possessed himself of the moveable [and immoveable, or the proceeds of the immoveable] property of E F, and has not paid the plaintiff his debt. As in paras 4 and 5 of Form No 17
- 7 The plaintiff claims that an account may be taken of the moveable [and in moveable property of E P, deceased, and that the same may be administered under the decree of the Court

No. 42

ADMINISTRATION BY SPECIFIC LEGATER

(Title)

[Alter Porm No 41 thus]-

[Omit paragraph 1 and commence paragraph 2] E F, late of , died on or about the By his last will, dated the day of οf , he appointed G D his executor, and bequeathed to the plaintiff [lere state the specific legacy]

For paragraph 4 substitute—

The defendant is in possession of the moveable property of II, and amongst other things, of the said [here name the subject of the specific bequest]

For the commencement of paragraph 7 substitute—

The plaintiff claims that the defendant may be ordered to deliver to him the said [here name the subject of the specific beguest] or that, etc.

No 43

Administration by Pecuniary Legater

(Title)

[Alter Torm No 41 thus] -

. d cd [Omit paragraph I and substitute for paragraph 2] E F, late of By his last will dated the on or about the day of , he appointed C D his executor and bequeathed to the plaintiff a day of rupees legacy of

In paragraph I substitite ' legacy for "debt

Another Form

(Title)

If F, the above named plaintiff, states as follows -

day of 1 A B of h in the died on the

it law, and as to his moveable property for the persons who would be the testators next-of kin if he had died intestate at the time of the death of the Hamill, and such

ful ire of his issue as aforesaid day of 2 the will was proved by the df n limt on th

He plaintiff is not been married

..

1 IBST SCHED (3), Nos 44, 45

 $\overline{3}$ The testator was at his death entitled to move able and immove able property, the default entered into the receipt of the rents of the immove able property and got in the move able property, he has sold some part of the immove able property

[As in paras 4 and 5 of Form No 1]

6 The plaintiff claims-

- (1) to have the moveable and immoveable property of A B administered in this Court, and for that purpose to have all proper directions given and accounts taken.
 - (2) such further or other relief as the nature of the ease may require

No 44

EXECUTION OF TRUSTS

(Trtle.)

- 4 B the above named plaintiff states as follows -
- I He is one of the trustees under an instrument of settlement bearing date on or about the day of made upon the marriage of E F and G H, the father and mother of the defendant for an instrument of transfer of the estate and effects of E F for the benefit of C D the defendant and the other creditors of F F 1

2 A B has taken upon himself the burden of the said trust and is in possession of [or of the proceeds of] the moveable and iran overable property transferred by the said unstrument.

strument

- 3 C D claims to be entitled to a beneficial interest under the instrument
- 6 The plaintiff is desirous to account for all the rents and profits of the said immoveable property [and the proceeds of the said of the said, or of part of the said immoveable property or moveable, or the proceeds of the sale of or of part of, the said immoveable and the proceeds of the sale of or of part of, the said immoveable.

the benefit of C D the defendant, and all other persons who may be interested in such administration in the presence of C D and such other persons so interested as the Court may direct, or that C D may show good cause to the contrary

[N B -- Where the suit is by a beneficiary the plaint may be modelled an iairs mulandie on the plaint by a legate]

No. 45

FORECLOSURE OF SALE.

(Title.)

- 1 B the above named plaintiff, states as follows -
- 1 The plaintiff is mortgagee of lands belonging to the defendant
- 2 The following are the particulars of the mortgage
 - (a) (date),
 - (b) (names of mortgagor an I mortgagec)

(f) (amount now due).

⁽g) (if the plaintiff's title is derivative, state shortly the transfers or develotion under which be claims)

Ωf

day

(If the plaintiff is mortgagee in possession, add)

3 The plaintiff took possession of the mortgaged property on the and is ready to account as mortgageo in possession from that time

[As in paras 1 and 5 of Form No 1]

6 The plaintiff claims -

(1) payment, or in default [sale or] foreclosure [and possession],

[If here Order 31, rule 6, applies]

(2) in case the proceeds of the sale are found to be insufficient to pay the amount due to the plaintiff then that liberty be reserved to the plaintiff to apply for a decree for the balance

No 46

REDEMPTION

(Title)

A B, the above named pluntiff, states as follows -

1 The plaintiff is mortgagor of lands of which the defendant is mortgaged

2 The following are the particulars of the mortgage -

(a) (date),

(b) (names of mortgagor and mortgagee).

(c) (sum secured),

(d) (rate of interest).

(e) (property subject to mortgago),

(f) (if the plaintiff's title is derivative, state shortly the transfers or devolution under which he claims)

(If the defendant is mortgagee in possession, add)

3 The defendant has taken possession for has received the rents] of the morigaged property

[As in paras 1 and 5 of Form No 1]

6 The plaintiff claims to redeem the said property and to have the same recon vescel to him [and to have possession thereof]

No 47

Specific Performance (No. 1)

(Title)

A B, the above named plumtiff, states as follows -

and signed by tlo I By an agreement dated the day of and signed by the defendant, he contracted to buy of [or sell to] the pluntiff certain immoveable property ther in described and referred to for the sum of

2 The pluntiff has applied to the defendant specifically to perform the agreement

on his part, but the defend int has not done so

3 The Huntiff has been and still is ready and willing specifically to perform the igic nent on his part of which the defendant has had notice

[ls in] tras I and 5 of Form No 1] 6 It will untuif claims that the Court will order the defend intersectionly to perform hate ment and to do all acts necessary to jut the plaintiff in full peace sion of thosa l trajerty [rto ecopt a tran for and po ess on of the sull priperty] and to pay the coats of the mit

SPECIFIC PERFORMANCE (No. 2)

(Title)

i B, the above named pfamtiff, states as follows -

1 On the day of 19 , the pluntiff and defendant entered into an agreement, in writing and the origina document is hereto annexed.

The defendant was absoluted, entitled to the immoveable property described in the

agreement

2 On the day of 19 , the plaintiff tendered

Typees to the defendant, and demanded a transfer of the said property by a sufficient instrument

3 On the day of 19, the plaintiff again demanded such transfer [or the defendant refused to transfer the same to the plaintiff]

4 The defendant has not executed any instrument of transfer

5 The plaintiff is still ready and willing to pay the purchase money of the said property to the defendant

[As in para 1 and 5 of Form No 1]

8 The plaintiff claims-

(1) that the defendant transfers the said property to the plaintiff by a sufficient instrument [following the terms of the agreement],

(2) rupces compensation for withholding the same

No 49

PARTNERSHILL

(Title)

4 B, the above named plaintiff, states as follows -

1 Ho and C D the defendant have been for years for months] past enrying on business together under articles of partnership in writing, for under a deed, or under a verbal agreement?

2 Several disputes and difference, have arrived between the plaintiff and defendant is such partners whereby it has become impossible to curry on the business in partner ship with advantage to the purtners. [Or the beforetain has a minuted the following breaches of the partnership articles.]

(1) (2) (3)

J

[4sin paris land , f Frii No 1]

5 The plaintiff claims —

(1) dissolution of the partnership, (2) that accounts be taken

(3) that a receiver be appointed

[VB] In suit for unifing up of any partner lop or at the clusses for distribution, in links ad in orthogonaph taking the fields of the partner object and place is distributed.

(4) WRITTEN STATEMENTS

General defences

Denial.

1 stoppel.

Ground of

sequent to institution of suit

Protest

with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged or at all.

The defendant admits assets but not the plaintiff's claim

The defendant denies that the plaintiff sold to him the goods mentioned in the plaint or any of them.

The suit is barred by articlo of the first Limitation or article schedule to the Indian Limitation Act, 1908

Juri diction The Court has no jurisdiction to bear the suit on the ground that (set forth the grounds)

On the a diamond ring was dehvered by day of the defendant to and accepted by the plaintiff in discharge of the alleged cause of action.

Insolvency The defendant has been adjudged an insolvent The plaintiff before the institution of the suit was adjudged an in

solvent and the right to suo vested in the receiver The defendant was a mutor at the time of making the alleged contract Minority part of Payment The defendant as to the whole claim (or as to Rs into Court the money claimed, or as the case may be) has paid into Court Rs.

and says that this sum is enough to satisfy the plaintiff's claim (or the part aforesaid) Performance The performance of the promise alleged was remitted on the

remitted The contract was rescanded by agreement between the plaintiff and Reseassion defendant

The plaintiff's claim is barred by the decree in suit (give the reference) Res judicata The plaintiff is estepped from denying the truth of (insert statement as to which estoppel is claimed) because (here state the facts relied on as creating

the estoppel) day Since the institution of the suit, that is to say, on the defence aub- of (set out facts)

No. 1.

DLIENCE IN SUITS FOR GOODS SOLD AND DILIVERLD

- 1 The defendant did not order the goods
- 2 The goods were not delivered to the defendant

I the price was not Rs

[or] 5 | Lixcopt as to Re

, same as

7 The defendant [or A B , the defendant's sgent] satisfied the claim by payment before suit to the [lamtiff for to C D, the plantiff's agent] on the

8 The defendant satisfied the claim by payment after suit to the plaintiff on the day of

DEFENCE IN SUITS ON BONDS

1 The bond is not the defendant's bond

2 The defendant made payment to the plaintiff on the day according to the condition of the bond

3 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

No 3

DEFENCE IN SUITS ON GUARANTELS

1 The principal satisfied the claim by payment before su t

2 The defendant was released by the plantiff giving time to the principal debtor in pursuance of a binding agreement.

No 1

DLIENCE IN ANY SUIT FOR DERT

 As to Rs 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff

Particulars are as follows -

	Its
1907, January 25th	150
, Tebruary Ist	50

2 As to the whole [or us to Ps

part of the money claimed the defend int and has paid the same into Court

Total 200

No 5

DEFENCE IN SUITS FOI INJURIES CAUSED BY NEGLICENT DRIVING

1 The defendant denies that the earriage mentioned in the plaint was the defendant's carriage, and that it was under the charge or control of the defendant's serrants. The carriage belonged to of Street Calcutta livery stable Leepers and or es, and the person

servant of the said

Street, either negligently, suddenly or without warning or at a rapid or dangerous place.

3. The defendant says the plaintiff might and could by the exercise of reasonable care and diligence, have seen the said carriage approaching him, and arounded any

collision with it.

The defindant does not admit the statements contained in the third paragraph of the plant.

30. 6.

DEFENCE IN ALL SUITS FOR WEGINGS.

I Demal of the several acts for matters] complained of

day

(4) WRITTEN STATEMENTS

General desences

Denial	

The defendant denies that (set out facts)

The defendant does not admit that (set out facts)
The defendant admits that but says the

Protest The defendant admits that but says that

The defendant denies that he is a partner in the defendant firm of

The defendant denies that he made the contract alleged or any contract with the plaintiff.

The defendant denies that he contracted with the plaintiff as alleged 0.

The defendant denies that he contracted with the plaintiff as alleged o at all.

The defendant admits assets but not the plaintiff s claim.

The defendant denies that the plaintiff sold to him the goods mentioned.

in the plaint or any of them

The suit is harred by article or article of the first

Limitation. The suit is harred by article schedule to the Indian Limitation Act, 1908

Jun diction The Court has no purisdiction to hear the

The Court has no jurisdiction to hear the suit on the ground that (sit forth the grounds)
On the day of a diamond ring was delivered by

the defendant to and accepted by the plaintiff in discharge of the alleged cause of action

Insolvency The defendant has been adjudged an insolvent
The plaintiff hefore the institution of the suit was adjudged an in

Minority
Payment
into Court
the defendant as a minor at the time of making the alleged centract
The defendant as to the whole claim (or as to Rs
into Court
the monoy claumed, or as the case may be) has paid into Court
Rs
and say a that this sum is enough to satisfy the plantiff's claim (or the part

aforesaid)
Performance The performance of the promise alleged was remitted on the remitted (data)

remitted (datc)

Rescussion

The contract was rescinded by agreement between the plaintiff and defendant

Res judicata 1 stoppel

l stoppel

the estoppel)
Since the institution of the suit, that is to say, on the of (set out facts)

Ground of defence sub of sequent to institution of suit

No 1

DLIENCE IN SUITS FOR GOODS SOID AND DELIVERED

| 1 | 2 | 3 | 4 | 5 | 1 | 1 | 2 | 4 | 5 | 1 | 2 | 4 | 5 | 1 | 2 | 4 | 5 | 1 | 2 | 4 | 5 | 1 | 4 | 5 | 1 | 4 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 | 5 | 1 |

19
110 defendant satisfied the claus by payment after suit to the plaintiff on the day of 13 ...

DEFENCE IN SUITS ON BONDS

1 The bond is not the defendant a bond

2 The defendant made payment to the plaintiff on the day according to the condition of the bond

3 The defendant made payment to the plaintiff after the day named and before suit of the principal and interest mentioned in the bond

No 3

DEFENCE IN SUITS ON GUARANTELS

I The principal satisfied the claim by payment before su t

2 The defendant was released by the plantiff giving time to the principal debtor in pursuance of a lunding agreement.

No t

DLIENCE IN ANY SOIT FOR DEBT

1. As to R^{α} 200 of the money claimed, the defendant is entitled to set off for goods sold and delivered by the defendant to the plaintiff

Particulars are as follows —

	166
1907, January 25th	150
" February 1st	50
	-

Total 200

2 As to the whole [or is to Rs made tender before suit of Rs

part of the money claimed) the defend int and has paid the same into Court

No 5

DEFENCE IN SUITS FOR INJURIES CAUSED BY NEGLICENT DRIVING

1 The defendant denies that the carriage mentioned in the plant was the defendant a carriage, and that it was under the charge or control of the defendant a servants. The carriage belonged to d Street Calcutt, livery stable keepers

Street, either negligently, suddenly or without warming, or at a rapid or dangerous pace.

3 The defendant says the plaintiff might and could by the exercic of reasonable

car, and diligence, have seen the said carriage approaching him, and avoided any collision with it 4. The defendant does not admit the statements contained in the third puragraph of the plant

No. 6.

DLIENCE IN ALL SUITS TOL HEOVE.

I Denial of the several acts [or matters] complained of

DEFENCE IN SUITS FOR DETENTION OF GOODS

1

1907, May 3rd To carriage of the goods claimed from Delhi to Calcutta — 45 maunds at Rs 2 per maund Rs 0

No 8

DELLICE IN SUITS FOR INFRINGEMENT OF COPYRIGHT

- 1 The plaintiff is not the author [assignce, etc.]
- 2 The book was not registered
- 3 The defendant did not infringe

No 9

DELENCE IN SUITS FOR INFRINGEMENT OF TRADE MARK

- 1 The trade mark is not the plaintiff s
- 2 The alleged trade mark is not a trade mul
- J The defendant did not infringe

No 10

DLILINGES IN SUITS RELATING TO AUISANCIS

1 the plaintiff's lights are not ancient for deny his other dieged prescriptive rights;
2 the plaintiff's lights will not be materially interfered with by the defendant's

buildings

3 The defendant denies that he or his servants pollute the water for do what is

complimed of

If the defendant claims the right by prescription or otherwise to do what is couplanted of, he must say so, and must state the grounds of the claim, he whether by prescription grant, or what 1

1 The plaintiff has been guilty of laches of which the following are particulars

1870 Plantiff's mill began to work 1871 Plantiff came into possession

1883 First complaint

1883 First complaint

in ilnie

[ast dar aje]

No 11.

DIFLACE TO SUIT TOR LORLET OSURL

- 1 the defendant did not execute the mort, ge 2. The mort, was not transferred to the plaintiff (fig. 1) of the receiver first
- ill , l, ajuhich ted nd)

7 The suit is barred by article of the first declude to the fin han Launtation Act 1908

4 The f llowing payments have been made, to -

| Pa | 1000 | (Insert lete) | (O) | (Insert lete) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) | (O) |

5 The plaintiff tool possession on the f and has received the reals ever since.
6. That plaintiff released the debt on the f like defendant transferred. Il his interest to V.B. by a document, dated.

No. 12

DIRECT TO SLIT FOR REDIMPTION

I the plaintiff's right to redecin is barred by article of the first schedule to the Indian Limitation \(\chi \) t 1303

2. The plaintiff true ferred all interest in the preparty to \ B

3 The defendant by a document dated the day of trin ferted all his interest in the mericace debt and property course of in the mericace to A. B.

4 The defendant nover took possession of the morigined property of received the cents thereof

(If the defe lant admits possession from only he load state the highest days

No 13

DEFENCE TO SUIT FOR SPECIFIC PLESON MANCE

1 1hod 2 \ B 3 1hep 4

is houn

1 hes son be not I what he advists 1

6 The agreement is uncertain in the following respects - (tate th +1)

7 (or) The plantiff has been guitte of delay,

8 (or) The plaintiff has been guilty of fraud (or mi represent iti n)

(or) the parameters unfair,

(or) The agreement is unfair,

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(o

(In cases where da nages are claimed and the defenda Adveputes his liability to dun a jeshe i ust deny the agreement or the alleged breaches or show whatever other ground of defence he intends to rely on, og the Indian Limitation Act accord and satisfaction, release, fraud, etc.)

No 14

DEFENCE IN ADMINISTRATION SUIT BY PACENTARY LEGITER

1 \ B s will contuned a charge of debts he died insolvent he was entitled at his death to some immoveable property which the defendant sold and which produced the net sum of Rs defendant solt in and which produced the net sum of Rs.

- 2 The defendant applied the whole of the said sums and the sum of Rs which the defendant received from rents of the immoveable property in the payment of the funeral and testamentary expenses and some of the dehts of the testator
- 3 The defendant made up his accounts and sent a copy thereof to the plaintiff on day of 19 , and offered the plaintiff free access to the vouchers to verify such accounts, but he declined to avail himself of the defendants offer
 - 4 The defendant submits that the plaintiff ought to pay the costs of this suit

PROBATE OF WILL IN SOLEMN FORM

1 The said will and codicil of the deceased were not duly executed according to the provisions of the Indian Succession Act, 1865 for of the Hindu Wills \ct, 1870]

2 The deceased at the time the said will and codicil respectively purport to have

been ex 3

the plai defendantl

4 The execution of the said will and codicil was obtained by the fraud of the plaintiff, such fraud, so far as is within the defendant's present knowledge, heing [state the nature of the fraud]

5 The deceased at the time of the execution of the said will and codicil did not know and approve of the contents thereof [or of the contents of the residuary clause in

the said will, as the case may be] 6 The deceased made his true last will, duted the 1st January, 1873, and thereby

appointed the defendant sole executor thereof

The defendant clums -(1) that the Court will pronounce against the said will and codicil propounded

hy the plaintiff

(2) that the Court will decree probate of the will of the deceased, dated the 1st Tanuary, 1873, in solemn form of law

31 of

PARTICULARS (O 6, r 5)

(Title of Suit)

The following are the particulars of there state the matters in respect of 1 aticulars which particulars have been ordered) delivered pursuant to the order of the

(Here set out the particulars ordered in paragraphs if necessary)

APPENDIX B.

PROCESS.

So L

SUMMONS FOR DESCOSAL OF SUIT (O 5, FT 1, 5)

(I itle)

Τo

la

19

[Vame, lesergtion and place of residence.]

While has instituted a sort against you for how by summ med to appear in this Court in person or by a pleader duly instructed, and able to answer all in sterial questions relating to the sint, or who shall be accompanied by some person able to answer all such questions, on the day of 19 at a colook in the form to answer the dain, and as the day fixed for your appearance is appointed for the final disposal of the sint, you must be prepared to the sint of the fixed of the sint of the day of the sint of the documents muon

1 the

Given under my hand and the seal of the Court this

d 13 of

19

Judje

Notict —1 Should you apprehend your witnesses will not attend of their own accord.

you can hive a summons froot this Court to compel the attendance of any witness, and the production of any document that you have a right to call upon the witness to produce, on applying to the Court and on depositing the necessary expenses

2 If you dimit the claim, you should pay the money into Court together with the costs of the suit, to a you execution of the decree, which may be ignust your person or property, or both

No 2

SUMMONS FOR SETTLEMENT OF ISSUES (O 5 IF 1 5)

(Title)

[Vame, description and place of residence]

by some person able to answer all such questions, on the day of 10 , at o'clock in the noon, to answer the claim , and you are directed to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the

uit will be heard and determined in your absence
GIVEN under my hand and the seal of the Court, this

day of Judge Notice —1 Should you apprehend your witnesses will not attend of their own accord, you can have a summons from this Court to compel the attendance of any witness, and the production of any document that you have a right to call on the witness to produce, on applying to the Court and on depositing the necessary expenses

2 If you admit the claim, you should pay the money into Court together with the costs of the suit, to avoid execution of the decree, which may be against your person or property, or both

No. 3

SUMMONS TO APPLAR IN PERSON (O 5, r 3)

(Title)

 T^{o}

To

[Name, description and place of residence]

Where is has instituted a suit against you for you are hereby summoned to appear in this Court in person on the day of 19, at o'clock in the noon, to answer the claim, and you are duceded to produce on that day all the documents upon which you intend to rely in support of your defence

Take notice that, in default of your appearance on the day before mentioned, the suit will be heard and determined in your absence

GIVEN under my hand and the seal of the Court, this

day of

No 4

SUMMONS IN SUMMARY SUIT ON NEGOTIABLE INSTRUMENT (O 57, 1 2)

To (Title)

[Name, description and place of residence]

WHELLAS has instituted a suit against you under Order AAAVII of the Code of Civil Procedure, 1908, for Rs balance of pinceryl and interest due to him as the of a of which a copy is hereto amerce.

sum of Rs and the sum of Rs for costs.

10 . Judge

No 5

NOTICE TO PLESON WHO, THE COURT CONSIDERS, SHOULD BE ADDED AS COTTAINING (0 1, r 10)
(1/14c)

[Name, description and place of residence]

WHEREAS has instituted the above sorting unst for and where is it appears necess my that you should be added as a plinitiff in the aid

suit in order to enable the Court effectually and completely to adjudicate upon and

ettle all the questions involved Take notice that you should on or before day of 19

signify to this Court whether you consent to be so added GIVEN under my hand and the seal of the Court, this day of

to Judge

No 6

SUMMONS TO LEGAL REPRESENTATIVE OF A DECLASED DELENDANT (O 22, r 4)

(Tyle) Γ_{Ω}

WHERE IS the plantiff instituted a suit in this Court on the day of 19 , against the defendant who has since deceased.

and whereas the said plaintiff has made an application to this Court alleging that you are the legal representative of the said deceased, and desiring that you be made the defendant in his stead

You are hereby summoned to attend in this Court on the divof s at to defend the said suit, and, in default of your appearance on

the day specified, the said suit will be heard and determined in your absence GIVLN under my hand and the seal of the Court, this

Julie

30.7

ORDER FOR TRANSMISSION OF NUMBERS FOR SERVICE IN THE JURISHICTION OF ANOTHER COURT (O 5 r 21)

(Little)

dresdant in the above suit is at present WHEREAS It is stated that day of 19 , be forwarded to the service on the said demands with a duplicate of this proceeding. The court fee of charge-able is serviced by the said of the service of the said of the sa It is ordered that a summons returnable on the Court of for

chargeable in respect to the summons has been realized in this Court in stamps Dated 19

Jula

No 8

ORDER FOR TRANSMISSION OF SEMMONS TO BE SERVED ON A PRISONER. (O. 5, r. 21)

(Talle)

10

the Superintendent of the Jail at Unper the provisions of Order V rule 21 of the Code of Civil Procedure, 1988 a

summons in duplicate is herewith forwarded for service on the deferdant a prisoner in 12st You are requested to cause a colly of the said summ of a to be served upon the said defendant and to return the original to this Court signed by the and defendant, with a statement of service endorsed thereon by you.

Julge

No 9.

Order for Transmission of Summons to be served on a Public Servant of Soldier. (O. 5, rr. 27, 28)

(Trile.)

To

UNDLE the provisions of Order V, rule 27 (or 28, as the case may be), of the Code of Civil Procedure, 1908, a summons in displicator is herewith forwarded for service on the defendant. Who is stated to be serving under you. You are requested to cause a copy of the sud summons to be served upon the said defendant and to return the original to this Court signed by the said defendant, with a statement of service endorsed thereon by you

Judge.

No 10.

TO ACCOMPANY RETURN OF SUMMORS OF ANOTHER COURT. (O 5, r. 23)

(Trile)

Read proceeding from the forwarding in Suit No of 19 of that Court.

for service on
he and proof of the

Read Serving Officer's endoisement stating that the above having been duly taken by ine on the eath of ordered that the be returned to the executing

with a copy of this pro

Judge.

Note. —This form will be any health to process other than summons, the service of which may have to be effected in the same manner.

No 11.

Affidavia of Process server 10 accompany return of a Summons or Notice (O 5, r. 18)

(Title.)

Ŧ

The Affidavit of son of

make call

and say as follows.—

(1) I am a process screer of this Court
(2) On the day of 19 I received a requirement of the Court of in Suit No of 19, in the said Court, dated the day of 19 for service on

the day of 19 for service on

(3) The said was at the time personally known to me, and I served the said said solve on the day of 19, at about o'clock in the noon at by tendering a copy

thereof to her and requiring her sign ture to the original submission.

(a)

(b)
(d) Here state whether the person served signed or refused to sign the process, and in whose presence
(b) Signature of process server

(d) The said not being personally known to me accompanied not to and pointed out to me a person whom he stated to be the said and I served the said market on the enthe day of 19 at about o'clock in the noon at by tendering a copy the coff to her and requiring her signature to the original serve.

(1)

(b) Here state whether the person served six of or refund to slight the process, and in whise present of the following process reference.

l n st Sendo No. 12, 13

(3) The said and the house in which he ordinarily resides being per onally known to me, I went to the and house, m and there on the o clock in the 10 it about noon, I did not and the said

(a) (6)

(3) One

19

(a) Literfully and exactly the ranner for which the process was served with special reference to Order 5 rules to and 17 (b) Signature of process server

accompanied me to

and there pointed out to me ordinarily resides I

which he said was the house in which did not find the said there

(a)

thi (a) Enter fully and exactly the mann or in which the proce s was served with special reference to Or let a rules I and I (b) "spaning of process server

or.

If substituted service has been ordered, state fully and exactly the manner in which the

summons was served with special reference to the terms of the order for substituted service Ammed by the said before mo this day of

Empowered under section 139 of the Code of Civil Procedure to administer the oath to deponents

No 12

NOTICE TO DEFENDANT (O 9, r 6)

(Title)

To [Name, description and place of residence]

said summons was served on you but not in sufficient time to enable you to appear and answer on the day fixed in the said summons .

Notice is hereby given to you that the hearing of the suit is adjourned this day and 19 that the day of , is now fixed for the hearing of the same in default of your appearance on the day last mentioned the suit will be heard and

determined in your absence GIVEN under my hand and the seal of the Court, this

day of

Julac

No. 13

SUMMONS TO WITNESS. (O 16, rr 1, 5)

(Title.)

To Whereas your attendance is required to on behalf of the in the above suit you are hereby required [personally] to appear before this Court on the day of 19 at o clock in the forenoon, and to hring with you [or to send to this Court]

A sum of Rs , heing your travelling and other expenses and subsistence allowance for one day, is herewith sent. If you fail to comply with this order without

1 IRST SCHED Nos 14 16

lawful excuse, you will be subject to the consequences of non attendance laid down in rule 12 of Order XVI of the Code of Laul Procedure

GIVEN under my hand and the seal of the Court, this day of 19 Ju lge

Notice -(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid

(2) If you are detained beyond the day aforesaid, a sum of Rs will be tendered to you for each day's attendance boyond the day specified

No 14

PROCEMATION REQUIIING ATTENDANCI OF WITNESS (O 16, r 10) (Title)

Γο Where is it appears from the examination on eath of the serving officer that the summons could not be served upon the witness in the manner prescribed by law and where is it appears that the evidence of the witness is material, and he abscends and keeps out of the way for the purpose of evading the service of the summons The proclaimation is therefore, under rule 10 of Order AVI of the Code of Civil Procedure 1908, issued requiring the attendance of the witness in this Court on the

o clock in the forenoon, and from day to day until he shall have leave to depart and if the witness fails to attend on the day and hour

sforesaid he will be dealt with according to law

GIVEN under my hand and the seal of the Court, this day of 19

Judge.

No 15

PROCLAMATION REQUIRING ATTENDANCE OF WITNESS (O 16, r 10) (Talle)

10 117 ~

Ling proclamation is therefore, under rule 10 of Order AVI of the Code of Civil Procedure, 1908, issued, requiring the attendance of the witness in this Court on the o clock in the forenoon, and from day to day unlil he shall have leave to depart, and if the witness fails to attend on the day and hour foresaid he will be dealt with according to law

Given under my hand and the seal of the Court, this day of 19

Judie

No 16

Warrant of Attachment of Prolifts of Witness (O 16, r 10) (Title)

io

The Buliff of the Court has not, after the experition With most the witnes cited by has not, after the experiment of the period limited in the proclamaters a swed for his attendance, appeared in term property I clouding to the You are hereby directed to hold under attachment sulfuting sets the value of and to submit ereturn, every rand with an inventory tiere Lawlin days

Civis in I raise hand will be defil bent this devel

Jilx.

Libst School Nos 17-19

No. 17

WARRANT OF ARRIST OF WITNESS (O 16 r 10)

(Tytle)

The Bulliff of the Court

To

WHEREAS has been duly served with a summons but has failed to attend fabsconds and I cens out of the way for the purpose of avoiding service of a summons]. You are hereby ordered to arrest and bring the said Court You are further ordered to return this warrant on or before the

day of with an endorsement certifying the day on and the manner in which it has been executed or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of 19

Judae.

No 18

WARRANT OF COMMITTAL. (O 16 r 16)

(Talle)

Го

The Officer in charge of the Jail at

WHERE is the plaintiff (or defendant) in the above named suit has made application to this Court that security be taken for the appearance of to give evidence for to preduce a document), on the day of 19 . and whereas the Court has called upon the said to furnish such security, which he has failed to do This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the said day and on such other day or days as may be hereafter ordered

GIVEN under my hand and the seal of the Court this 10

Judje

day of

No. 19

WARRANT OF COMMITTAL (O 16 r 18)

(Tatle)

То

19

The Officer in charge of the Jul at

, whose attendance is required before this Court in the above WHERFAS named case to give evidence (or to produce a document) has been arrested and brought before the Court in custody, and whereas owing to the absence of the plaintiff (or cannot give such evidence (or produce such document) defendaut), the said and whereas the Court has called upon the said to give security for his appearance on the day of , at which he has failed to do . This is to require you to receive the said into your custody in the civil prison and to produce him before this Court at on the 19 GIVEN under my hand and the seal of the Court, this day of

Judge.

APPENDIX C

DISCOVERY, INSPECTION AND ADMISSION

No 1

ORDER FOR DELIVERY OF INTERROOUTORIES (O II r 1)

In the Court of Civil suit No A B

of 19

Plaintiff,

against CD, EF and GH

Defendants

Upon hearing filed the and upon reading the affidavit of be at libert) day of , it is ordered that the to deliver to the do interrogatories in writing, and that the said answer the interrogatories as prescribed by Order XI, rule 8 and that the costs of this application be

No 2

INTERROGATORIES (O 11, r 4)

(Title as in No 1, supra)

Interrogatories on behalf of the above named [plaintiff or defindant C D] for the examination of the above named [defindants E F and G H or plaintiff]

I Did not, etc

2 Hae not, etc etc,

ete, The defendant E F is required to answer the interrogatories numbered The defendant G II is required to answer the interrogatories numbered

No 3

INSWIR TO INTERROGATORIES (O 11, r 9)

(Litte as in No 1, supra)

the insuce of the above num 1 fillint E P to the interioratories for his examination by the above named the shore named I' I, make an oath ard In mover to the said interior may so f ll

<u>!</u>;}: to mirr , it raphs numbered consecutively. 'en l

on the ground that er the paters A ste jr ļ

APTUNDING DISCOVERY, INSPECTION, ADMISSION, 1417

Oaden for Armevit et to Dicember (O. H. r. 12)

(Title as in No. 1, sugra)

Upon he gang It is ordered that the da within

days from the date of this other, answer on affidavit stating which documents are or have been in his issession or nower relating to the matter in operation in this suit and that the casts of this application be

No. 5

Appropriate to Documents (O 11 r 13)

(Title as in \a 1, supra)

I, the above named defendant (D , make oath and say as follows:-

I. I have in my possession or power the documents relating to the matters in question in this suit set forth in the first and second parts of the first schedule hereto

2. I of ject to produce the said documents set forth in the second part of the first

schedule hereto [state grounds of objection]

3. I have had, but have not now in my possession or power the documents relating to the matters in question in this suit set forth in the second schedule hereto

4 Tho last mentioned documents were last in my possession or power on [state when

and what has been me of them, and in whose possession they now are

5 According to the best of my knowledge, information and behef I have not now, and nover had, in my possession, custody or power, or in the possession, custody or power of my pleader or agent, or in the possession, custody or power of any other person on my behalf, any account, book of account, roucher, receipt, letter, memorandum, paper or writing, or any copy of or extract from any such document, or any other document what soever, relating to the matters in question in this suit or any of them, or wherein any entry has been made relative to such matters or any of them other than and except the documents set forth in the said first and second schedules hereto.

No 6

Onder to produce Documents for Inspection (O 11, r 14)

(Title as in No 1, supra)

Upon hearing and upon reading the affidavit of filed the រែ១ . It is ordered that the do, at all seasonable times, day of on reasonable notice, produce at , situate at , the following , and that the documents, namely, be at liberty to inspect and peruse the documents so produced, and to make notes of their contents. In the mean time it is ordered that all further proceedings be stayed and that the costs of this application be

No 7

NOTICE TO PRODUCE DOCUMENTS (O 11, r 16)

(Title as in No 1, supra)

Take notice that the [plaintiff or defendant] requires you to produce for his inspection the following documents referred to in your [plaint or written statement or affidavit day of 19 dated the

[Describe documents required]

Y , Pleader for the

NOTICE TO INSPECT DOCUMENTS (O II, r 17)

(Title as in No 1, supra)

Take notice that you can inspect the documents mentioned in your notice of the day of 19 [except the documents numbered ınstant, between ction on Thursday next the

defendant objects to giving you inspection of documents 19 , on the ground mentioned in your notice of the dry of that [state the ground] -

No 9

NOTICE TO ADMIT DOCUMENTS (O 12 r 3)

(Title as in No 1, supra)

Take notice that the plaintiff for defendantl in this suit microses to addice in

documents as are stated to have been served, sent or delivered were so served, sent or delivered, respectively, saving all just exceptions to the admissibility of all such documents as ovidence in this suit

G H, pleader [or agent] for plaintiff [or defendant] To E P, pleader [or agent] for defendant [or plaintiff] [Here describe the documents and specify as to each document whether it is original or a copy]

No. 10

NOTICE TO ADMIT PACES (O 12, r 5)

(Title as in No 1, supra)

Take notice that the plantiff for defendant] in this suit recuires the defendant [t

- 1 That M died on the 1st Tanuary, 1890
- 2 That he died into tate, 3 That N was his only lawful son
- 1 That O died on the 1st April, 15 6 5 Hat O was never married

No II

Admission of Pages lurguant to Notice (O 12, r o)

(Title as in No 1, supra)

The defendant [or plaintif] in this suit, for the purposes of this suit only, hereby admits the soveral facts respectively benemider specified, subject to the qualifications or limitations, if any, hereunder specified saving all just exceptions to the admissibility of any such facts, or any of them, as evidence in this suit.

Provided that this admission is made for the purposes of this suit only, and is not an admission to be need against the defendant for plaintiff on any other occasion or by any one other than the plaintiff for defendant, or party requiring the admission!

D. F., pleader [or agent] for defendant [or plaintiff]
To G. H. pleader [or agent] for plaintiff [or defendant]

	Facts a limited	Qualifications or limitations of any subject to which they are admitted
34	That V died on the 1st Junuary 1990 That he died intestate That V was his lawful son That O di di That O was never marri d	1 2 3 But not that he was his only lawful son 4 But not that he died on the lat April, 1896

No. 12

NOTICE TO PRODUCT (GENERAL LORM) (O 12, r 8)

(Title as in No 1, supra)

Take notice that you are hereby required to produce and show to the Court at the first hearing of this suit all books papers, letters, copies of letters and other writings and dominants in your custody possession or power, containing any entry, memorandum or minute relating to the matters in question in this suit, and particularly

G H, pleader [or agent] for plaintiff [or defendant]
To E 1' pleader [or agent] for defendant [or plaintiff]

APPENDIX D

DECREES

No 1.

DECRFI IN ORIGINAL SUIT (O 20, IT 6, 7)

(Talle)

Clum for

This suit coming on this day for final disposal before in the piesence of for the plaintiff and of for the defendant, it is ordered and decreed that and that the sum of Rs be paid by the to the on account of the costs of this suit, with interest thereon at the rate

of per cent per annum from this date to date of realization
Give's under my hand and seal of the Court, this day of

19 Judge

Costs of Surt

Plaintiff			Defendant	Ī		
1 Stamp for plaint 2 Do for power 3 Do for exhibits 4 Pleader's fee o. Rs. 5 Subsistence for winessees 6 Commissioner's fice 7 Service of process Total.	Rs	AP	Stamp for power Do for petition Pleaders fee Subsitence for witnes es Service of process Commissional's fee	Rs.	,	P

No 2

SIMPLE MOYEN DECRFI (Section 34)

(Title)

Claim for in the literce This stirt coming on this day for final disposal before for the defendant, it is ordered that οf for the plaintiff and of with interest thereon the. the sum of Rs do pay to the to the date of re shrate " w the rate of per cent per annum from , the costs of this suit with interest of the and sum and do also pay Reper cent. per unum from this date to the date of thereon at the rate of realization day of GIVEN under my hand and the seal of the Court, this

J. l.

Costs of Surt

Plaintiff				Defen lant	1		
1 Stamp for plant 2 Do for power 3 Do for exhibits 4 Pleader s feo on Rs. 5 Subsidence for witnesses 6 Commissioner s feo 7 Service of process	Rs.	1	r	Stamp for power Do for pointion Pleader's feo Subsistence for witnesses Service of process Commissioner's feo	Rs	А	P
lotal		_	-	Fotal	-		1

No 3

PRELIMINALL DECREE FOR PORECICSELL (O of r 2)

(7 itle)

This suit coming on this day, etc., It is berchy declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 10 , is R. . and it is decreed as follows.—

(1) that if the defendant pays into Court the imount so declared due on or before the said day of 19, the plaintiff shall deliver up to the defendant, or to such person as he appoints all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or any person claiming under him. [Where the plaintiff claims by derived title add or by those under them he claims] (Where the plaintiff is in possession add and shall put the defendant in possession of the property)

(2) That if such payment is not made on or before the said day of 19, the defendant shall be deharted from all right to redeem the

property

Schedule

Description of the mortgaged property

No. 4

PILLIMINARY DECREE FOR SALE (O 34, r 4)

(Title)

This suit conting on this day, etc., It is bereby declared that the amount due to the plantiff on account of principal, interest and costs calculated up to the of 19, is Rs. and that such amount shall carry interest at the rate of per cent per annum until realization, and it is decreed as follows —

(1) That if the defendant pays into Court the amount so declared due on or before the said dry of 19, the plaintiff shall deliver up to the defen dant, or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall, if so required, retransfer the property to the defendant free from the mortgage and from all incumbrances created by the plaintiff or up, person claiming under him. [Where the plaintiff claims by derived title add

or by those under whom he claims] [Where the plaintiff is in possession add at a shall put the defendant in possession of the property]

(2) That if such payment is not made on or before the said

day of , the mortgaged property or a sufficient mart thereof he sold and that

defendant

(3) That if the net proceeds of the sale are insufficient to pay such amount and such subsequent interest and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance

Schedule

Description of the mortgaged property

No 5

PRILIMINARY DIGRLI 10R REDIMPTION (O 34 1 7)

(l'ttle)

This suit coming on this day etc , It is hereby declared that the amount due to the defendant on account of principal, interest and costs calculated up to the d sy of 19 , 18 Rs

whom he claims] [Where the defendant is in possession add and shall put the I lumbiff in noisession of the property 1

Schedule

Description of the mortgaged property

No 6

Decree for I oreclosure -1 mer Mortogale : Second Mortogal Ind Mort O GOR -SUCCESSIVE PERIODS TOR REDLATEDA

(Lille)

It is hereby declared that the amount duo to the plaintiff on account of principal, 19 (a) 1 R T dis of interest and costs calculated up to the (6) there will I e due to the plantil and that on the day of . in thing in all Rs y, and it is furth f for interest the further sum of R 1) (b) there will be due to the declared that on the dry of hrat defendant on account of principal, interest and ce talks 2,

and it is decree I as follows -(1) That if the first defend int pays into Court the said surreflex center before the 19 (a) the Huntuf shall deliver up etc (18 11 \ru1 dis of

lerm to 3) (2) That in default of the first defend int parm, the sul sum on er before the all In I hall be d I stred from all right to red on the property

(3) That in a rec of such forcelower and if the second defendant pays into Court the

m on or before the

second defendant pays into Court the said sums of Rs y and Rs z on or before the day of 19, (6) the test defendant shall deliver up, etc (25 in Form No. 3)

(a) Insert a day with maix months from the date of decree

No 7

Dickle for San Therefore to Second Morroscee and Morroscon --

(Tatle)

It is hereby declared that the amount due to the plaintiff on account of principal, interest and costs calculated up to the day of 10 is ${\rm Re}(x)$ and that on the said day three will be due to the first defend ait on account of principal, interest and costs ${\rm Re}(y)$.

and it is decreed as follows -

(1) That if the defendants or other of them pay into Court the said sum of R. x on or before the said day of 19, the plaintiff shall deliver up, etc (as in 1 orun No 4)

(2) That if payment of the said sum is not made on or before the day of 19, the mortgaged property or a sufficient part thereof be sold, and that

secondly in payment to the first defendant of the said sum of Rs. y and such subsequent interest and costs as afores ud, and that the balance if any, be paid to the second defendant

(3) That in ease the defendants or either of them shall pay the said sum of Rs x as aforesaid, he or they shall be at bleety to apply to the Court that the plaintiff's mortgage may be kept alive for the benefit of the person making the said payment or otherwise as he or they may be advised.

(4) That if the net proceeds of the sale are insufficient to pry the said sum of Rs z and such subsequent interest and costs in full the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance

No 8

Dicable for Sile —Second Mortgagle v First Mortgagle and Mortgager— One plriod for redemption

(Title)

[Insert declarations of the amounts due to the plaintiff Rs.y and to the first defendant Rs.y as in Porm No.7] And it is decreed as follows —

(1) That if the plaintiff or the second defendant pays into Court the said sum of Rs. x on or before the said day of 19, the first defendant shall

deliver up, etc (as in Form No 4)

FIRST SCHEN No 9

(2) That if payment of the said sum is not made on or before the day of , the first defendant shall be at liberty to apply that the suit be dismissed or for the sale of the mortgaged property; and in case he shall apply for a sale the mortgaged property or a sufficient part thereof shall be sold free from the meumbrances of the plaintiff and first defendant, and the proceeds of the sale (after defraying thereout the expenses of the sale) shall be paid into Court and applied, first, in payment to the first defendant of the said sum of Rs. x and such subsequent interest and costs as may be allowed by the Court: secondly, in payment to the plaintiff of the said sum of Rs. y and such subsequent interest and costs as aforesaid: and that the balance, if any, be paid to the second defendant.

(3) That if the plaintiff shall pay the said sum of Rs, x into Court on or before the 'iall be at liberty to pay day of

day of Form No. 4)

(4) That if the plaintiff shall pay the said sum as aforesaid but the second defendant shall fail to pay the said sums as aforesaid, the mortgaged property or a sufficient part thereof shall he sold, and the proceeds of the sale (after defraying thereout the expenses

and costs in full, the plaintiff shall be at liberty to apply for a personal decree for the amount of the balance.

No. 9.

DLORBE FOR SALE -SUB MORTGAGEE V. MORTGAGEL AND MORTGAGOR, THE AMOUNT OF THE OBIOINAL MORTGAGE EXCEEDING THAT OF THE SUB MORTGADL.

(Title)

[Insert declarations of the amounts duo to the plaintiff Rs. x and to the first defendant Rs. y as in Form No 7.1

And it is decreed as follows:-

(1) The first defendant and the second defendant shall be at liberty to pay into Court the said sum

19

plaintiff. (2) In the event of payment by the second defendant as aforesaid the first defendant shall also dehier up, etc. (as in Form No. 4), and thereupon the residue (after payment to the plantiff as afore and shall be paid to the first defendant.

secondly, in payment to the first defendant of the excess of Rs. y over Rs. z and such subsequent interest and costs as aforesaid; and that the balance, if any, be paid to the second defendant

(1) In the ci second defendan

of the mortgages sold, and the net said sum of Rs.

and the bilance, if any, shill be paid to the second defendant.

(5) That if the net proceeds of the side are montheunt to pay the aforesaid small with further interest and costs the plaintiff or the first defendant, as the case may be, shall be at liberty to apply for a personal decree for the amount of the balance.

made

No. 10

FINAL DECREF FOR FORECLOSURF (O 34, r 3)

(Title)

Upon reading the decree passed in the above suit on the day of 19 , and the application of the plantiff dated the day of 19 and after hearing pleader for the plaintiff and pleader for the defendant, and it appearing that the payment directed by the said decree has not been

It is hereby decreed as follows -

That the defendant and all persons claiming through or under him he debarred from all right to redcom the mortgaged property set out and described in the schedule here unto annexed (Where the defendant is in possession add and shall put the plaintiff in possession of the said property 1

Schedule

Description of the mortgaged property

No 11

DECREE AGAINST MORTGAGOR PERSONALLY (O 34, r 6)

(Title)

Whereas the net proceeds of the sale held under the final decree for sale passed in , and now in Court to the credit of this suit on tho day of 19 this suit, amount to Rs y, and there is now due to the plaintiff the sum of Rs x men tioned in the said decree together with the further sum of Rs interest thereon at the rate of 6 per cent per annum from the day of for his costs of this suit subsequent to the

this day, and also the sum of Rs decree, making a halance due to the plaintiff of Rs z, And whereas it appears to this Court that the defendant is personally liable for the said halance

It is hereby decreed as follows -

(1) That the said sum of Re y be paid out of Court to the plaintiff (2) That the defendant do pay to the plaintiff the said sum of Rs z with interest thereon at the rate of 6 per cent per annum from this day to the date of realization of the said sum

No 12.

DECREE FOR RECTIFICATION OF INSTRUMENT

(Tatle)

. dated the It is hereby declared that the day of

, does not truly express the intention of the parties to su h 19 And it is decreed that the sail be rectified hy

No 13

DECREE TO SET ASIDE A TRANSFER IN FRAUD OF CHEDITOLS.

(Title)

It is hereby declared that the , dated the , and made between , is void as against the plaintiff and all other the creditors, if any, of the defendant.

CERTIFICATE OF NON-SATISFACTION OF DECELL. (O 21, r. 6)

(Tule)

Certified that no (1) satisfaction of the decree of this Court in Suit No. of 19 , a copy which is hereunto attached, has been obtained by execution within the jurisdiction of this Court.

Dated the

day of

Judge

(1) If partial, strike out "no and state to what extent

19

No 5

CLERIFICATE OF EXECUTION OF DECREE TRANSFERRED TO ANOTHER COURT $(0,\,21,\,r$ 6)

(Title)

				(2 100)				
Number of surfan i the Court 13 which the decree was presed	Names of parties	fite of al pheation for coccution	Number of the evecu- tion cave	Processes issue Land dites of service thereof	Calvofaceut n	hacht 1. thred	Now the en ors dis	Renuts
1	2	3	•	,	6	7	8	
	3				Rs V P	R4 \ P	-	

So. 6.

ALPHICATION FOR EXECUTION OF DECREE. (O 21, r 11)

In the Court of decree holder, hereby apply for execution of the decree herein below

A Defendant of the contraction o	sct	forth	_		ueer	ee noid	er, nereny	apply for ex	ecum	on of the decree herein below
When attachment and sale of morcable property as sought.] 1	No of suit	\ meet fparties	Date of derive	Whather any appeal pro- formed from the rec-	Laymerther histin ne in it fang	freel uanpy li ati miff any with them fre	to untwittiniteration up neith describing frances therefore the gentled therefore there with justice than of any error electrice.	Vie intole att if any	Andread in to be executed	Visie in which the as islance of the Court is required
Sought] The sought is the total amount of Re [together with merest on the principal sum up to date of payment) and the costs of taking out this execution, be realized by	ı	•	3	٠	٠	6	_	b	,	10
	789 of 1897	A B—Plantiff C D—Defendant	October 11th, 1897	No	Лопе	Its 72-4 recorded on application, dated the 1th March, 189)	lis 314-8 2 principal interest at 6 per cont per annum, from date of decree till payment]	Iotal	Aguinst the defendant C. D	sought] I pray that the total amount of its on the together with men to the together with men to date of hymneti and the costs of taking out this execution, be realized by attachment and sale of defendants moveable property as per annexed list and paul to me [When attachment and sale of ammoveable property see the together with merest on the principal sum up to date of payment] and the costs of taking out this execution be realized by the attachment and sale together with the together with the costs of taking out this execution be realized by the attachment and say the together with the together with the property specified at the foot of this application and

declare that what is stated herein is true to the best of my knowledge

and belief

Signed

. Decree holder

Dated the

day of 19

(When attachment and sale of unmoverble property is sought) Description and Specification of Property

The undivided one third share of the judgment debtor in a house situated in the value Rs. 10 and bounded as follows village of

East by G s house, west by H's house, south by public road, north by private

ane and J's house

Judge

declare that what is stated in the above de cription is true to the best of my knowledge and belief, and so far as I have been able to ascertain the interest of the defendant in the property therein specified

. Decree holder Signed

No 7

NOTICE TO SHOW CAUSE WILL EXECUTION SHOULD NOT ISSUE (O 21, r 22) (Title)

 Γ_0

WHEREAS has made application to this Court for execution of decree in Suit No.

, on the allegation that the said decree has been transferred to him hy assignment, this is to give you notice that you are to appear before this Court 19 , to show cruse why execution on the day of should not be granted

GIVEN under my hand and the seal of the Court, this day of

No 8

WIRRANT OF ATTACHMENT OF MOVEABLE PROLECTY IN FAICUTION OF A DICREE FOR MONEY (O 21, r 30)

(Title) Lo

The Bailiff of the Court was ordered by decree of this Court passed on the WHEREAS , in Suit No of day of pay to the plaintiff the sum of Reas noted in the margin and whereas the

has not been DECREE said sum of Rs paid These are to command you to attach Principal Interest Costa and unless you by the said

shall pay to you the Costs of execution the said Further interest togetler with Lutal

from this Court You are further commanded to return this warrant on or before the 19 , with an endorsement certifying the day on which and manner in which it

has been executed, or why it has not been executed GIVEN under my hand and the seal of the Court, this day of 19

Schedule

A. 110

WALLANT FOR SEIZURE OF SELCIFIC MOVERBIL PROTERTY ADJUTTED BY DIGITE (O 21, r 31) (Little)

La The Bashif of the Court

was erlered by deere of this to it pased William dis ef ly , m Suit No

on the chare m

, to deliver to the plantiff the movedle property (r) f 19

Judac

1 irsi 5сні в Nos 10-12

the moveable property) specified in the schedule hereinto innexed, and whereas the said property (or share) has not been delivered.

said property (or share) has not been delivered,

These are to command you to seize the said moveable property (or a

share of the said moveable property, and to deliver it to the plaintiff or to such person as he may appoint in his behalf

GIVEN under my hand and the seal of the Court, this day of

Schedule.

No. 10

NOTICE TO STATE OBJECTIONS TO DRIFT OF DOLLMENT (O 21, r 34)

(Title)

To TAKE notice that on the day of 19 the decree holder in the above suit presented an application to this Court that the Court may execute on your behalf a deed of whereof a draft is hereunto annexed of the

. Description of Property

Given under my hand and the seal of the Court this day of

Judje

No. 11

Warrant to the Bailing to give Possession of Land 1 to (O 21 r 35)
(Table)

1o ____

The Bailiff of the Court

Withthen the undermentioned property in the occup may of
has been deered to the relativity in this built. You are hereby

directed to put the said in possession of the same, and our are hereby authorized to remove any person bound by the decree who may refue to a case the same.

Given under my hand and the scal of the Court, this day of

Schedule

Julje

No 12

Notice to show cross with W cerest of Aerest should not issue. (O 21, r/37)

(Title)

While it is a spilor this court for execution of decree in suit No. (11) by arrivat and impresonment of your person you are hard you private for this court cauther day of 19 to show cause why you should not be committed.

to the envil prison in execution of the said decree

Given under my hand and the seal of the Court, this day of

July.

WARRANT OF ARREST IN EXECUTION (O 21, r 38) (Title)

•	
-	LO.

The Bailiff of the Court

WHEREAS was adjudged by a decree of the Court in Suit No of 19 . dated the day of 19

Principal Interest Costs Execution Total

, to pay to the decree holder the sum of as noted in the margin, and whereas the said sum of Rs been paid to the said decree holder in satis faction of the said decree, these are to com mand you to arrest the said judgment debtor and unless the said judgment debtor shall pay to you the said sum of Rs for the costs for together with Rs executing this process, to bring the said defendant before the Court with all con

GIVEN under my hand and the seal of the Court, this 19

day of

Judge

No. 14

WIRRANT OF COMMITTAL OF JUNGMENT DEBTOR TO JAH (O 21, r 40) (Title)

Го

the

The Officer in charge of the Jail at

WHEREAS been brought before this Court this day of 19 warrant in execution of a decree which was made and pronounced by the said Court on 19 , and by which decree it was ordered day of that the said

should pay has not obeyed the decree, nor saturfied the whereas the said

nas not occue that he is entitled to be discharged from custody. You are hereby, in the name of the King Emperor of India, communded and required to take and receive the said

for a period not exceeding

tho said

terms and provisions of section 58 of the Code of Civil Procedure, 1908, and the Court annas per diem as the rate of the monthly allowance does hereby fix

for the subsistence of the said during his confinement under this warrant of committal

day of

GIVEN under my sign iture and the scal of this Court this 19

Judge

No 15

ORDER FOR THE RELEASE OF A LERSON IMPRISONED IN EXECUTION OF A DECREE (Sections 59, 59)

(I'ttle)

10

the Other in charge of the lail at Union orders proceed this day, you are hereby directed to set free and ment debter now in your custody

Judit

Dated

No. 16

ATTACHMENT IN LINECUTION

PROBERTORY ORDER, WHERE THE PROPERTY TO BE ATTACHED CONSISTS OF MOVEABLE PROPERTY TO WHICH THE DEFENDANT IS ENTITLED SUBJECT TO A LIEN OF RIGHT OF SOME OTHER PERSON TO THE INMEDIATE POSSESSION THEREOF (O 21, r 46) (Tatle)

To

WHIPPERS

has failed to satisfy a decree passed against

on the

day of

19 , in Suit No of 19 , in favour of for Re It is ordered that the defendant be and is hereby prohibited and restrained until the further order of this Court from receiving from the following property in the possession of the said , that is to sav.

hras

, to which the defendant is entitled, subject to any claim of the , and the said hereby probabited and restrained, until the further order of this Court from delivering

the said property to any person or persons whomsoever Given under my hand and the scal of the Court, this day of

Judge

No 17

ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROPERTY CONSISTS OF DEBTS NOT SECURED BY NEGOTLABLE INSTRUMENTS (O 21, r 46)

(Telle)

To

WHEREAS

has failed to satisfy a decree passed against on the gainst on the of 19 , in favour of

day of

, in Suit No of 19 , in rayour of It is ordered that the defendant he, and is hereby, for Rs prohibited and restrained, until the further order of this Court from receiving from you a certain deht alleged now to be due from you to the said defendant, namely,

and that you, the said , he and you are hereby. prohibited and restrained, until the further order of this Court, from making payment of the said deht, or any part thereof to any person whomsoever or otherwise than into

this Court. GryEv under my hand and the seal of the Court, this day of

Judae

No. 18

ATTACHMENT IN EXECUTION

PROBEBITORY ORDER, WHERE THE PROPERTY CONSISTS OF SHARFS IN THE CAPITAL OF A CORPORATION (O 21, r 46)

(Tatle)

Defendant and to Secretary of Corporation has failed to satisfy a decreo passed against on day of 19, in Suit to of 19, in favour, for Rs , It is ordered that you, the defendant, be, and you WHEREAS the

for Rs are hereby, prohibited and restrained until the further order of this Court, from making shares in the afore-aid Corporation, namely, any transfer of from receiving payment of any dividends thereon and you, , the Secretary of the said Corporation, are hereby probibited and restrained from permitting any such

transfer or making any such payment GIVEN under my hand and the seal of the Court, this day of

Jular

19

No. 19

Order to	ATTACH SALARA OF PUBLIC OFFICER OR LOCAL AUTHORITY.	0R	SERVINT 21, r 48.)	OF	Railwaa	COMPANY
	(Title)					

 T_0 WHIPEAS

, judgment debtor in the above named case is a ldescribe

from the salary of the said and to in monthly instalments of remit the said sum (or monthly instalments) to this Court.

GIVEN under my hand and the scal of the Court, this 19

day of Judge

Judge

No 20

ORDER OF ATTACHMENT OF NEGOTIABLE INSTRUMENT (O 21, r 51) (Title)

То

The Bailiff of the Court, WHEREAS an order has been passed by this Court on the day of for the attachment of , You are hereby directed to 19 seizo the said and bring the same into Court

GIVEN under my hand and seal of the Court, this day of 19

No. 21.

ATTICIDIENT

PROHIBITORY ORDER, WHERE THE PROPERTY CONSISTS OF MONTY OR OF ANY SECURITY IN THE CUSTOD' OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT. (O 21, r 52)

(Ttile)

Sm. th

80

P

T

I have the honour to le, StR. Your most obedient Servant, Judge

Dated the day of

No 22 Notice of Atticument of a Decree to the Court which essent (0, 21, r 53) (Little)

10

The Judge of the Court of have the honour to inform you that the decree obtained in your Court on the

19 , by m Suit No ds) of has been attached by the in which he was

Judae

Judge.

, passed on the

Court on the application of the in the suit specified above You are therefore requested to stay the execution of the decree of your Court until you receive an intimation from this Court that the present notice has been cancelled or until execution of the said decree is applied for by the holder of the decree now sought to be

executed or by his judgment debtor I have the honour, etc . Judge Dated the day of 10 No. 23

NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE (O 21, r 53) (Tatle)

То WHEREAS an application has been made in this Court by the decree holder in the ahove suit for the attachment of a decree obtained by you on the
19 , in the Court of in Suit No day of of 19 , It is ordered that which was Rest , be, and you are hereby, prohibited and restrained, until the you, the said further order of this Court from transferring or charging the same in any way

GIVEN under my hand and the scal of the Court this 19

No. 24

ATTACHMENT IN EXECUTION

PROBERTY CONSISTS OF IMMOVESURE PROPERTY CONSISTS OF IMMOVESURE PROPERTY (O 21, r 51)

(Title)

To Defendant WHEREAS you have failed to satisfy a decree passed against you on the

, in Suit No day of 19 favour of . for Rs it is ordered that you, the said , be and you are hereby, pro hibited and restrained, until the further order of this Court, from transferring or charging the property specified in the schedule hercunte annexed, by sale gift or otherwise, and that all persons he, and that they are hereby, prohibited from receiving the same by

nurchase, gut or otherwise Given under my hand and the scal of the Court, this

19 Schedule

No 25

ORDER FOR PAYMENT TO THE PLAINTIFF ETC., OF MONEY, CTC., IN THE HANDS OF A THIRD PARTA (O 21, r 56)

(Title) Tο WHEREAS the following property has been attached in execution of a decree in Suit No.

19 , m favour of day of , It is ordered that the property so attached, consisting of Rs for Rs in money and Rs in currency notes, or a sufficient part thereof to satisfy the said decree shall be paid over by you, the said

GIVEN under my hand and the seal of the Court, this day of

Judge.

ORDER TO ATTACH SALARA OF PUBLIC OFFICER OR SERVANT OF RAILWAY COMPANY OR LOCAL AUTHORITY (O 21, r 48)

(Title)

oTWHEREIS . Judgment debtor in the above named case, is a (describe office of judgment debtor) receiving his salar, (or allowances) at your hands, and whereas, , decree holder in the said case, has applied in this Court for the attachment of the salary (or allowances) of the said to the extent of him under the decree . You are hereby required to withhold the said sum of in monthly instalments of from the salary of the said and to

remit the said sum (or monthly instalments) to this Court GIVEN under my hand and the seal of the Court, this 19

day of Judge

Judge

No 20

Order of Attachment of Negotiable Instrument (O 21, r 51) (Title)

 \mathbf{o}

The Bailiff of the Court, WHEREAS an order has been passed by this Court on the dayof

, You are hereby directed to for the attachment of 19 seize the said and bring the same into Court

day of GIVEN under my hand and seal of the Court, this 19

No 21

ATTACHMENT

PROBLEM ORDER, WHERE THE PROPERTY CONSISTS OF MONEY OR OF ANY SECURITY IN THE CUSTOD'S OF A COURT OF JUSTICE OR OFFICER OF GOVERNMENT (O 21,r 52)

(Table)

10 Sn.

The plaintiff having applied under rule 22 of Order XXI of the Code of Civil Procedure, 1908, for an attachment of certain money now in your hands (here state loss the money is supposed to be in the hands of the person addressed, on ulat account, etc) I request that you will hold the said money subject to the further order of this Court

I have the honour to Ic, SIR.

Your most obedient Servant,

Judge

19 No 22

NOTICE OF ATTICHMENT OF A DECREE TO THE COURT WHICH I 1551 D IT (0 21, 1 03.)

(Table)

Ίo the Judge of the Court of

Dated tho

day of

I have the honour to infirm you that the decree obtained in your Court on the m Suit No 19 , 1 v day of his lem attiched by if a ard in which he was

19

Court on the application of the m the suit specified above. You are therefore requested to stay the execution of the decree of your Court until your receiver an intimation from this Court that the present notice has been cancelled or until execution of the suit decree is applied for by the holder of the decree now sought to be executed or by his undersuit debtor.

I have the honour, etc . Judae Dated tho day of 19 No 23 NOTICE OF ATTACHMENT OF A DECREE TO THE HOLDER OF THE DECREE (O 21, r 53) (Tatle) To WHEREAS an application has been made in this Court by the decree holder in the above suit for the attrehment of a decree obtained by you on the
19 , in the Court of in Suit No day of . It is ordered that which พาร was you, the said , he, and you are hereby, probibited and restrained, until the further order of this Court from transferring or charging the same in any way GIVEN under my hand and the seal of the Court this Judge No. 24 ATTACHMENT IN EXECUTION

PROHIBITORY ORDER WHERE THE PROFESTY CONSISTS OF IMMOVEMBLE PROPERTY (O 21,7 54)

(Table)

Whenever you have fuled to satisfy a decree passed against you of the day of 19, in Suit No of 19, in favour of for Re. be, and you are hereby, pro-

it is ordered that you, the said

be and you are hereby, proliabled and restrained, until the further order of this Court, from transferring or charging

the property specified in the schedule hereunte annexed, by sale, gift or otherwise, and

that all persons be, and that they are hereby, prolibited from receiving the same by

purchase, gift or otherwise

Glysn under my hand and the said of the Court, this

day of

GIVEN under my hand and tho scal of the Court, this day of

Judge.

Order for Payment to the Plaintiff, etc., of Money, etc., in the hands of a thind party (O 21, r 55)

(Title)

Whereas the following property has been attached in execution of a decree in Sut No of 19 , passed on the day of 19 , in favour of the latter

for Rs , It is ordered that the property so uttached, consisting of Rs in money and Rs — un currency notes, or a sufficient part thereof to satisfy the said decree, shall be paid over by 30m, the said — to

GIVEN under my hand and the seal of the Court, this day of

No. 26

NOTICE TO ATTACHING CREDITOR (O. 21, r 58.)

То

19

Tα

WHEREAS of attachment on

(Title)

has made application to this Court for the removal

placed at your instance in execution of the

Judge.

No. 27.

WARRANT OF SALE OF PROPERTY IN EXECUTION OF A DECREE FOR MONEY. (O 21, r 66)

(Title.)

The bailiff of the Court

THESE are to command you to sell by auction after giving previous notice, by affixing the same in this Court house, and after making due proclamation, the property attached under a warrant from this Court, dated the , in execution of a decree in favour of day of

suit No , or so much of the said property as shall ın of 19 of the said decree realize the sum of Rs , being the

and costs still remaining unsatisfied.

You are further commanded to return this warrant on or before the , with an endorsement certifying the minner in which it has day of been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this 19

Julge.

day of

No. 28

NOTICE OF THE DAY FIXED FOR SETTLING A SALT PROCLAMATION (O. 21, r 66)

(Title)

Judgment deblor To the decree holder has applied for the With RI 15 in the above named smt Salo of , You are hereby informed that the day of

, has been fixed for setting the terms of the proclamation of sak. GIVEN under my hand and the scal of the Court, this ilay of 10

Jula

: - -

No 29

PROCESSIATION OF SALE (O 21 r 66)

(Fitte)

Notice is here by given that, min cedure, 1903, an order has been passe. .

mentioned in the decree holder in the suit (1) mentioned in the marks (11) amounting with costs and interest up to date of sale to the leci le 11 ; the In will h was I lait tiff at 1

The sile will be by public suction, and the property will be put wat delen lar t up for sile in the lots specified in the schedule. The sile will be of the property of the julyment debtors above named as mentioned in the releduce

below, and the highlities and claims attaching to the said property, so far as they have been ascertained, are these specified in the schedule against each let

In the absence of any order of postponement, the sale will be held by at the monthly sale commencing at o'clock on the

. In the event, however, of the debt above specified and of the costs of the

mission of the Court previously given. The following are the further

Conditions of Sale.

 The particulars specified in the schedule below have been stated to the best of the information of the Court, but the Court will not be answerable for any error, mis

price offered appears so clearly inadequate as to make it advisable to do so

4 For reasons recorded, it shall be in the discretion of the officer conducting the sale to adjourn it, subject always to the provisions of rule 69 of Order XXI

6 In the case of immoverable property, the person declared to be the purchaser shall

Court cloves on the fifteenth day after the sale of the property, exclusive of such day, or if the fifteenth day be a Sunday or other holiday, then on the first office day after the

8 In default of payment of the balance of purchase money within the period

Gives under my hand and the seat of the Court this

il ey of

19

Judge

Scholule of Property

Description of projecty Title to le soll with the name of each owner where there are more julgment let tors than one

The revenue as essed upon the estate of part of the estate of the property to be sold or an interest in an estate or a part of an estate paying revenue to towerment

It tail of any special to the property and to the property and to the property and to the property and to the property and to the property and

19

To

ın

has made applic

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No. 26
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NOTICE TO ATTACHING CREDITOR. (O. 21, r. 66) (Title)

 T_0 WHEREAS of attachment on decree in Suit No this Court on

placed a', , this . of 19 , the ď٩ or by a pleader of the Court duly instructed

operty of the judgment day of dereas the copies of property. you, and you are hereby ordered at within each of the properties aid proclamation on a conspicuous the court house, and then to submit ch and the manner in which the pro

Judge

WARRANT OF SALE C

... Schedule

The bar

GIVEN under my hand and the sea!

AO 31

AO 31

AO 31

AN OFFICER ROLDING A SALE OF THE DETICIENCA OF PRICE ON A RY SALE OF THE PURCHASER'S DEFAULT /O 01

AND THE PROPERTY OF THE PURCHASER'S DEFAULT /O 01 OF THE DETICIENCY OF PRICE ON A RT ST. DEFAULT (O. 21, r 71) THESE previous clamat

cuttified that at the re sale of the property in execution of the decree in the above. Cortineu in consequence of default on the part of named suit, in the price of the said property amounting to Rs defining such re sale amounted and that the defends attending such re sale amounted to Rs which sum is recoverable from the defaulter. , making a total of Rs

Officer Ichi

No. 32 NOTICE TO PURSON IN POSSESSION OF MOVEABLE PROPERTY

(0 21, r 79) (Tatle)

To WILLIETS has become the purchaser at a ? decree in the above suit of now in your posses from delivering possession of the said

to any person except the said

GIVEN under my hand and the seal of the Court. 19

No. 33.

PROHIBITORY ORDI R ACAINST PARMENT OF DIBTS THAN THE PURCHASER (

(Tale)

Ta and to

WILLIAM has become the purcha the deeree in t3 duse suit of toxen . It is ordered that v

prohibited from uor bna , suc a to any person or rept the said the scal of to Givi v under

19

PROHIBITORY ORDER AGAINST THE TRANSFER OF SHARES SOLD IN EXPERTION (O 21, r 79)

(Title)

Τo

19

and . Secretary of

Corporation

has become the purchaser at a public sale in execution of the WHEREAS decree, in the above suit, of certain shares in the above Corporation, that is to say, of standing in the name of you . It is ordered that you

be, and you are hereby prohibited from making any transfer of the said shares to any , the purchaser aforesaid, or from receiving any person except the said dividends thereon, and you

Judae

No. 35

CERTIFICATE TO JUDGMENT DEDTOR AUTHORIZING BAN TO NORTO ACE, DEASL OF SELL PROPERTS (O 21, r 83)

(Talle)

Whreeas in execution of the decree passed in the above out an order was made on 19 . for the sale of the under mentioned property the day of

> of · of

οf - to make the proposed mortgage, lease or sale within a period of from the date of this certificate provided that all monies payable under such mortgage, here expense

shall be paid into this Court and not to the said judgment debter Given under my hand and the seal of the Court this day of

19

Descripts nof trongette

Jular

No. 36

Notice to Show Carne was Sale should not be net asked (O 21, et (0, 92))

(Tile)

To WHEREAS the under mentioned projects was sold on the , in execution of the decree passed in the above far ed as t. and the decree holder for judgment delter has applied to the Court to set aside the sale of the sail property on the ground of a material irregularity [, fraud] in publishing (or con factor g) the sale, namely that

Take notice that if you have any cause to show why the said at an ata a shall red be granted you should appear with your process at the Court on the day of , when the said applicate a wall be found and determined.

Gives un for my hand and the scalef the tourt the 'at if 1)

Decrept rifge per

NOTICE TO SHOW CAUSE WHY SALE SHOULD NOT BE SET ASIDE (O 21, rr 91, 92) (Title)

Tα WHEREAR , the purchaser of the under mentioned property sold on the day of 19 . in execution of the decree passed in the above named suit, has applied to this Court to set aside the sale of the said property on the

ground that , the judgment debtor, had no saleable interest therem Take notice that if you have any cause to show why the said application should not be granted, you should appear with your proofs in this Court on the

, when the said application will be heard and determined GIVEN under my hand and the seri of the Court, this

19

Description of property

Judge

No 33

CERTIFICATE OF SALE OF LAND (O 21, r. 94)

(Tatle)

has been declared the purchaser at a sale by public This is to certify that in execution of auction on the day of 19 . of decree in this suit, and that the said sale has been duly confirmed by this Court

Grary under my hand and the seal of the Court this

day of Julge.

No 39

ORDER FOR DELIVERY TO CERTIFIED PURCHASER OF LAND AT A SAFE BY EXECUTION (O 21, r 95)

(Title)

10

The Buliff of the Court.

has become the certified purchaser of WHEREAS of 19 . You are hereby ordered execution of decree in Suit Yo , the certified purchaser, is iforestid, in possession of the to put the said same

(avy a under my hand and the a lafth Court, this 19

Judge

hy d

No 10

SUMMONS TO ALLE US UNSWER CHARGE OF OBSTRUCTING I ALLERION OF DECEL (O 21, r 97)

(Title)

10 , the decree helder in the above suit, has complained to the () art that you have real ted (robstructed) the officer charged with the executional the wirrant for per soon tas f You are hereby summon d to appear in this Court on the

it an to answer the and complaint

tity y unter my hard and the calefthe t mit this

Juse

Judge

No 41.

WARRANT OF COMMITTAL. (O. 21, r 98)

(Tsile.)

To

The Officer in charge of the Jail at

Williams the under-mentioned property has been decreed to the planning in this suit, and whereas the Court is satisfied that without any just cause resisted for obstructured the said

nade

into the civil prison and to keep him imprisoned therein for the period of Given under my hand and tho seal of the Cour*, this day of

No. 42

AUTHORITY OF THE COLLECTOR TO STAY PUBLIC SALE OF LAND (Section 72.)

(Title)

 T_0

Collector of

Sie

In answer to your communication No , dated , representing that the sale in execution of the decree in this suit of land situate within your district is objectionable, I have the bonour to inform you that you are authorized to make provision for the satisfaction of the said decree in the manner recommended by you.

I have the honour to be, Sir.

Your obedient servant.

Judae.

APPENDIX F.

SUPPLEMENTAL PROCEEDINGS.

No. 1.

WARRANT OF ARREST BEFORE JUDGMENT (O. 38, r l.)
(Title.)

 T_0

The Bulff of the Court WHEREAS , the plantiff in the above suit, claims the sum of Rs as noted in the margin and has proved to the satisfaction of the Court that there is prohable cause for believing that the defen dant is about to These are to command you to demand and Principal Interest the sum receive from the said Costs as sufficient to satisfy the plaintiff's claim, and unless the said sum Lotal is forthwith delivered to of Rs

		•	
ıım	in the suit	s -	
9	GIVEN under my hand and the	seal of the Court, this	day of
			Judje
		No 2	
	SLCURITY FOR APPEARANCE OF	1 DEFENDANT ARRESTED (O. 38, r 2)	nerore Judgment
		(Title)	
	WHERE 13 at the instance of	, the plantiff in the	ibove suit,
			•
٠			•

19

(Signel)

day of

that may be adjudged against the and defendant in the said suit

this

Witness my hand at

Witne sea.

SUMMONS TO DESENDENT TO LEGGED ON SUMMER'S ASSESSMENT OF DESCRINGS (O 38, r 3)

(Tetle)

WHEREAS

To

who become surety on the 19

, for your appx trance in the above suit, has applied to this Court to be discharged from his obligation

You are hereby summoned to appear in this Court in person on the οf . at M, when the said application will be heard and determined

Given under my hand and the seal of the Court, this day of

Julac.

day of

\n t

ORDER 101 COMMITTAL (O 38, r 4)

(7 stle.)

To WHIRLAS , plaintiff in this suit has made application to the Court that scentity be taken for the appearance of the defendant, to answer any judgment that may be passed against him in tho suit, and whereas the Court has called upon the defendant to furnish such security, or to offer a sufficient deposit in lieu of security, which he has failed to do . It is ordered that the said defendant committed to the civil prison until the decision of the suit, or, if judgment be pro-

nounced against him, until satisfaction of the decree Given under my hand and the seal of the Court, this

day of

19

Judge

No 5

ATTACHMENT BEFORE JUDGMENT, WITH ORDER TO CALL FOR SECURITY FOR PULFILMENT OF DECREE (O 38, r 5)

(Tatle)

ol

The Bashif of the Court

WUEREAS has proved to the satisfaction of the Court that the defendant . These are to command you to call upon the said in the above sint , either to defendant on or before the day of 19 furnish security for the sum of Rs to produce and place at the disposal of this Court when required or the value thereof, or such portion of the value as may be sufficient to satisfy any decree that may be passed against him, or to appear and show cause why he should not furnish security and you are further ordered and keep the same under safe and secure custody until to attach the said the further order of the Court, and you are further commanded to return this warrant on , with an endorsement certifying the or before the day of 19 date on which and the manner in which it has been executed, or the reason why it has not been executed

GIVLN under my hand and the seal of the Court, this day of

Judge.

SECULIE FOR THE PRODUCTION OF PROPERTY (O 38 r 5)

(Title.)

WHEREAS at the instance of the plaintiff in the above suit.

the defendant, has been directed by the Court to furnish security in the sum of Rs to produce and place at the disposal of the Court the property specified in the schedule bereunto annexed,

Therefore I have voluntarily become surety and do hereby bind myself,

my heirs and executors, to the said Court, that the said defendant shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, and in default of his so doing, I bind myself my heirs and executors, to or such sum not pry to the said Court at its order, the said sum of Rs exceeding the said sum as the said Court may adjudge

Schedule

this

Witness my hand at

day of

(Signed)

19

Witnesses 1.

2

No 7

ATTACHMENT BEFORE JUDGMENT, ON PROOF OF PAILURE TO FURNISH SECULITY (O 38, r 6)

(Tttle)

Lo

19

the Bailiff of the Court

the plaintiff in this suit, has applied to the Court to call WHERLAS , the defendant, to furnish scourity to fulfil my decree that may upon be passed against him in the suit, and whereas the Court has called upon the said to furnish such security which he has failed to do, These are to and Leep the command you to attach the property of the said

GIVLN under my hand and the seal of the Court, this

dis of

Julie

No 8

LEMIORARY INJUNCTIONS (O alir i)

(I ttle)

. Pleader of Jer Counsel for the Uses motion in ide into this Court by plaintiff A B, and upon reading the petition of the said I limit I m this in after the lift is , er the written day] for the I lant tiled in this suit on the day of] in luje ti div of a itement of the said plaintiff filed on the m support thenof lef Br heiring the evidence of iotice and befored into tappe or it all influid other endence of a store of of notice of this motion upon the defendant (D). This Court doth order that in injunction be awarded to restrain the defendant C. D. his servants, agents and works enfrom pulling down, or suffering to be pulled down, the house in the plaint in the said Buit of the plantiff mentioned for in the written statement, or petition, of the plaintiff and cyalence at the be-Hindupur, in the T

house is composed.

Dated this

day of

Julge

[Where the injunction is sought to re train the ne jolishion of a note or bill, the ordering part of the order may run thus -1 to restrain the defendants from parting with out of the custody of them or any of them or en-

order of this Court

to restrain the defendant C D, bis servants, agents [In Copyright cases] or workmen, from printing, publishing or vending a book, called . or any part thereof, until the, etc

[If here part only of a book is to be restrained] to restrain the defendant C D, his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence, etc] mentioned to have been published by the defendant as heremafter specified, namely that part of the said book which is entitled and also that part which is entitled for which is contained in page both inclusivel to page

nntil . etc

to restrain the defendant C D, his agents, servants [In Patent cases] and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc , or written statement etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff s plaint [or as the case may be] mentioned, and from counterfeiting unitating or resembling the same in ventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, etc

[In cases of Trade marks]

to restrain the defendant C D, his servants.

the plaintiff's plaint for petition, etc | mentioned, or any other labels so contrived or expressed as, by colourable imitation or otherwise, to represent the composition or blacking sold by the defendant to be the same as the composition or blacking minu factured and sold by the plaintiff A B and from using trade cards so contrived or expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A B, until the, etc

[To restrain a partner from in any way interfering in the business]

to

the said partnership firm can or may in any manner become or be made hable to or for the payment of any sum of money, or for the performance of any contract, promise or undertaking until the, etc

SECURITY FOR THE PRODUCTION OF PROTERTY (O 38 r 5)

(Title.)

WHLREAS at the instance of , the plaintiff in the above suit, the defendant, has been directed by the Court to furnish security in the sum of Rs to produce and place at the disposal of the Court the property specified in the schedule hereunto annexed.

Lhereforo I have voluntarily become surety and do hereby bind myself, my hears and executors, to the said Court, that the said defend uit shall produce and place at the disposal of the Court, when required, the property specified in the said schedule, or the value of the same, or such portion thereof as may be sufficient to satisfy the decree, and in default of his so doing, I hand myself, my heirs and executors to or such sum not pry to the said Court, at its order, the said sum of Rs exceeding the said sum as the said Court may adjudge

Schedule

Witness my hand at day of (bi med) Witnesses

No 7.

ATTICHMENT BLIORI JUDGMENT, ON PROOF OF PAHIURE TO FURNISH SECURITY (O 38, r 6)

(Fitle)

lο

The Bailiff of the Court

the plaintiff in this suit, has applied to the Court to call WHERLAS , the defendant, to furnish security to fulfil any decree that may นเวดเ be passed against him in the suit, and whereas the Court has called upon the said to furnish such security which he has faded to do, These are to daction of ever knownson

command you to attach the property of the eard and keep the same under safe and secure custody until the further order of the Court, and you we day of further commanded to return this warrant on or before the , with an endorsement certifying the date on which and the manner in which it has

been executed, or the reason why it has not been executed

GIVEN under my hand and the seal of the Court, this day of Julie

No 8

TEMPORARY INJUNCTIONS (O 39, 1 1)

(Title)

*, Plender of for Counsel for the ULON motion in ide into this Court by plaintiff A B , and upon reading the petition of the sud plaintiff in this matter filed [this , or the written day] [or the plaint filed in this suit on the day of] and up on day of s'atement of the said plaintiff ided on the in support thereof [1] after hearing the evidence of and totice and lefendant not appearing add, and il o the evidence of of notice of this motion upon the defendant C D] This Court doth order that all injunction be awarded to restrain the defendant (D, his servants, ngents and workings,

from pulling down, or suffering to be pulled down, the house in the plaint in tho said suit of the plantiff mentioned for in the written statement, or petition, of the plaintiff and evidence at the he . Hindupur, in the I

house is composed.

Dated thu

day of

Judge

(1) here the injunction is sought to re train the negotiation of a note or bill, the ordering part of the order may run thus -1 to restrain the defendants and

dorsing. .

dated on and the evidence heard at this motion until the hearing of this suit, or until the further arder of this Court

[In Copyright cases] to restrain the defendant C D . his servants, agents or workmen, from printing, publishing or vending a book, called . or any part thereof, until the, etc.

[Where part only of a book is to be restrained] to restrain the defendant C. D., his servants, agents or workmen, from printing, publishing, selling or otherwise disposing of such parts of the book in the plaint [or petition and evidence, etc] mentioned to have been published by the defendant as hereinafter specified, namely that part of the said book which is entitled and also that part which is entitled for which is contained in page hoth inclusivel

to page

until , ctc

[lu Patent cases] to restrain the defendant C D, his agents, servants and workmen, from making or vending any perforated bricks [or as the case may be] upon the principle of the inventions in the plaintiff's plaint [or petition, etc., or written statement etc.] mentioned, belonging to the plaintiffs, or either of them, during the remainder of the respective terms of the patents in the plaintiff's plaint [or as the case may bol mentioned, and from counterfeiting imitating or resembling the same in ventions, or either of them, or making any addition thereto, or subtraction therefrom, until the hearing, otc

manufactured by the plaintiff A B in bottles having affired ther to

expressed as to represent that any composition or blacking sold or proposed to be sold by the defendant is the same as the composition or blacking manufactured or sold by the plaintiff A. B. until the, etc

[To restrain a partner from in any way interfering in the business] restrain the defendant C D, his servants and agents, from entering into any contract, and from accepting, drawing, endorsing or negotiating any bill of exchange, note, or written security in the name of the partnership firm of B and D and from contracting any ny verbal or

be done, any , or whereby ble to or for

... , promise or

ALLIOINTMENT OF A RECLIVER, (O. 40, r. 1)

(Title)

10

WHEREAS has been attached in execution of a decree passed in the above suit on the day of 19 , in favour of hereby (subject to your giving security to the satisfaction of the Court) appointed icceiver of the said property under Order XL of the Code of Civil Prodecure, 1908, with full powers under the provisions of that Order.

You are required to render a due and proper account of your receipts and disburse ments in respect of the said property on You will be entitled to remunera per cent upon your receipts under the authority of this tion at the rate of

appointment.

GIVEN under my hand and the seal of the Court, this

day of Judge

No. 10

BOND 10 DE OIVLN BY RECEIVER (O 10. r 3)

(Title)

Know all men by these presents, that we, are jointly and severally bound to to he paid to the said

ສາເຕັ aud of the Court of or his successor in office for the time being For which payment to be made we bind ourselves, and each of us, in the whole, our and

each of our heirs, executors and administrators, jointly and severally, by these presents Dated this day of

agamst

Whereas a plaint has been filed in this Court by

purpose of [here insert the object of suit] has been appointed, by order of the above And whereas the said

mentioned Court, to receive the rents and profits of the immoveable property and to get in the said plaint named in the outstanding moveable property of 1 .11

void, otherwise it shall remain in full force

Signed and delivered by the above bounden in the presence of Note -If deposit of money is made, the memorandum thereof should follow the terms of the condition of the bond.

APPENDIX G.

APPEAL, REFERENCE AND REVIEW.

No. 1.

Memorandum of Aliest. (O 11, r 1)

the above named apprais to the Court at from the decree of in Sun No of 19 , dated the day of 19 , and sets forth the following grounds of objection to the decree appraised from, namely —

No 2

Security Bond to be given on order being made to stay Execution of Decree (O 41, r 5)

(Title)

To

This security hand on stay of execution of decree executed by mit-

That , the plantiff in Suit No of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of . 19 , in favour of the plantiff, and the defendant having preferred an appeal from the and decree in the ... Court, the said appeal is still pending

Now the plaintiff decree holder baving applied to execute the decree, the defendant

Court the said defendant shall duly act in accordance with the decree of the Appellate Court and shall pray whatever may be payable by him thereunder, and if he should fail therein then any amount so payable shall be realized from the properties hereby mort gaged, and if the proceeds of the sale of the sad properties are insufficient to pay the amount due, I and my legal representatives will be personally hable to pay the balance. To this effect I execute this security bond this day of 19

Witnessed by

(Signed)

SECURITY BOND TO BE GIVEN DURING THE PENDLACY OF ALPEAL. (O 41 r 6) (Title)

Pα This security bond on stay of execution of decree executed by

witnesseth -That , the plaintiff in Suit No of 19 , having sued , the defendant, in this Court and a decree having been passed on the day of 19 in favour of the plaintiff, and the defendant having preferred an appeal from the said decree in the Court the said appeal 19 still non 1 "

been to th heret

balunce To this effect I execute this security bond this 19

day of

Witnessed by

(Signed)

.2

No 4

Schedule

SECURITI FOR COSTS OF ALPEAL (O 41 r 10)

(Title)

10

th -Accord aging the

DI

me at a a shinel II he real red from the proper nf f

19

Schedule

Witnessed by 1 2

(S and)

Nos 5-7

No. 5.

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O 41, r. 13) (Title)

To

You are hereby directed to take notice that the in the shove suit, has preferred an appeal to this Court from the decree passed by you therein on the

You are requested to send with all practicable despatch all material papers in the smit.

Dated the

day of 19

Judge

No 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL (0 41, r 14)

(Title)

APPEAL from the day of 19 To

of the Court of dated the

Respondent

Take notice that an appeal from the decree of in this ease has been presented by and registered in this Court, and that the has been fixed by this Court for the hearing of this appeal

day of If no appearance is made on your behalf by yourself, your pleader, or by some one by the authorized to act for you in this appeal, it will be heard and decided in your absonce

Gives under my hand and the seal of the Court, this day of

19 [Not: - If a stay of execution has been ordered intimation should be given of the fact on this notice ?

\n 7

NOTICE TO A PARTY TO A SUIT NOT WADE A PARTY TO THE APPLAL BUT JOINED BY THE COURT AS A RESPONDENT (O 41, r 20)

(I ale)

Wiffin is you were a party in suit No of 19 , in the Court of ٦.,, ٠,,

tale on weathern artifered it in the said appeal, and has adjourned the hearing thereof till the day of A M If no appearance is made on your behalf on the said day and at the said hour, the appeal will be heard and decided in your absence

GIVEN under my hand and the scal of the Court, this 19

July.

	SECURITY B	OND .	10 BE	GIVŁN	DURING	гні	Pendency	0F	AI PEAL.	(0	11, r 6)
(Title.)											

To

This security bond on stay of execution of decree executed by witnesseth -

That , the plaintiff in Suit No of 19 , having sucd , the defendant, in this Court and a decree having heen passed on the 19 m favour of the plaintiff, and the defendant Court, the said appeal having preferred an appeal from the said decree in the 18 still nendmø

hereby mortgaged, and if the proceeds of the sale of the said properties are insufficient to pay the amount due, I and my legal representatives will be personally hable to pay the balance. To this effect I execute this security bond this ın

Schedule

Witnessed by

(Signed)

I, 2

pr

No 4

SECURITY FOR COSTS OF APPLAL (O 41, r 10)

(Talk)

To This security bond for costs of appeal executed by

witnesseth This appellant has preferred an appeal from the decree in Suit No , against the respondent, and has been called upon to furnish security Accord I of my any free will stand comments for the costs of the appeal, mortgaging the

able tall be realized from the plot-

Schedule

Witnessed by 2.

(Signed)

INTIMATION TO LOWER COURT OF ADMISSION OF APPEAL. (O 41, r 13)

(Title) T۵ You are hereby directed to take notice that the in the above suit, has preferred an appeal to this Court from the decree passed by you therein on the

day of You are requested to send with all practicable despatch all material papers in the

smt Dated the

day of

10

Judge

NO 6

NOTICE TO RESPONDENT OF THE DAY FIXED FOR THE HEARING OF THE APPEAL (O 41. r 14)

(Title)

APPEAL from the

of the Court of

dated the

day of 19 lo

Respondent

LARL notice that an appeal from the decree of in this case has been and registered in this Court and that the presented by

has been fixed by this Court for the hearing of this appeal.

If no appearance is made on your behalf by yourself your pleader or by some one by law authorized to act for you in this appeal it will be heard and decided in your Great under my hand and the seal of the Court this

dwel

19

Judge

if a stay of execution I as been ord and in timation should be given of the fact on this notice 1

No. 7

NOTICE TO A PARTY TO A SUIT NOT WADE A PARTY TO THE APPEAL BLT J DER . 27 THE COURT AS A RESPONDENT (O 41 r 20)

(Talle)

Unfiles ton were a party in suit to 111 I as preferred at appeal is , and whereas the the I cree passed is unst him in the sail suit and it appears to the form interested in the result of the said appeal

This is to give von its other that but has been chive I rathe said appeal and his adjust od the learning there I tall the AN II no appearance is to are a vour !

col at the earl hour, the appeal wall be leard and decord a year Gives wider my had land the scatefitlet art than

MUMORANDUM OF CROSS OBJECTION. (O. 41, r. 22)

(Title)

WHERE'S the

day of

has preferred an appeal to the Court a from the decree of in Smt Ne , dated the of 19 , and whereas notice of the day fixed for day of day of

hearing the appeal was served on the on the

files this memorandum of cross objection under rule 22 of Order XLI of the Code of Civil Procedure, 1908, and sets forth the following grounds of objection to the decree appealed from, namely --

No 9

DECREE IN APPEAL (O 41, r 35)

Appeal No

(Title) of 19 from the decree of the Court of

Memorandum of Appeal

Plaintiff Defendant

The abeve named appeals to the Court at day of from the decree of in the above suit, dated the

, for the following reasons, namely -This appeal coming on for hearing on the day of for the appellant and

before , in the presence of

for the respondent, it is ordered-, are to be The costs of this appeal, as detailed below, amounting to Rs

The costs of the original suit are to he paid by day of Given under my hand this

Judge

dated

Costs of Anneal

				,				
-	Appellant	A	mount		Respondent	Amount		
,	Stamp for memoran dum of appeal Do for power Services of processes Pleader's fee on Rs	Rs	1	P	Stamp for power Do for petation Service of processes Pk.ader's fee on Rs	Rq	a	r
	Total				Fotal			

No 10

APPLICATION TO APPEAL IN FORM'S PAUPERIS. (O 44, r 1)

(Trtle.)

the of appeal from the door

Annexed is a full .. _ belonging to me with the estimated value thereof

Dated the day of

(Signed)

No. 11

Notice of Arriva is form putting (O (4, r 1)

(7 etf)

WHEREAS the above named his applied to be allowed to appeal as a pauper from the de ree in the above suit dated the day of 19 has been used for hearing the applicawhereas the day of tion, notice is hereby given to you that if you desire to show cause why the applicant should not be allowed to appeal as a pumper in opportunity wall be easen to you of doing so on the afore mentioned date

Given under thy hand and the scal of the Court this

day of

70 7 10

No. 12

NOTICE TO SHOW CALSE WHY A CHRISTICALL OF APILOT TO THE BASE IN UNION. SHOULD NOT BE ORINTED (O 45 1 1)

(Telle)

Tο

TAKE notice that has applied to this Court for a mutificate that is regards amount or value and nature the above case fulfils the remue ments of section 110 of the Code of Civil Procedure 1908 or that it is otherwise a fit one for appeal to His

Majesty in Conneil The day of is fixed for you to slow cause why He Court should not great the restduate asked for

Given under my hand and the seal of the Court, this

als of

Remstra

No. 13

NOTICE TO RESIDEDUCE OF ADMISSION OF MARKET THE REPORT OF COUNTY (f) 45, r R)

(7 dle)

To

WHEREAR . the ne the above case, has furni hed the security and made the deposit regime t by Order XLV sule 7 of the Cole of Civil receiling 1908.

Take notice that the appeal of the sail. to the Maje to in term of his been admitted on the day of

Given under my hand and the reaf of the Court this alay of 19

Pr dstenr

No. 11

NOTICE TO STOV CAUSE WHY A REVIEW SHOULD HOLDE CHANTED (U 17 + 1)

(Title)

TARE notice that has applied to this Court for a reads of its decree 1) m the sloener fro passed on the is fixed for you to show ourse way the Court hould not grant try of 1.3 Free ew of its decree in this case

tat en under my hand and the eal of the Court, the divot 123

APPENDIX H

MISCELLANEOUS

No 1

Agreement of Parties as to issues to be tried (0.14, r.6)(Title)

WHERE'S we the parties in the above sunt, we agreed as to the question of fact for of law to be decended between us and the point at issue between us is whether a claim founded on a bond, dated the day of 19 and filled in Exhibit in the said sunt, is or is not beyond the statute of limitation (or state the point at issue whatever it may be)

We therefore severally bind ourselves that, upon the finding of the Court in the negative

We therefore severally bind ourselves that, upon the finding of the Court in the negative [or affirmative] of such issue will pay to the said the sum of Kupees (or such sum as the Court shall hold to be due thereon) and I

the said will accept the said sum Court shall hold to be due) in full satisfacti

that upon such finding I, the said

Plaintiff Defendant

Witnesses 1

Dated the

day of

19

No 2

Notice of application for the transfer of a suff to another Court for trial (Section 24)

In the Court of the District Indge of

No of 19

WHEREAS an application dived the div of 19 his been made to this Court by the in Suit No of 13 now pending in the Court of the it in which plantiff and is defendant, for the trunsfer of the suit for trial to the Court of the

of the

Nou are hereby informed that the day of 10 his been fixed for the bearing of the application, when you will be heard if you desire to ofter any

ction to it.
Given under my hand and the seal of the Court, this day of 1)

Julje

Notice of Payment into Court (O 24, r 2)

(Title.)

Take notice that the defendant has paid into Court Rs.

and says that that sum is sufficient to satisfy the plaintiff s claim in full

To Z, Pleader for the plaintiff

A Y, Pleader for the defendant

No 4

NOTICE TO SHOW CAUSE (GENERAL FORM.)

To

WHEREAS the above named has made application to this Court that

You are hereby warned to appear in this Court in person or by a pleader duly instructed on the day of the color in the foreness, to show acquires the application, failing wherein, the

at o clock in the forenoon, to show cause against the application, failing wherein, the said application will be heard and determined ex parte

Given under my hand and the seal of the Court, this

day of

Judge

No 5

LIST OF DOCUMENTS PRODUCED BY THIS A F (O 13 r 1)

(Title)

Descrition of document

Date if any which the document bears bears

NOTICE TO PARTIES OF THE DAY FILLD FOR EXAMINATION OF A WITNESS ABOUT TO IFAVE THE JURISDICTION (O 18, r 16) (Pulle)

То

of.

plantifi (or defendant) WHERL IS in the above suit application has been in ide to the Court by

that the examination of . a witness required by the said in the said suit may be taken immediately, and it has been shown to the Court's satisfaction that the said witness is about to leave the Court's jurisdiction (or any other good and sufficient

cause, to be stated) Take notice that the examination of the said witness

will be taken by the Court on the Dated the 19

19 day of

No 7

COMMISSION TO EXAMINE ABSENT WITNESS (O 26, rr 4, 18)

(Tulle)

Го in the above WHERE IS the cyldence of is required by the , you are requested to take the evidence on interrogatories suit, and whereas for viva vocel of su for that purpose if in attendance, w ... 144 and you are further requested to make return of such evidence as soon as it may be

taken Process to compel the attendance of the witness will be issued by any Court having

jurisdiction on your application being your fee in the above, is helewith forwarded A sum of Rs

Giver under my hand and the scal of the Court, this 19

Julic

Ju lae

No 8

LETTER OF REQUEST (O 26, r 5)

(I'ttle)

(Heading -To the President and Judges of, etc., etc., or as the case reay be)

WHERLAS a suit is now pending in the

in which A B is plaintiff and C D is defendant, And in the said suit the plaintiff claims (abstract of clan i) .

And whereas it has been represented to the said Court that it is necessary for the purposes of justice and for the due determination of the matters in dispute between the parties, that the following persons should be ex unimed as witnesses upon outh touching such matters, that is to say

L 1, of G H, of 1 J. of

m f

And it appearing that such witnesses are resident within the jurisdiction of your honour ble Court.

of the said Court, have the henour to reque t , as tho and do hereby request, that for the reasons aforesaid and for the assistance of the said , or some one or mere if Court you, is the President and Judges of the said con, will be I he sed to aummon the said witness (and such other witnesses as the agents hirst Schlid Nos 9, 10

interrogatories which accompany this letter of request (or vii i loce) touching the said matters in question in the presence of the agents of the plaintiff and defendant, or such of them as shall, on due notice given, attend such examination.

And I further have the honour to request that you will be pleased to cause the unswers of the sud witnesses to be reduced into writing, and all hooks, letters, papers and documents produced upon such examination to be duly marked for identification, and that you will be further pleased to authenticate such examination by the seal of your trihinal, or in such other way as is in accordance with your procedure, and to return the same, together with such requestin writing, if any, for the examination of other witnesses to the said Coart.

(Note — If the Request Vajesty's Secretary of State after the words' other with through His uld ho inserted

No 9

Commission for a Local Investigation, or to example accounts (O. 26, et. 9, 11.)

(Title)

When a set is deemed requisite, for the purposes of this suit that a commission for should be issued. You are hereby appointed Commissioner for the purpose

of
Process to compel the attendance before you of any witnesses or for the production
of any documents, whom or which you may desire to examine or inspect, will be issued
by any Court having jurisdiction on your uppheation

A sum of Rs , being your fee in the above, is herewith forwarded Given under my hand and the seal of the Court, this day of

19

Judje

No. 10

COMMISSION TO MAKE A PARTITION (Q 26 r 13)

(Title)

 T_0

19

Whereas it is deemed requisite for the purposes of this suit that a commission should be assued to make the partition or separation of the property specified in and seconding to the rights as declared in the decree of this fourt dated the

of 19 . You are hereby appointed Commissioner for the said purpo e and are directed to make such inquiry is may be necessary, to divide the said property according to the hest of voir skill and judgment in the shares set out in the said decret, and to allot such shares to the several parties. Nou are hereby authorized to avair sinus to be paid to my party by any other party for the purpose of equalizing the value of the shares.

Process to compel the attendance before you of any attness or for the production of up documents whom or which you may desire to examine or inspect, will be resued by any Court having jurisdiction on your application

A sum of Rs. , being your fee in the above, is herewith forwarded (iven under my hand and the seal of the Court this day of

lο

19

To

No 11

Notice to Minor Defendant and Guardian (O 32, r 3)

(Title)

Manor Defe ida il

mmor, and you (1) (1) Here insert the name of guard an days from the service upon you of required to take notice that nuless within this notice, an application is made to this Court for the appointment of you (1) or of some friend of you, the minor, to act as guardian for the suit, the Court will proceed to appoint some other person to act as a guardian to the minor for the purposes of the

Given under my hand and the scal of the Court this

19

Judge

No 12

NOTICE TO OPPOSITE PARTY OF DAY FIXED FOR HEARING EVIDENCE OF PAUPERLY (O 33, r 6)

(Fitle)

La has applied to this Court for permission to institute a suit WHLPEAS in forme pauperis under Order XXXIII of the Code of Civil Pro cedure, 1908, and whereas the Court sees no reason to reject the application and has been fixed for receiving such day of 19 evidence as the applicant may adduce in proof of his pauperism and for hearing any

ovidence which may be adduced in disproof thereof Notice is hereby given to you under rule 6 of Order XXXIII that in case you may wish to offer any ovidence to disprove the pauperism of the applicant you may do so on

appearing in this Court on the said day of day of Given under my hand and the seal of the Court, this

No 13

NOTICE TO SURLEY OF HIS LIABILITY UNDER A DECREE (Section 145)

(Litle)

WHEREAS YOU did on hable as surety for the performance of my decree which mught be pas ed against the defendant in the above suit, and whereas a decree was passed on the dity of and whereas

the and defendant for the payment of application has been made for execution of the said decree against you

I ske notice that you are hereby required on or before the

to show cause why the and deeper It not be executed against you, and if no sufficient cause shall be, within the time honour ib shown to the satisfaction of the Court, an order for its execution will be

Now I sued in the terms of the said up he ation οŧ in I do hereby ler my hand and tho scal of th west, this

Court you, 19 fr you will to 1 k s>

J Ise

7 2

APPLNDIX II--- MISCELLANI OUS.

5 5

Register of Appeals (0 41, r 9)

COURT (OR HIGH COUR.) AT Reserve of Appeals in on Decrees in the year 19

		No 19
JUDGMENT	10 Julw 10T Janoair	
	OnnfinoO 1) loriotat found	
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THE SECOND SCHEDULE

ARBITRALION.

Arbitration in Suits.

1. (1) Where in any suit all the parties interested agree (species to suit may parties to suit may matter in difference between them apply for order of referred to arbitration, they may, at any time before judgment is pronounced, apply to the Court for an order of reference

(2) Every such application shall be in writing and shall

state the matter sought to be referred.

References *-Shama Sundiam Ivar v Abdul Latif 1 (* W. N. 92., 27 C 61 [reference to arbitration on verbal application], followed in Aldul Hannel v Riaz ud din 30 A 32 (1907), Bem Madhub Mitter v Priva Nath Mandal, 5 C W N 268 [arbitration award if binding on person not puty to reference], Chooney Money v Rum Kinkar Dutt 5 C W N 212 28 (155 (valuators not arbitrators and therefore order of reference not under section], Ghulam Idam v Muhammad Ahmad 6 W N 226 [scheme of Code as to arbitration] , Debi Churn Manna e Bipra Prasad Jane, 7 (W N 186 [withdrawal of snit after award], Fakir Chand Dey v Tin Cowre Dey 7 (W N 180 Juguette ut to refer-not in writing-whether idjustment of smill Shoo Dis Massel v Brota Nandan Pershad 7 (W N 313 [upple ation by plender not specially authorized], Protap Chunder Dey v Toolsey Dis D , 29 (793 [sections applicable to arbitrations in a suit], Hardeo Salai . Gauri Slanker 28 A 35. Lutawan v Lachya 36 A 69 (PB) (1913) [authority of guardrins of minor to agree to reference], Parsidh Naram bingh i Ghanshvam Naram bingh 9 C W N 873 [award on reference not agreed to by all parties] Index Subharana v Kandadai Rajamannar, 26 M 47 [reference on petition not joined in by all the parties to the suit]. Kadhu Singh v Balut Singh 29 A 123 laundy ition for reference signed by pleader holding defective valuate namah], Pitam Mal v Sadiq Ah, 29 A 229, Ishar Das : Keshab Deo 32 A 657 (1910) [me ming of words "all the parties to a suit], Ramperwin Ring : Kali Charan Suigh 29 A 429 [authority of pleader to agree to reference], If in Wednia Correction

^{*} The cases here note lare decisions subse and reject dup to act limits in great tender, quent to the last edition of O Kinealy & Code 1314

71

31

Luxmibai 1 Bom L R 617 [Court has no power of its own motion to order reference—absence of written application] Lal Mohun Pal v Surya Kumar Das 11 C W N 1152 [reference not concurred in by all parties] Harakbhai i Jamrabai, 15 Bom L R 340 (1912), 37 B 639 [this schedule does not con template reference to arbitration by parties to a pending suit outside that suit and without intervention of Court Jadu v Kailas 37 C 63 (1909) [award upon a private reference], Sabta Prasad v Diaram Kirti 35 A 107 (1912)

The arbitrator shall be appointed in such manner as Appointment of arbi- may be agreed upon between the parties trator

(1) The Court shall, by order, refer to the arbitrator the matter in difference which he is required Order of reference to determine, and shall fix such time as it thinks reasonable for the maling of the award, and shall specify such time in the order

(2) Where a matter is referred to arbitration the Court shall not, save in the manner and to the extent provided in this schedule deal with such matter in the same suit

References -Sita Ram v Bhawam Din Ram 26 A 100 [delivery of a vard within time fixed by Court] Asad ul lah v Muhammad Nur 27 A 459 [validity of award made but not reaching the Court within the time limited] Dutta t Khedu 33 A 645 (1911) Lachman Das v Abparkash 30 A 169 (1908) [omission to fix date of delivery is fatal to award] Pachkaum Ram v Nand Rai of A 505 (1908) [no second reference on same submission]

(1) Where the reference is to two on more arbitrators, 91 provision shall be made in the order for a Where reference is to difference of opinion among the arbitratorstwo or more order to (a) by the appointment of an umpire provide for difference of

notatao (b) by declaring that, if the majority of the arbitrators

agree, the decision of the majority shall presail (c) by empowering the arbitrators to appoint an umpire, or

(d) otherwise as may be agreed between the parties or, if

they cannot agree, as the Court may determine

(°) Where an umpire is appointed, the Court shall fix such time as it thinks reasonable for the maling of his award in case he is required to act

(1) In any of the following cases, namely -01 (a) where the parties cannot agree within (2)] Power of Court to apa reasonable time with respect to the appoint point arbitrator in cerment of an arbitrator, or the person appointed tain cases refuses to recept the office of arbitrator or

- (b) where an ubitiator or unpire-
- (i) dies, or

(ii) refuses or neglects to act or becomes meapable of is acting, or

acting, or

(111) leaves British India in circumstances showing that

he will probably not return at an early date, or

(c) where the arbitrators are empowered by the order of seference to appoint an unipire and fail to do so,

any party may serve the other party or the arbitrators, as the case may be, with a written notice to appoint an arbitrator

or umpne

(2) If, within seven clear days after such notice has been served or such further time as the Court may in each case allow, no arbitrator or no umpire is appointed, as the case may be, the Court may, on appheation by the party who gave the notice, and after giving the other party an opportunity of being heard, appoint an arbitration or impire or make an order superseding the arbitration and in such case shall proceed with the suit

References—Jamaa Kunwar v Nasir Ali 24 A 412 [arbitrators neglecting to file award], Mirza Saddi. v Musst Kaniz P C 15 C W N 1005 (1911), 38 I A 181 14 C L J 313 [not necessary that the arbitrator who refuses must have accepted office before refusing]

- 6 Every arbitrator or umpine appointed under paragraph is Powersofathitrator of the propersymptotic and the powers umpine appointed under use if the powers paragraph 4 or 5 shall have the like powers as if his name had been inserted in the order of reference
- 7 (1) The Court shall issue the same processes to the fa-Summoning witnesses parties and witness whom the arbitrator or and default impire desires to examine as the Court may issue in suits tried before it
- (2) Persons not attending in accordance with such process, or making any other definit, or refusing to give their evidence, or guilty of any contempt to the arbitrator or unipire during the investigation of the matters referred, shall be subject to the like disady intages, penalties and punishments, by order of the Court on the representation of the arbitrator or unipire, as they would mean for the hke offences in sints trad before the Court
- 8 Where the arbitrators or the umpire cannot complete is extension of time for making award within the period specified in the award within the period specified in the allow further time, and from time to time, either before or after

the expiration of the period fixed for the making of the awaid, enlarge such period; or may make an order superseding the arbitration, and in such case shall proceed with the suit.

References.—Jamu'a Kunwar v Nasir Ali, 21 A 312 [order for super session]; Situram v Bhavam Din Ram, 26 A 105 [delivery of award within time fixed], Asad ul-lah v Muhammad Nur, 27 A 159 [here the completion and delivery of the award are not distinguished the one from the other]

- 5.] 9. Where an umpire has been appointed, he may enter on the reference in the place of the arbitrators,—

 (a) if they have allowed the appointed time to expire without making an award, or
 - (b) if they have delivered to the Court or to the umpne a notice in writing stating that they cannot agree
- 3.3 10. Where an award m a suit has been made, the persons who made it shall sign it and cause it to be and documents which have been taken and proved before them; and notice of the filing shall be given to the parties.

References.—See Nobin Kally Dabee v Ambier Chuin Banerjee, 5 C W N 803 [application to set aside award—time from which limitation begins to ruil], Asad-ul-lah v Mahommed Nur, 27 A 459 [meaning of word "made"], Benode v Pran Chandra, 14 C L J 143 (1898) [award void when arbitrator signs a blunk paper on which the decision is to be written by other arbitrators]

11. Upon any reference by an order of the Court, the statement of special case by arbitrators or umpire.

arbitrator or umpine may, with the leave of the Court, state the award as to the whole or any part thereof in the form of a special case for the opinion of the Court, and the Court shall deliver its opinion thereon, and shall order such opinion to be added to and form part of the award.

Reforences.—Purshotum v Ringopal, 35 M 130 (1910) The mere use of the word "award" does not convert a reference to the Court for its opinion upon a difference between arbitrators into an award in the form of a special case and see Arshabar v. Essay, 38 B 60 (1913)

12. The Court may, by order, modify or correct an Power to modify or award,—
correct award. (a) where it appears that a part of the

award is upon a matter not referred to arbitration

and such part can be separated from the other part and does not affect the decision on the matter referred: or

(b) where the award is imperfect in form, or contains any obvious error which can be included without affecting such decision, or

(c) where the award contains a element mustake or an error arising from an accidental slip or omission

Reference.—Narsingh + Apothyn, 16 C W N 256 (1911), 15 C L J 110 [latitude of arbitrators]

- 13 The Court may also make such order as at thinks fit is order as to costs of respecting the costs of the arbitration uhere any question arises respecting such costs and the award contains no sufficient provision concerning them
- The Court in which the hward or any matter referred [5.]

 Whereawardermatter referred to arbitration to the ne consideration of the same arbitrator of unipper, upon such terms as it thinks fit.—
 - (a) where the award has left undetermined any of the matters referred to arbitration, or where it determines any matter not referred to arbitration, unless such matter can be separated authout affecting the determination of the matters referred.
 - (b) where the award is so indefinite as to be meapable of execution,
 - (c) where an objection to the legality of the award is apparent upon the face of it

References — Dhanjibhai Gudharbhai i Wathurbhai Ghilabhai, 28 B 287 [see notes to next clause] Mustafa Khan i Phulja Bibe. 27 A 526 [see notes to paris 20 21], Thereevenga Datheencar v Vaidanatha, 29 M 303 [award determining matters not referred]

- 15 (1) An award remuted under paragraph 14 becomes is 5

 Grounds for setting void on failure of the arbitrator or impire to 16 consider it. But no award shall be set 17 raide except on one of the following grounds, namely
 - (a) corruption or imsconduct of the arbitrator or unipire,
 - (b) either party having been guilty of fraudulent concenhient of any matter which he ought to have disclosed, or of wilfully misleading or deceiving the arbitrator or umpure,

(c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid

(2) Where an award becomes rord or is set aside under clause (1), the Court shall make an order superseding the arbitration and

in such case shall proceed with the suit

References - Dhanjibhai Gudharbhai v Mathurbhai Ghilabhai 28 B 287 [not sufficient merely to allege a ground under this or last clause it must also be proved], Kalı Charan Sırdar v Sarat Chunder Chowdhury 7 C W A 515, 30 C 397 ['misconduct" does not necessarily imply "corruption jurisdiction of Small Cause Court], Damodar Trimbak v. Raghunath Hari 4 Bom L R 267, 26 B 551 [order setting aside award is not subject to revision]. Ram Narain Roy v Baij Nath Malla, 29 C 36 [nusconduct of arbitrator] Nida Marthi Mukkanti v Thammana Ramayya, 26 M 76 [Munsiff acting as urbitiator], Asad ul lah v Muhammad Nur 27 A 459 [meaning of word "made "], Ganga Prasad v Kura 28 A 408 [no appeal from order setting aside award], but see Achuthayya v Thimmayya, 31 M 345 (1908) (contra), Walne Mathura Das v Ebji Umersey, 29 B 285 [see next clause], Nadcar Chand t Gobiud Chandar, 2 C L J 61 [misconduct], Behan Lal v Chunni Lal, 29 A 4.7 [misconduct], Aishabai v Essaji 15 Bom L R 392 (1913) [honest though mistaken admission of a document in evidence by umpire], Ganesh v Malida 13 C L J 399 (1911), Shrib Krishna v Satish 38 C 522 (1911), Haji threed v Essaji, 14 Bom L R 1007 (1912) [private enquiries by arbitrator] Amir Begam v Badr ud-din P C 19 C L J 495 (1914) [misconduct] Buccleugh v Metropolitan Board of Works 5 H L 418 (1872) [misconduct]

Judgment to be according to award for reconsideration in manner aforesaid and no application has been made to set aside the award, or the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall he from such decree except in so far is the decree is in excess of, or not in accordance with, the award

References—Shyum Chum Prumunk v Prohlid Durwan, 8 C W \ 290 [second apped hos from decree of Appellate Court made in accordace with an award by an arbitrator to whom the case had been referred by the first Court and whose award the first Court had set used.] Debundri Nath Chitterjee t Sarbomangala Debi 8 C W N 916 [moupped on ground of miconduct], Ghulum Edun v Muhammad Hii in 1 Bon L R 161, 34 167 6 C W N 226 [apped] Subbuth Iver t Subramana Ajir, 31 M 171

(1208). Caponey Money v. Ram Kinkar Dutt, 28 C. 115., 5 C. W. N. 242 [referees valuators not arbitraters], Indur Sabbarami i Kondadai. 26 M 17 (1 02) [sppeal] (not followed in Korakku Nagalings e Nigalings Naik, 32 M 510 (1 vs)), Gobardi an Das e Jan Kishore 22 A 224 (appeal). Par idh Narain Similar Grain vary Narain Singh 9 C W N 873 [appeal and second appeal lie fro ad e ce pa ed or award or reference net agreed to be all parties! Walke Mat a a Dis e Fbji Umersey, 29 B 255 [appeal]. Nadar Cland e Gobind Condar, 2 C L J of 65 [appeal] Sham Laft Miri Kunwar, 29 A 426 [app al], datingua ed in Bel ari Lale Chunni Lal, 29 A 1 of [appeal], Ran esh Casadra D ar r Karunamoy, Dutt 33 C 1's [appeal] Chauman of Purnea Managpahity v Siva Sunkar Ram, 33 C 893 [appeal], Janokey Nath Guha t Brojo Lall Gat a, 33 C 757 [c. clause 21] Abdul Tahir e Azmut Bibi 2 C L J 50 (want decree made in terms of, by Appellate Court if appealable) Clinta money r Haladhar, 10 C W N 601 (appeal) [See notes to clause 20] Shib Kri to v Satuh, 73 C 822 (1912), and see Rangoon Botatoung Co v Collector Rangoon (PC) 40 C 21 (1312) [appeal to Privs Council] Sur,a Noram r Bunwari Jha 18 C L J 35 (1913) [no appeal though validity of award a ailed]

Order J reservace on agrees exts to reser

17 (1) Where any persons agree in writing that any persons agreement agreement agreement persons agreement agreement before agreement to which the agreement persons agreement agreement persons agreement agreement persons agreement agreement agreement agreement persons agreement agree

(2) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or elaming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the parties, or, if otherwise, between the applicant as plaintiff and

the other parties as defendants

(.) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed.

(4) Where no sufficient cause is shown the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement or, if there is no such provision and the parties cannot agree the Court may appoint an arbitrator

References.—Perumalla Satya Marayana r Perumalla Venkata Rangayya, 27 M 112 - Wali Muhammad r Bahawal Baksh, 28 P R (1914), Jagan Math r

- (c) the award having been made after the issue of an order by the Court superseding the arbitration and proceeding with the suit or after the expiration of the period allowed by the Court, or being otherwise invalid.
- (2) Where an award becomes rord or is set aside under clause (1), the Court shall make an order superseding the arbitration and in such case shall proceed with the suit

References - Dhanjibhai Gudharbhai v Mathurbhai Ghilabhai, 28 B 287 [not sufficient merely to allege a ground under this or last clause it must also be proved], Kalı Charan Sırdar v Sarat Chunder Chowdhury 7 C W N 545, 30 C 397 ["misconduct" does not necessarily imply "corruption , jurisdiction of Small Cause Court], Damodar Trimbak v. Raghunath Hari 4 Bom L R 267, 26 B 551 [order setting aside award is not subject to revision], Ram Naram Roy v Bail Nath Malla, 29 C 36 [nusconduct of arbitrator] Nida Martha Mukkanta v Thammana Ramayya, 26 M 76 [Munsiff acting as arbitiator], Asad ul lah v Muhammad Nur, 27 A 459 [meaning of word "made "], Ganga Prasad v Kura, 28 A 403 [no appeal from order setting aside award], but see Achuthayya v Thimmayya, 31 M 345 (1903) (contra), Waljie Mathura Das v Ebji Umersey, 29 B 285 [see next clause], Nadcar Chand v Gobind Chandar, 2 C L J 61 [misconduct], Behari Lal v Chunni Lal, 29 A 457 [misconduct], Aishabai v Essaji, 15 Bom L R 392 (1913) [honest though mistaken admission of a document in evidence by umpire], Ganesh v Maluli 13 C L J 399 (1911), Shrib Krishna v Satish, 38 C 522 (1911), Haji thmed v Essay, 14 Bom L R 1007 (1912) fprivate enquiries by arbitrator] Amir Begam v Badr-ud-din, P C, 19 C L J 495 (1914) [misconduct] Buccleugh & Vetropolitan Board of Works, 5 H L 418 (1872) [musconduct]

Judgment to be according to award or any of the matters referred to arbitration for reconsideration in manner aforesuld and no application has been made to set aside the award, of the Court has refused such application, the Court shall, after the time for making such application has expired, proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall he from such decree except in so far as the decree is in excess of, or not in accordance with, the award

References—Shy ma Chuan Primanik v Prohlid Durwan, 8 C W 199 [second appeal has from decree of Appellite Court made in accordance with in award by an irbitrator to whom the case had been referred by the first Court and who a award the first Court had set aside.] Debinder With Chatterjee a Sarbomangala Debi, 8 C W N 916 [no appeal on ground of mi conduct], Ghallon Jelan v Muhammad Hu in 1 Bon L R 161, 2016 [no appeal], Subbuh Iver a Subramana Mar, 31 M 171

(1908), Chooney Money t Ram Kinkar Dutt, 28 C 115, 5 C W X 212 [referees valuators not arbitraters], Indur Subbarami t Kondadar, 26 M 17 (1.02) [appeal] [not followed in Konakku Nagaling i C Nigaling i Naik, 32 M 510 (1909)1. Gobardh in Dasa Jan Kishore, 22 A 221 [appeal], Parsidh Narain Singh r Ghanshyam Narain Singh, 9 C W X 873 [appeal and second appeal he from decree pa ed on award on reference net agreed to by all parties]; Willie Mat jury Dis t Ebn Umer ey, 29 B 285 [appeal], Nidiar Cland t Gobind Crandar, 2 C L J 61 65 [appeal], Shain Lal t Misri Kimwar, 29 A 126 [appeal], distinguished in Behari Lala Chunni Lal, 29 A 457 [appeal], Ramesh Clandra Di ar e Karunamove Dutt, 33 C 198 [appeal], Chauman of Purnea Municipality & Siya Sunkar Ram, 33 C 893 [appeal], Janokey Nath Gulia & Broto Lall Guha, 33 C 757 [ec clause 21] Abdul Tahir e Azmut Bibi 2 C L J 50 [award decree made in terms of, by Appellate Court if appealable]. Chinta money r Haladhar, 10 C W N 601 (appeal) [See notes to clause 20] Shib Kristo r. Satish, a) C. 822 (1912). and see Rangoon Botatoung Co. c. Collector Rangoon (PC) 10 C 21 (1912) [appeal to Privy Council] Surja Naram v Bunwari Jha, 18 C L J 35 (1913) [uo appeal, though validity of award assailed]

Order of reference on agreements to refer

Application to file in difference between them, shall be referred to difference between them, shall be referred to arbitration, the puttes to the agreement, or any of them, may apply to any Court having jurisdiction in the matter to which the agreement relates, that the agreement be filed in Court

(!) The application shall be in writing and shall be numbered and registered as a suit between one or more of the parties interested or claiming to be interested as plaintiff or plaintiffs, and the others or other of them as defendants or defendant, if the application has been presented by all the patties, or, if otherwise, between the applicant as plaintiff and

the other parties as defendants

(3) On such application being made, the Court shall direct notice thereof to be given to all the parties to the agreement, other than the applicants, requiring such parties to show cause, within the time specified in the notice, why the agreement should not be filed

(i) Where no sufficient cause is shown, the Court shall order the agreement to be filed, and shall make an order of reference to the arbitrator appointed in accordance with the provisions of the agreement, or, if there is no such provision and the parties cannot agree, the Court may appoint an arbitrator

References —Perumalla Satya Narayana v Perumalla Venkata Rangayya, 27 M 112 - Wali Muhammad v Bahawal Baksh, 28 P R (1914), Jagan Nath t

Nanuk Chand, 9 P R (1913), Dutta v Khedu, 33 A 615 (1911), Ghulam Khan v Muhammad Hassan, P C, 29 C 167 (1902), Venkatachala Reddi t Ringiah Reddi, 36 U 353 (1911) [order filing an agreement to arbitrate is a decree and appealable] [See seet 104 (d)] See also Surya Narayan Raot Surbuth, 21 W L J 263 (1911), Thruvengada Thiengar t Vaidmatha dyyar, 29 W 303 (1906) [death of one of parties—application by legal representative], Tin Coury Dey v Fakir Chand Dey, 30 C 218 [agreement to refer not in writing—agreement in pending suit], Sheo Dalv Sheo Shankar Singh, 27 A 33 [agreement to refer made pending suit—such agreement a bur to continuance of suit]

18 Where any party to any agreement to refer to arbitration, or any person claiming under him, institutes Stay of surt where there is an agreement any suit against any other party to the agree to refer to arbitration ment, or any person claiming under him, in respect of any matter agreed to be referred, any party to such suit may, at the earliest possible opportunity and in all cases where issues are settled at or before such settlement, apply to the Court to stay the surt, and the Court, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the agreement to refer to arbitration, and that the applicant was, at the time when the suit was instituted and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staining the suit

Provisions applicable with any agreement filed under paragraph I. shall be applicable to all proceedings under the order of reference made by the Court under that paragraph, and to the award and to the decice

following thereon

Arbitration without the intercention of a Court

20 (1) Where any matter has been referred to arbitration without the intervention of a Court, and any willboart intervention of any person willboart intervention of court having jurisdiction over the subject

matter of the award that the award be filed in Court

(*) The application shall be in writing and shall be numbered and resistered as a sint between the applicant is pluntiff and the other parties as defendants

() The Court shall direct notice to be given to the parties to the arbitration other than the applicant, requiring them to

show cause, within a time specified, why the award should not be filed.

References.-Mahomed Wahiduddin v Hakimau, 29 C 278 [objection to validity of reference], Macnaghten v Rameshwar Sing, 30 C 831 [valuation not an award], Seshayya v Chengayya, 24 M 31 [award relating to property partly outside jurisdiction]. Ghulam Jilam v Muhammad, 6 C W N 226 scheme of Code: referred to in Kunji Lal v Durga Prasad 32 A 484 (1910)]. Narsing Das v Ajodhya Prasad, 31 C 203 [the words in the former section "the matter to which the award relates ' refer to the subject matter of the arbitration and not the matters actually awarded], Mohes Chunder v Amar Chand, 19 C L J 260 (1913), Gauri Shankar v Maida Koer, 31 C 516 [withdrawil of application], Ponnusami Mudah v Mandi Sandara, 27 M 255 [appeal, revision], Kalika Ram v Babu Lal, 26 B 205 [appeal], Mustafa Khan v Phulja Bibi, 27 A 526 [no power to amend or remut], distinguished in Bahadur Singh v Nagipuran, 30 A 151 (1908), Thiruvengadathiengar v Vaidinatha, 29 M 305 forder on application is decree and appealable, see next clause], Chintamoney v Haladhar, 10 C W N 601 [appeal, distinction between cases when application to file award is allowed and when it is refused]. Nam ud din Ahmad v Albert Puech, 29 A 581 [decree on award made without allowing time to file objections-appeal], Bhajahari Saha v Behary Lal Basik 33 C 881 fa valid award is operative though neither party has sought to enforce it], Tek Lal Singh v Sripati, 19 C L J 123 (1913). Basant Lal v Kanye Lal, 28 A 2! [order refusing to file award, appeal], Gaucsh Singh v Kashi Singh 28 A 621 Jurisdiction of Court to decide is to validity of reference and see Manilal v Vanmali Das, 29 B 621], Abdul the Anwar th, 11 C W N 220 [appeal], Raghavendra & Gururao, 15 Bom L R 362 (1913) [scope of clause], Ramdhart v Ram Charitter 38 C 143 (1910) frejection of application out of Court], Narsingh v Ajodhya 16 C W N 256 (1911), 15 C L J 110 [filing award in part], Muhammad Ibrihim v Ahmad Said, 32 A 503 (1910), Nagendra : Harendra 16 C W N 34 (1911), Dhanpat Rai v Musst Kahan Devi, 30 P R 109 (1914). Thiruxin adathiengar t Vaidinatha Ayyar, 29 M 303 (1905) [award determining matters not referred] See cases cited under clause 16, ante

21 (1) Where the Court is satisfied that the matter has been is Filing and enforcenent of such award made thereon and there no ground such is is mentioned or referred to in paragraph 14 or paragraph 15 is proved, the Court shill order the award to be filed and shall proceed to pronounce judgment according to the award.

(2) Upon the judgment so pronounced a decree shall follow, and no appeal shall he from such decree except in so far as the decree is in excess of or not in accordance with the award

References.—Protap Chundar Dey t Tool ev Da a Dey, 23 C 93 [section of Code applicable to arbitrations in usual]. Gobardhan Da sat Jai Ka hen Da ,

23 A 224 [appeal uuduc influence-coercion], Gridharbhai v Mathurbhai Ghilabhai, 28 B 287 [proof of allegations against award], Mustafa Khan v Phulpa Bibi, 27 A 526 [in last clause], Janokey Nath Guha v Brojo Lal Guha

33 C 757 [appeal hes from order directing award to be filed] Ahdul Tahir i Lemut Bibi, 2 C L J 88 [order refusing to file award is a decree] Chintamonev v Huladhar, 10 C W N 601 [see clruse 20], Abdul Ali v Anwar Ali 11 C W A 220 [ibid], Ganesl v Walida, 13 C L J 399 (1911) [order made under this

clause is appealable under sect 104 cl (f)] Dhanpat Rai v Musst Kahan Devi o0 P R 109 (1914), Bhagat Ram v Pares Ram 81 P R (1907)

The last thirty seven words of section 21 of the Specific 22 Relief Act, 1877, shall not apply to any agree Exclusion of certain words in the Specific ment to refer to arbitration, or to any award, Relief Act 1877 to which the provisions of this schedule apply

The forms set forth in the Appendix, with such rana trons as the circumstances of each case require, Forms shall be used for the respective purposes therein

mentioned

APPENDIX

No. I.

APPLICATION FOR AN ORDER OF RESPRENCE.

(Title of suit.)

1. This suit is instituted for (state nature of claim)

2. The matter in difference between the parties is (state matter if difference).

3. The applicants being all the parties interested have agreed that the matter in

difference between them shall be referred to arbitration.

4 The applicants therefore apply for an order of reference,

.1 I

Dated the

I the day of 19

Norm-If the partice are agreed as to the arbitrators it should be so stitted

No 2

Order of Reference

(Title of suit,)

Upon reading the application presented on the day of it is ordered that the following matter in difference arising in this suit, mainly —

be referred for determination to X and Y or in case of their not agreeing then to the

. . .

19

Liberty to apply
Given under my hand and the scal of the Court, this day of

Judge.

No 3

ORDER FOR APPOINTMENT OF NEW ALBITI 1701

(Title of suit)

Whereas by an order, dated the day of 19 [state order of reference and death, refueal, etc., of arbitrator], it is by consist noticed that Z be appointed in the place of X (deceased, or as the case may be) to act as arbitrator with Y, the surviving arbitrator, under the said order, and it is ordered that the award of the said arbitrators be made on or before the day of 19

GIVEN under my hand and the seal of the Court, this day of

 $Judge_{\bullet}$

SLECIAL CASL

the following specie (I The questions	il case is stated : <i>Iere state the facts</i> of law for the o	for the opinion concisely in nur pinion of the Co	of und C 1 of the Court — nbered paragraphs]) of
Secondly whet	her			
Dated tl c	day of	19		Y
		No 5 AWARD		
Werent	day of	etween A B of ler of reference 1	nade by the Court of the following matter	m differen
We award—	g duly considere	d the matter re	ferred to us, do here	by make o
• •				
	day of	19		\ Y

THE THIRD SCHEDULE.

EXECUTION OF DECREES BY COLLECTORS.

Where the execution of a decree has been transferred in to the Collector under section 65, he may-

Powers of Collector. (a) proceed as the Court would proceed when the sale of immoreable property is postponed in

order to enable the judgment debtor to raise the amount

of the decree: or (b) raise the amount of the decree by letting in perpetuity, or for a term, on payment of a premium, or by mortgaging, the whole or any part of the property ordered to be sold; or

(c) sell the property ordered to be sold or so much thereof

as may be necessary.

This schedule deals with the functions of the Collector as the authority invested with jurisdiction to see that the decree is satisfied. The authority is given for the purpose of enabling him to determine the best mode of satisfying the decree But his discretion does not extend to any jurisdiction to determine whether the decree has been satisfied or not (1)

Where the execution of a decree, not being a decree is Procedure of Collector ordering the sale of minoveable property in pursuance of a contract specifically affecting in special cases the same, but being a decree for the payment of money in satisfaction of which the Court has ordered the sale of immoveable property, has been so transferred, the Collector, if, after such inquiry as he thinks necessary, he has reason to beheve that all the habilities of the judgment-debtor can be discharged without a sale of the whole of his available immoveable property, may proceed as heremafter provided.

"Powers."--The Collector, it has been held, is limited to one or other of the courses specifically mentioned in the section (2)

⁽¹⁾ Bhurchand v Vira, 14 Bom L R 787 (2) Madhavji Karandikar v. Hari Chikne, (1912); 37 B 32 7 B 332 (1983)

(1) In any such case as is referred to in paragraph 2, AΊ

the Collector shall publish a notice, allowing Notice to be given to a period of sixty days from the date of its decree-holders and to persons having claims publication for compliance and calling uponon property. (a) every person holding a decree for the

payment of money against the judgment-debtor eapable of execution by sale of his immoveable property and which such decree-holder desires to have so executed, and every holder of a decree for the payment of money in execution of which proceedings for the sale of such property are pending, to produce before the Collector a copy of the decree, and a certificate from the Court which passed or is executing the same, declaring the amount ie coverable thereunder.

(b) every person having any claim on the said property to submut to the Collector a statement of such claim, and to produce the documents (if any) by which it

is evidenced

(4) Such notice shall be published by being affixed on a conspicuous part of the court house of the Court which made the original order for sale, and in such other places (if any) as the Collector thinks fit, and where the address of any such decree holder or claimant is known, a copy of the notice shall be sent to him by post or otherwise

(1) Upon the expiration of the said period, the Col Βl Amount of decrees for lector shall appoint a day for hearing any representations which the indgment debtor payment of money to be ascertained, and immoveand the deeree holders or claimants (if any) able property available may desire to make, and for holding such in for their satisfaction.

quity as he may deem necessary for informing himself as to the nature and extent of such decrees and claims and of the judg ment debtor's immoveable property, and may, from time to time,

adjourn such hearing and inquity

() Where there is no dispute as to the fact or extent of the hability of the judgment-debtor to any of the decrees or claims of which the Collector is informed, or as to the iclative priorities of such decrees or claims, or as to the hability of any such property for the satisfaction of such decrees or clums, the Collector shall draw up a statement, specifying the amount to be recovered for the discharge of such decrees, the order in which such decrees and claims are to be satisfied, and the immoreable property as alable for that purpose.

(3) Where any such dispute arises, the Collector shall refer the same, with a statement thereof and his own opinion thereon, to the Court which made the original order for sale, and shall, pending the reference, stay proceedings relating to the subject thereof. The Court shall dispose of the dispute if the matter thereof is within its jurisdiction, or transmit the case to a competent Court for disposal, and the final decision shall be communicated to the Collector, who shall then draw up a statement as above provided in accordance with such decision

Amount of decrees to be ascertained and property available for their satisfaction—It was held that the assignees of a decree for money obtained against a person whose property had been taken over by the Collector under sect 326, Act X of 1877, whilst such property was under the management of the Collector, were not entitled to be placed on the list of creditors prepared by the Collector under sect 322n of the last Code. An application to be placed on the said list of creditors should be made to the Collector and not to the District Judge (1). An appeal from a decision under this section by which a disputed chim is settled has, in Madras, been treated as a miscellaneous appeal, i.e. an appeal from a decision under this section by which a disputed chim is settled has, in Madras, been treated as a miscellaneous appeal, i.e. an appeal from a decree not passed in a regular suit (2).

5 The Collector may, instead of himself issuing the notices and holding the inquiry required by paramy issue notices and may listed notices and holding the inquiry required by paramy ingulary.

and of his immoveable property so far as they are known to the Collector or appear in the records of his office, and forward such statement to the District Court, and such Court shall thereupon issue the notices, hold the inquiry and draw up the statement required by paragraphs and i and truismit such statement to the Collector

Issue of notice and inquiry by District Court - Under the Bengal North-West Provinces and Assau Civil Courts Act 1887, the High Court has power to authorize Subordiente Judges and Muneiffs to take cognizance of references by Collectors under sect 322c of the former Code (Act XII of 1887 sect 23 (2) (c))

6 The decision by the Court of any dispute arising under is Effect of decision of parograph i or paragraph 7 shall, as between court as to dispute the parties thereto, have the force of and be appealable as a decree

⁽¹⁾ Muran Das v Cellector of Gharipur, 18 t 313 (1890) (2) Simitass v Pena, 4 V 420 (1882)

referred to in Naravan r Bhagyant, 10 B. -38 (1886), dies, from Ahmad Khan e Vadho 7 A #5 (1881)

Effect of decision.—As to the nature of the appeal, and the Court fee duty payable, see the cases cited in the notes to parigraph 4

5 (1) Where the amount to be recovered and the property available have been determined as provided in paragraph in paragra

(a) if it appears that the amount cannot be recovered without the sale of the whole of the property available, proceed

to sell such property, or,

(b) if it appears that the amount with interest (if any) in accordance with the decree, and, when not decreed, with interest (if any) at such rate as he thinks reasonable, may be recovered without such sale, raise such amount and interest (notwithstanding

the original order for sale)—
(i) by letting in perpetuity or for a term, on payment of a premium, the whole or any part of the said

property, or

property, or
(12) by mortgaging the whole or any part of such
property, or

(111) by selling part of such property, or

(10) by letting on farm, or managing by himself or another, the whole or any part of such property for any term not exceeding twenty years from the date of the order of sale, or

(v) partly by one of such modes, and partly by another

or others of such modes

(2) For the purpose of managing the whole or any part of such property, the Collector may exercise all the

powers of its owner.

(3) For the purpose of improving the saleable value of the property available or any part thereof, or rendering it more suitable for letting or managing, or for preserving the property from sale in satisfaction of an incumbrance, the Collector may discharge the claim of any membrance which has become payable or compound the claim of any membrance whether it has become payable or not, and, for the purpose of providing funds to effect such discharge or composition, may mortgage, let or sell any portion of the property which he deems sufficient. If any dispute arises as to the amount due on any membrance with which the Collector proposes to deal

under this dause, he may institute a suit in the proper Court, either in his own name or the name of the indigment debtor, to have an account taken, or he may agree to refer such dispute to the decision of two arbitrators, one to be chosen by each party, or of an unmile to be named by such arhitrators.

(i) In proceeding under this paragraph the Collector shall be subject to such rules consistent with this Act as may, from time to tune, be made in this hehalf by the Local Goternment.

Liquidation of money decree —With regard to the rules referred to in last paragraph, see N W P hat of Local Rules and Orders, ed. 1891, p. 112.

Burmah Rules Manuel, ed. 1897, p. 114. Contral Provinces Last of Local Rules and Orders, ed. 1896, p. 15 (I). In the case of the Central Provinces the nonfictions are also such under seet 3.0 of the last Code —As for interest to be taken into account see Burchind e. Airi 11 Bom. L. R. 787 (1912), 37 B. 32. It has been held that the powers here conferred on the Collector and those conferred on the Tipukdari Settlement others by seet. 3 of the Bombay Talukdari Settlement left are both enabling and are not necessarily contradictors (2).

- 8 lVhcre, on the expiration of the letting or manageResoury et balance (if any) after letting or ment under paragraph? the amount to be
 (if any) after letting or recovered has not been realized, the Collector shall notify the fact in writing to the judgment-debtor or his representative in interest, stating at the same
 time that, if the balance necessary to make up the said amount is not p nd to the Collector within six weeks from the date of such notice, he will proceed to sell the whole or a sufficient part of the said property, and, if on the expiration of the said six weeks the said balance is not so paid, the Collector shall sell such property or part accordingly.
- 9 (1) The Collector shall, from time to time, render to is a collector to render the Court which made the original order for accounts of all monies which come to his hands and of all charges mentred by him in the exercise and performance of the powers and duties conferred and imposed on him under the provisions of this Schedule, and shall hold the halance at the disposal of the Court

(?) Such charges shall include all debts and habitites from time to time due to the Government in respect of the property or any part thereof, the rent (if any) from time to time due to a

⁽¹⁾ O Kinealy, C P C

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superior holder in respect of such property or part, and, if the Collector so directs, the expenses of any witnesses summoned by him

() The balance shall be applied by the Court-

(a) in providing for the maintenance of such members of the judgment debtor's family (if any) as are entitled to be maintained out of the income of the property, to such amount in the case of each member as the Court thinks fit; and

(b) where the Collector has proceeded under paragraph 1, in satisfaction of the original decree in execution of which the Court ordered the sale of immoveable property, or otherwise as the Court may under section 73 direct,

(c) where the Collector has proceeded under paragraph 2,—
(i) in keeping down the interest on incumbrances on the

property, (11) where the judgment-debtor has no other sufficient means of subsistence, in providing for his subsistence to such amount as the Court thinks fit, and

(iii) in discharging lateably the claims of the original decree-holder and any other decree holders who have complied with the said notice, and whose claims were included in the amount ordered to be becomined.

(1) No other holder of a decree for the payment of mones shall be entitled to be paid out of such property or bilance until the decree holders who have obtained such order have heen satisfied and the residue (if any) shall be paid to the judgment debtor or such other person as the Court directs.

Reference Govind & Sikharam 36 B 519 (1911), 14 Be a L. P. 6-7 [at the disposal of the Court]

10 Where the Collector sells any property in der the Sales how to be conducted

Solic how to be conducted

m one or more lots as he thinks ht at dir we

(a) hy a reasonable reserved price for evil 1.

(b) adjourn the for a reasonable recorded, he do necessary for the adjoint of the leaves of the purpose of the grafier of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the control of the leaves the leaves the control of the leavest the leaves the leaves the leaves the leaves the

(c) buy in the 1 offered for sale I the one by public or private cor

11. (1) So long as the Collector can exercise or perform (a

Restrictions as to alternation by judgmentdebtor or his representative, and prosecution of remedies by decreebolders. in respect of the judgment-dehtor's immoveable property, or any part thereof, any of the powers or duties conferred or imposed on him by paragraphs 1 to 10, the judgment-debtor or his representative in interest shall be

or his representative in interest shall be incompetent to mortgage, charge, lease or alienate such property or part except with the written permission of the Collector, nor shall any Civil Court issue any process against such property or part in execution of a decree for the payment of money.

(2) During the same period no Civil Court shall issue any process of execution either against the judgment-debtor or his property in respect of any decree for the satisfaction whereof provision has been made by the Collector under paragraph?

(2) The same period shall be excluded in calculating the period of limitation applicable to the execution of any decree affected by the provisions of this paragraph in respect of any remedy of which the decree holder has been temporarily deprived.

Object of section — is to the object of this section and the exclusion from computation of the time during which the property is under the management of the Collector see case noted below (1)

- 12. Where the property of which the sale has been [5,1]
 Provision where property is in several dislifets on the Collector by paragraphs 1 to 10 shall
 be exercised and performed by such one of the Collectors of the
 said districts as the Local Government may by general tule or
 special order direct
- 13 In exercising the powers conferred on him by para-[s.:

 Powers of Collector to graphs 1 to 10 the Collector shall have the compel alreadance and powers of a Civil Court to compel the attend ance of parties and witnesses and the production

tion of documents

⁽¹⁾ heshav Lai r Pitamber Dav. 19 B (1910) (meaning of alrenate), and see 261, 265 266 (1891) Magnitam r Falubai, also Khushalchvad r Nandram, 35 B 510 (1912) 14 Bom J. R 599 and 2111) (collector's powers cease will satisfac see Vulnammad r Vulnamund, 33 A 23 too of decree)

THE FOURTH SCHEDULE.

(See Section 155)

ENACTMENTS AMENDED

1	,		
-	-	3	
l car	No.	hort title	Amendment
1870	· VII	The Court fees Act 1870	In article 1 of Schedule I, after the wo "plant" the words "written stateme pleading a set off or counter claim" and afti- the word "Act" the words "or of cros- objection" shall be inserted
			From article II of Schedule II the words "from an order rejecting a plaint or" shall be omitted
			For the entry in the first column of Schedule II relating to article 10 the following entry shall be substituted, namely —
ļ I			"Agreement in writing stating a question for the opinion of the Court under the Code of Civil Procedure, 1908"

THE FIFTH SCHEDULE

(See Section 156)

LNACTMENTS REPEALED

1	2	3	4						
1 car	10	Subject or short title	Extert of repeal						
-		Acts of the Governo	r General in Council						
1870	VII	The Court fees Act, 1870	Section 16 and article 15 c						
1882	IV	The Iransfer of Property Act, 1882	Scetions 85 to 90 inclusive, 92 to 94 inclusive, 90, 97, 99 and in section 100 the worlds "and all the provisions hereinbefore contained as to a mortgage instituting a suit for the sale of the mortgaged property						
	NΙV	The Code of Civil Procedure	The whole Act.						
**	xv	The Presidency Small Cause Courts Act, 1882	The last paragraph of section 3						
1888	17	The Debters Act, 1888	Sections 2 to 8						
"	VII	The Civil Procedure Code Amend ment Act, 1838	So much as is unrepealed, except section I, section 65 and section 68 sub sections (I), (3) and (4)						
•	`	The Presidency Small Cause Courts Law Amendment Act, 1888	So much as a unrepealed						
1890	VIII	The Guardian and Wards Act, 1890	Section 53						
1891	ΛII	The Repealing and Amending Act, 1891	So much as relates to Act AlV of 1882 and Act VII of 1888						
1892	V1	The Indian Limitation Act and Civil Procedure Code Amend ment Act, 1892	In the title and preamble the words and the Code of Civil Procedure and sections 2, 3 and 4						
1894	v	The Civil Procedure Code Amend ment Act, 1894	The who'e Act						
1895	V11	The Punjab Laus Act Amend ment Act, 1895	Sections 1 and 2						
•	XIII	The Civil Procedure Code Amend ment Act, 1895	The whole Act						
1900	Vl	The Lower Burma Courts Act, 1900	So much of the schedules as relate to Act XIV of 1882						

APPENDIX A

INDIA

ORDERS, ETC., OF THE GOVERNOR GEVERAL, Under the Code of Civil Procedure, Corrected up to June, 1914

00111110124	- 10 001111, 1011	
Subject Declaration under Section 650A of the Code (Act AIV of 1882) as to service of summons of Mysore Courts by Courts in British India	Date, 25 11 81	Year and page of India Gazette Part I 1881 p 589
Ditto of Hyderabad Courts	No 752, I B Date, 17 3 99	1899 p 153
Ditto of Courts in certain Tributary States	No 2806, I B Date 10 7 08 No 3266, I B Date 12 8 08	1908, p 610 1908, p 774
Declaration under Section 29 of the Code (Act V of 1908) as to service of summons of certain Courts in the Benares State by Courts in British India	Date, 30 6 11	1911, p 490
Dulto of Courts in certain States named	No 1344, I B Dale 30 6 11	1911, p 491
Application of Section 650A of the Code (Act AIV of 1882) to the Court of Political Agenl, Sholapui	No 3491 I B Date 15 10 85	1885 p 584
Ditto to certain Courts named	No 2417, I Date 31 5 87 No 327 1 C Date, J1 1 07	1887, p 256 1)07, p 74
Ditto to certain Pappipla Com18	No 4313 I A Date, 22 11 97	18 17, p 1061
Cooling Dang and pane, I taken a since	No 3035, I A. Date, 16 8 91 No 879 I A Date 28 2 92	1901, p 82. 1902, p 171
Application of Section 650A of the Code (Act NIV of 1882) to certain Courts in Triviance in	No 12) [1 Date R [1 0]	1 ml, p 177

Application of Section 29 of the Code (Act V of 1908) to Courts in the Strats Settlement and Ceylon	Number and date No 214 Date, 16 2 09	Year and page of India Gazette, Part I 1909, p 152.
Ditto to Courts in France, Spain, Bel gium, Russia, Germany, and Portugal	No 852, C Date, 3 2 13	1913, p 102
Ditto to certain Courts named and service of summons of Courts in British India by such Courts		1912, p 349 1912, p 1618 1913, p 233 1913, p 329 1911, p 321
Declaration under Section 434 of the Code (Act X of 1877) as to execution of decrees of Courts in Cooch Behar by Courts in British India	No 53, I' Date 7 3 79	1870 p I49
Datto of Courts in Mysore	No 233 I F Date 25 11 81	1581, I 589
Doclaration under Section 229B of the Code (Act NIV of 1882) as to execution of decrees of Courts in Travancoro by Courts in British India	No 4035 1 Date, 10 12 85	1885, p 667
Datto of Courts in Cochin-	No 4036, I Date, 10 12 85	1885, p 667
Ditto of Chief Court of Padukottai	No 4395, J A Date 8 12 04	1904 р 917
Ditto of Civil Courts in Baroda	No 2684 I A Date, J 7 08	1908, p 591
Declaration under Section 220B of the Code (Act XIV of 1882) of certain Courts in Native States	\times 2877,1 \text{ L} \text{ Date, 13 7 06} \text{ No 3101 I A} \text{ Date, 24 8 08} \text{ No 4128 1 B} \text{ Date, 24 8 08} \text{ No 639, 1 B} \text{ Date, 14 09} \text{ No 639, 1 B} \text{ Date, 15 2 12} \text{ No 638, 1 B} \text{ Date, 3 4 13}	1906 p 472 1908, p 805 1909 p 21 1909, p 256 1912 p 136 1913, p 329
Declaration under Section 44 of the Code (Act V of 1908) as to execution of decrees of certain Courts in Benaria State by Courts in British India	No 1341, I B Dute, 30 6 11.	1911, p 490

Subject	Yumber and date	Year and ia e of India Gazette Tart I
Notification under Section 45 of the Code	No 2053, I B Date, 22 9 11 No 1147, I B	1911, p 782
(Act V of 1908) as to execution o decrees of Courts in British India by	f Date, 23 5 12	1912, p 591
Courts in territories named	Date, 17 3 13 No 688, I B	1913, p 234
	Date, 3 4 13	1913, p 329
Ditto by Courts named	No 790, I B Date, 9 4 13	1913, p 590
Application of Section 45 of the Code (Act V of 1908) to the Court of the Political Officer in Sikkim	No 789, I B Dite, 9 4 13	1913, p 390
Ditto to certain Courts specified and service of summons of Courts in British India by such Courts		1913, p 386
That's by saca equita	Date, 9 1 13 No 3287, I B	1913, р 388
	(Date, 3 10 13 No 788, I B	1913, p 90a
	Date, 9 4 13	191J, p 390
Dictar tion under Section 60 of the Code (Act V of 1908) of exemption from attachment or sale of stipends and gratuities of certain family pension funds.	No 1 Date, 1 1 00	190Ј, р о
Deligation under Section 433 (4) of the Code (Act XIV of 1882) of functions conferred on the Governor General in Council by Sub Sections (1), (2), and (3) thereof	No 1503, I Date, 8 5 96	1896, p 322
Ditto under Section 86 (4) of the Code (Act V of 1908) of functions conferred by Sub Sections (1), (2), and (3) thereof	Ao 749 1 B Date, 27 3 12	1912 , p 38)
Declaration under O V, 1 26 (h) of the Code (Act V of 1908) as to service of summons of Courts in British India by Courts in the K shinit State	No 2302, I B Date, 23 11 10	1910, p 1163
	No 145 1 B Date, 30 6 H	1511, p 492
	No 1037, 1 R Date, 9 5 12	1312, p. 510
Ditto by certain Courts of the Benaria	No 92+ 1 B Date 3 1 13	1913, p 1-0.

Direction under O AM, r 18 (1) of the Code (Act V of 1998) is to service of notice of attachment of salary or allowance of persons employed in the Indian Releggia Department and in the Post Office of India	Nut ber and late No. 3371-95 Date, 5-5-10	le lla Gazette Part I 1910, p. 565
Ditto, of persons employed in the High Court, Calcutta, in the Homo Depart- ment of the Government of India and in offices subordinate to that Depart ment.	No 1662 Date, 29 11 10	1910, p 1159
Ditto, of persons employed in the Finance Department of the Government of India and in offices subordin ito thereto.	(No. 1153, 1 Date, 24, 2, 11 No. 657, A Date, 15, 10, 12	1911, p 126. 1912, p 1150.
Ditto of others employed under the order of the Militury Secretary to 11 E the Victory	No. 792 Date, 25-5-11	1911, p 361.
Ditto of persons any loved in the others of Government 1 x ammers of Radway Accounts	No 6 17, A Date, 1 : 10 12	1912, p 1150.
Ditto of persons employed in the others of the Accountant General, Belair and Orissa, and the Comptroller Assam	\0 619 \ Date 17 6 IJ	1913, p 617

APPENDIX B.

BENGAL.

Orders, Ltd, of the Bengal Government and the High Couet, Calcut's Under the Code of Civil Procedure,

CORRECTED UP TO JUNE, 1914

Declaration under Section 55 (2) of the Code (Act V of 1908) that no employee of the Telegraph Department shall be hable to arrest in execution of a decree unless seven days' notice has been given.	Lear and page of Calcutta Gazette, Part 1 1910, p 989
Rule under Section 327 of the Code No. 3880 (Act XIV of 1882) for regulating the Date, 5 10. 96 sale of land in execution of decrees (Sambalpur District)	Central Provinces Revenue Manual, 1907, Vol. III, Circular No IV9, p. 76.
Declaration under Section 320 of the Code No 4577. (Act X of 1877) that execution of decrees Date, 26 11 77. In certain cases shall be transferred to the Deputy Commissioner, Sambalpur District	Ditto
Rules under Section 223 of the Code (dot. No. 3158 XIV of 1882) for carrying out the pro- Date, 27-5-01. Vision of that Section	Ditto pp 77 to 81.
General rules units Section 122 of the Code (Act V of 1908) as to procedure.	See Rules of the High Court, Cd cutta, Appellate Side, 1910.
Amendments in the above rules. No , nil Date, 27, 1-11	1911, pp. 120, 295
Rules under Sections 122 and 128 (b) of the Code (Act V of 1908) rel · · · to the Judicial business of Civil sub- ordinate to the High Court	of High Court Rules of Orders, Ap- liste Side, Civil, 40, Vol. I.
Revised rule 26 for th. for No, mf Sections 122 and 128 (b) for Date, 21, 2, 11, (Act V of 1998) relating to bu (Cred Courts of the Cred C	, p J16.
	-

Subject Declaration under Section 045 of the Code (Act XIV of 1882) that Uriya is the Court language in the Sambalpur Dis- trict.	Number and date No 10967. Date, 10 12 02	Year and page of Calcutta Gazette, Part I Central Provinces Gazette, 1902, Part III, p 503
Notification under Section 185A (1) of the Code (Act XIV of 1882) as to Judges who shall take down vudence with their own hands in the English language	No , ml. Date, 26, 11 92 No 1174, J. D. Date, 7 6 07. No. 4338 Date, 21 12, 08	1892, p 1063 1907, p 1012 1908, p 2005
Ditto . under Section 138 (1) of the Code (Act V of 1908) as to Ditto	No 76, J Date, 9, 1 13	1913, p 68
Empowering District Judges to appoint Commissioners to take affidurits (ende Section 139 (c) of the Code (Act V of 1908))	No. 2000, J D Date, 16 7 09	1909, p 1003
Direction under O XXI, r 48 (1) of the Code (Act V of 1908) as to service of notice of order attaching the salary or allowances of public officers and of servants of local authorities	No 2947, J Date, 6 10 11	1911, p 1405
Rules under O AXVI, r 9, prov of the Code (Act V of 1908) as to the persons	No 2004, J Date, 16 7 09	1909, p 1003
to whom Commissions shall be issued	No 3157, J Date, 25 11 09 No 1336, J	1909, p 1729
	Date, 1 5 11	1911, p 668
Rules under O XXVI, r 9, prov of the Code (Act V of 1908) as to the persons by whom local investigations are to be held	No 2001, J Date, 16 7 09 No 2742, J Date, 7 10 09	1909, p 1003 1909, p 1390
Rules of practice for the Original Side of the High Court (tide Section 129 of the	No , ml Date 14 2 14	1914 Put II p 305

ANNUMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE LIBST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, CALCUTTA

Code (let V of 1908))

ine Carcutta Gazette 1910, Part L. P 1314

HIGH COURT NOTICE.

Notification.

The following Rule having been framed by the High Court of Judicature at Fort William in Bengal in the exercise of the power vested in it by section 122 of the Code THE CODE OF CIVIL PROCEDURE

of Civil Procedure, 1908 (Act V of 1908), and sanctioned by the Governor General in Council under section 126 of the same Code, is published for general information By order of the High Court,

R L Ross, Requstrar

High Court, English Dept (Civil), the 21st September, 1910.

1490

Rule No * of 1910.

In the form of "Decree in Appeal, No. 9 of Appendix G to the First Schedule of the Code of Civil Procedure, 1908 (Act V of 1908), cancel the words from "Memorandum of Appeal" to "the following reasons, namely -"

* There is no number given in the Gazette

APPENDIX C.

MADRAS

ORDERS, ETC OF THE MADRAS GOVERNMENT AND THE HIGH COURT, MADRAS, UNDER THE CODE OF CIVIL PROCEDURE. CORRECTED UP TO DECEMBER, 1914

bul ject

General rules of procedure under Part X of the Code (Act V of 1998)		See the Rules of the High Court, Madras, Appellate Side, 1902, and The Civil Rules of Practice, Madras, 1905
Substituting new rule for rule No 531	No 1422	
of the Rules of the High Court, Madras, A. S., 1902	Date, 16 12 09	1909, p 1791
Adding new rule 164 to the above rules	Ditto	Ditto
Substituting new rule for rule No. 277 of the Civil Rules of Practice, Mudras, 1905	Ditto	Ditto
Amending Rule 192 (1) of above (will Rules	Date, 3 3 11	1911, p 471
Amending Rule 53 of above Civil Rules	Date, 18 7 12	1912, p 1142
Amending Rule 149 of above Civil Rules	Date, 6 12 13	1913, p 2072
Amending Rules 13 and 99 of above Civil Rules	Date, 21 3 14	1914, p 679
Adding new rules 100B and 100C to the Rules of the High Court, Madras, A. S, 1902	Date, 13 3 11	1911, p 536
Ditto to the Schedule of rates in Rule 102 of Ditto	Ditto	Ditto

Subject Subjec

ANNULMENTS, ALCEBRATIONS AND ADDITIONS TO THE RULES IN THE FIRST SCHEDULE OF THE CODE MADE BY THE HIGH COURT, MADEAS

FORT ST GEORGE GAZETTE.

1910, PART II , P 876

Notification dated 19th May, 1910

Under the provisions of section 127 of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the following amendment has been made to clause 4 of Rule 3 of Order XXXII of Schedule I to the Code of Civil Procedure, 1908.—

Omit the words "to the minor and occurring after the words "except upon

A DAVIES, Deputy Regi trar

High Court of Judicature, Mulras 19th May, 1910

IORT ST GEORGE GAZETTF.

1910, Puit H , r 1825.

Notrfication

Under the provisions of Pirt \ of the Code of Civil Procedure, 1903 and with the previous sanction of His Lycelleney the Governor in Council, the High Court I'vide the following rule, which is to be inserted as sub-rule (1-A) of Rule 7 of Order XXXII of Schedule I of the said Code, and framed the following form, which is to be added to Appendix D to the said Schedule as Form Ro 24, viz.

t'ute - '(1 1)-Where an application is made to the Court for leave to enter int an agreement or compromise or for withdrawal of a suit in pursuance of a cort from o or for taking inv other action on behalf of a minor or other person in der disability and such minor or other person under disability is represented by counselor The aler, the counsel or Header I ill file in Court with the all atton a certificate to I is in his opinion f r ompromiso or icti a the effect that the acreem | 1 reo or order for the the benefit of a mmorerson under disabil r other person to ter compromise of a suit iji matter, to which a sto and shall set out th de ability is a party, shall i sanction of the t terms of the compromi Schedule No 21 in Appendix I on behalf of a - > 1 m - No 21 - D ning a compress

(7 stle)

ing on the and disposal in the minor by 1 by the same at the same

- 1) le compromised in the terms of an agreement in writing dated the day of and made between A. B., the plantiff, of the one part, and the said C D by he said guardian ad litem of the other part (or, on the terms hereafter set forth), and, t appearing to this Court that the said compromise is fit and proper and for the henefit of the said minor, this Court doth spection the said compromise on hehalf of the said umor, and with the consent of all parties bereto . It is ordered as follows -

(Set out the terms of the compromise.)

FOOTNOTE.—This rule and form superside Rule No. 119 and Form No. 35 of the hal Rules of Practice, 1905, and Rule No 33A of the Rules of the High Court, Madras, Appellate Side.

> H. D C Reilly. Registrar

ligh Court of Judicature, Madras, 30th November, 1910

IORT ST GLORGE GAZETIE

1911, PART II . P 666

Autification.

Under the provisions of Part \ of the Code of Civil Procedure, 1908, and with ie previous sanction of His Excellency the Governor in Council the High Court has ade the following addition to Rule 4 of Order III of Schedule I of the said Code, viz. -

to previsions of clause (2) of this rule, be deemed to authorise him to appear or to make ly application or to do any act in connection with getting copies of documents and staining return of documents produced or filed in the suit or refund of moneys paid to Court in the suit

H D C REILLY.

Registrar

12h Court of Judicature Madras 3rd April, 1911

TORT SI GLORGE GAZETTE

1911, PART II , P 692

A of fication

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the evious sanction of His Excellency the Governor in Council the High Court has made e following addition to Rule 12 of Order XX of Schedule I of the said Code, viz. -

"(3) Where an Appellate Court directs such an inquiry, it may direct the Court of at instance to make the inquiry, and in every case the Court of first instance shall, the application of the decree holder, inquire and pass the final decree * H D C REILLY.

Registrar.

gh Court of Judicature, Madras, 12th April, 1911

Number of miscellancous cases	Date of presentation	Number of connected case if any	Name of petitioner, if any, and of his	Name of defendant and of his Yalii	Purport of case and section of law	I malorder with date	result and date	
1	2	3	4	5	6	7	8	

Form No. 18.

REGISTER OF MISCELLANEOUS CASES DISPOSED OF

Court Year

Instructions

1 This register will show all miscellaneous cases of every kind, whether instituted on the application of parties or of the Court's own motion, including cases of Contempt of Court (H C Oriculars Nos 557 of 1888 and 2928 of 1892)

2 The date to be entered in column 3 will always be the latest date. In the case of petitions restored to file, the date of original institutions should be entered and the date of restoration noted in the column of remarks.

					<u> </u>					Dis	pose	d o	1				A	ctua mbe day:	1
1		nsfer				W	thou	t cor	itest	_		١	l ith	cont	e _a t				
	sposed of	he order of tra			}		-		k.z irle	Ord on : end ark	lered refer to to outri	0	On ath	l à	(ter	1	be ins	ning twee tatu a an	1
berial number	Number of the miscellaneous case disposed of	Date of lustitution, or of receipt of the order of transfer	Date of disposal	Transferred or registered as sunt	Without trial	Cong rounsed	Ordered on confession	Ordered	Dhtassed	In whole or in part for I ctitioner	lor respondent	In whole or in part for petitioner	For respondent	In whole or in part for petitioner	For respondent		Uncontested (columns 7 to 10)	Contested (columns 11 to 16)	Remark*
1		ī	4	5	6	7	8	9	10	11	12	13	11	10	16	1"	118	10	
i _	_		_	- 7 -	0	10	11	1-	13	11	1	16	17	18	19	Re marks	23	<u>د</u> د —	torrespo dia c lunis i Nater eri No IN Fart II(s)

Form No. 19.

REGISTER OF EXECUTION PATITIONS RECEIVED (ON THE

SIDE

Court Year

Instructions

ution beyond the jurisdiction of Register, but must be entered in [70, 17]

	_					V 1.,		
Aumber of Exe-	Date of presenta	Number of connected sult and of iast pre vious appir cation	Name of decree holder and of his pleader	Name of judgment debtor and of his pleader	Items of decree or order to be executed, with date of any pro ceedings from which time runs for this application	Mode of assistance, and section of code or law, pre scribing it	Order, with reasons, for closing of proceedings under this application, and date	\umber of appeal with result and date
1	2	3	4_	5	6	7	8	0

Form No 20.

Register of Deorees of other Courts Received for Execution under Sections 38 and 39, CCP

Court Year

	4 647							
Date of recept	Serial number	Yame of the decreeing Court	Number of suit on the file of that Court	Number of coonected execution or miscellaneous application if any, presented in this Court	Lower Court to which sent for execu tion	Nature and date of com munication to the decreeing Court (r de Section 41 (CCI)	Amount of postage, if any received	Remarks
1	2	3	_•	5	0	- 7	lts A I	y
	1							

Form No. 21.

REGISTER OF EXECUTION PETITIONS DISPOSED OF

Court Year

Instructions

1 The date to be entered in column 4 will always be the latest date. In the case of authors restored to like the date of resignal institution should be entered, and it enter of responsion noted in the column of remarks.

Note in the remarks column the number of judgment-debtors impressed in each
eve, the value of decree under which judgment-debtor was impressed and date when
write pijal and date of rule set, for the jurposes of numer 311,376 of Stater in N.A. M.

rodennu lairo- | -- |

1500

Form No. 22.

Hampitan or Arrest & prepare

Cut } car

India to us Appeals for recolers which have the force of decrees should be shown in this register and not in the Louiser of Marshamons Appeals Received (Form No. 24) in which at make from other orders st. All be entered, in tell C. Circular No. 3100, dated 22nd Bownler, 18 G, and Section 2 (2) and Rule 5, Order AAAM, Shedule I, CCP

2. Unity ste a . Party plane of sist an I electro at pealed from center also nature and value of appeal, with special reference to the information required by Annual Statement No. X, parts 3 a. (4, and 11 C Circulars Nos. 105) of 1870 and 225) of 1891. In cases of appeals against orders having the force of decrees, substitute the world "thur for 'Derce and all after date the minds " passed unler

CAMP As ef 1 3 If the a, and has been received by transfer, a note should be made to that effect at the head of the mer

I II an appeal is remarked under Rule 23, Order ALL Schedule L CCP, note

under heal 2 the date of rest rate m to tle.

5. A note should be made of all parties brought on or struck off the record under Order for XXII, whether I GCP

> I Miral No of 191

Promiston. 2 Date 11

I Appellante Name, description, and pface of abode,

1 Bestendent - Same, description and place of alade

's Particulars of ant and decree appealed against. Decree of the Court 191 . in original Suit Vo. datel

Value of relie!

Putaral west relief

Claumed Decreed Ippented against Ra A. P Ita A. P Rs A.P

6. Hearing, if any, under Itule 11, Order XLL Scholule I, CCP and result with date

7. Date for Respondent a first appearance

Lakil for | Persondent

8. ludgment, result, and date

9 Objections, under Rule 22 Order Md Schedule I, CCP, if any filed by whom, and value

10 Number of application for review (re hearing) with result and date.

Frish Judyment, of any, with date

11 \cond Appeal No of 191 Result with date

Form No. 23.

Court Year

REGISTLE OF APPEARS DISLOSED OF

Instructions

1. There must be three separate registers of appeals disposed of, viz. (1) for money or moveables, (2) under the Madras Estates Land Act, 1908, and (3) for title and other appeals

2 The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered.

	13									Dist	osed	l of					1	
1	order of trans				ecuted	1-	itho	ut ce	ontes	1	W	th c	er tr		inte be inst	of da rveni tween itutio decre	ys ng n	
Number of the appeal disposed of	Date of institution or of the receipt of the order of transfer	Date of disposal	Trusterred to another Court	Diamissed under Rule 11 Order XLI	1 +	Decree confirmed	Decree modified	Decree reversed	Remanded	On oath or by arbitration or compromise	Decree confirmed	Decree modufied	Decree reversed	Remanded	Uncontested (columns 8 to 11)	Uncontested (columns 8 to 11) Contested (columns 13 to 16)	Objections under Rule 32 Order 3 I I	
2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	
			8	10	11	12	13	14	15	16	17	18	19	20	24	28	31	col imps of Statement to Part I (a)

Form. No. 24.

REGISTER OF MISCELLANEOUS APPEALS RECLIVED

Court Year

Instructions

Appeals from orders which have the force of decrees should not be should in this register. Appeals from other appealable orders only should find place in this register

2 If necessary give value of appeal under head 5

3 A note should be made of all parties brought on or struck off the recor | un lef Order I or XXII, Schedule I, CCP

1 Miscellancous Appeal No of 191

2 Date of

) Appellant-\ame, description, and place of abode

4 Respondent-Name, description, and place of abode 5 Particulars of order appealed against Order of the

of 101 . 191 , passed on MP No duel in eriginal Suit No of 191 Appeal under

C. urt

6 Hearing of any, under Rule II Order VLI, Schedule I, C.C.P., and result with date.

7 Date for Respondent's first as pearance

(Appell int Respondents

4. Indement-Result and date.

- 9. Objections under Rule 22, Order XLI, Schedule I, C.C.P., if any, filed by whom
- Number of application for review (or re hearing) with result and date.
 Fresh Judgment, if any, with date

Form No. 25

Court

REGISTER OF MISCELLINEOUS APPEALS DISPOSED OF

Instructions.

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered

	10		1	!					1	Dispo	sed	of					ı	i
	of trans				3	1177	th.		•						,		-1	1
sed o	orde				эесп			ĺ	ļ						dis	noral_	Į,	
\umber of the miscellaneous appeal disposed of	Date of institution, or of the receipt of the order of transfer	Date of disposal	Transferred to another Court	Dismissed under Rule 11, Order XLI	Dismissed for default or otherwise not prosecuted	Order confirmed	Order modified	Order reversed	Remanded	On oath or by arbitration or compromise	Order confirmed.	Order modulied	Order reversed	Remanded	Uncontested (columns 8 to 11)	Contested (columns 13 to 16)	Objection 8 under Rulo 22, Order ALI	Remarks
2	3	4	5	6	7	8	9	19	11	12	13	14	15	16	17	18	19	Corresponding
L		_	7	9	10	11	1°	13	14	15	16	1	18	19	°3	2	10	Statement No.

If D C REILIY,
Registrar.

High Court of Judicature, Madras, 30th October, 1911

FORT ST GLORGE GAZETTE,

1912, Part II , p. 154

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1903, and with the previous sanction of His Excellency the Governor in Council, the High Court has made

		ig.	ŀ	1							Desp	iosci	l of						
		order of trans				secuted	1_	ritho	nte	ontes	1		th c	onte er tr		ber inte be	of da rveni tween itutio decre	ng	
- 14	Number of the appeal disposed of	Date of institution or of the receipt of the order of transfer	_	Transferred to another Court	Dismissed under Rufe 11, Order XI,I	<u> </u>		Decree modified	Decree reversed	Remanded	On oath or by arbitration or compromise	Decree confirmed	Decree modufied	Decreo ter ersed	Remanded	Uncontested (columns 8 to 11)	Contested (columns 13 to 16)	Objections under Bule 22 Order XII	(Happesisared
1	2	3	4	5	G	7	8	8	10	11	12	13	14	15	16	17	18	19	
	1			8	10	11	12	13	14	15	16	17	18	10	20	21	20	31	columns of Statement to Part I(s)

Form. No. 24.

REGISTER OF MISCELLANEOUS APPEALS RECLIVED

Court Year

Instructions

Appeals from orders which have the force of decrees should not be show an this register Appeals from other appealable orders only should find place in this register 2 If necessary, give value of appeal under head 5

3 A note should be made of all parties brought on or struck off the record unfer

Order I or XXII, Schedule I, CCP

1 Miscellaneous Appeal No of 191

2 Date of

Appellant-Name, description, and place of abode

Respondent-Name, description, and place of abode

5 Particulars of order appealed against Order of the cf 191 . 191 , passed on If P No of dax tin original Suit No of 191 . ωf

Court

6 Hearing, it any, under Rule 11, Order MLI, Schedule I, CCP, and Appeal under result with date

7 Date for Respondent's first as prasunce

Valid for Steependent.

4. Indement-Result and date.

- 9. Objections under Rulo 22, Order XLI, Schedule I, C.C.P., if any, filed by whom.
- Number of application for review (or re hearing) with result and date, Fresh Judgment, of any, with date.

Form No. 25.

REGISTER OF MISCELLANEOUS APPEALS DISPOSED OF.

Court Year

Instructions.

The date to be entered in column 2 will always be the latest date. In the case of appeals restored to file, the date of original institution should be entered.

	ed of.	eder of transfer			_	ecuted	WIL	liout	con	_		Wie	a cor	nlest tri1	_	ber o	I num- f days ening en in- on and osal		l
- Serlal number	Number of the miscellaneous appeal disposed of.	Date of institution, or of the receipt of the order of transfer	Date of disposal	Transferred to another Court	Damissed under Ruio 11, Order XLI	Damissed for default or otherwise not prosecuted	Order countried	Order modified	Order reversed	Remanded	On cath, or by arbitration or comprounded	Order confirmed	Order modufied	Order reversed	Remanded	Uncontested (columns 8 to 11)	Contested (columns 13 to 16)	Objections under Rule 22, Order MLI	Remarks
1	2	3	4	5	G	7	8	9	10	11	12	13	14	25	26	17	18	19	
	_	 	_	7	9	10	11	12	13	14	15	16	17	19	19	23	2, f	30	Corresponding columns of Statement No A Part II (a)

H D C. REILLY, Registrar.

High Court of Judicature, Madras, 30th October, 1911

FORT ST. GEORGE GAZETTE,

1912, PART II , r. 154.

Notification.

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made

the following amendment of Form No. 15 of Appendix E to the Pirst Schedule of the said Code, viz -For the word "Dated" substitute the words "Given under my hand and the seal

of the Court, this day of H. D. C. REDLA.

High Court of Judicature, Madras 19th January, 1912

Registrar

FORT ST. GEORGE GAZETTE.

1912, PARC II , P 191. Notification,

Under the provisions of Part X of the Code of Civil Procedure, 1909, and with the previous sanction of His Excellency the Governor in Council the High Court his made the following amendments and additions to Order V of the First Schedule of the sud Code, viz ~

(1) 11 . insert the words "by registered post

(2) e. unsert the words "by registered post

r 3) 1. defendant is a public officer (not belonging to His Majesty's Military of Naval forces or His Majesty's Indian Marine Service) saed in his official capacity, service of summons shall be made by sending a copy of the summons to the defendant by registered post prepaid for acknowledgment together with the original summons, which the defendant shall sign and

H D. C REHIY,

Registrar

High Court, Madras. 20th January, 1912

FOR1 ST CEORGE GAZETTE, 1913, PART II , PP 13 AND 14

return to the Court which issued the summons "

Notification

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council the High Court has made the following amendment and addition to Schedule I of the said Code, viz. -

(1) For rule 43 of Order XXI of the said Schedule substitute the following rules,

142 "43. (1) Where the property to be attached is moveable property, other than the attachment shall agricultural produce, in the to property in his own be made by actual scizure, be responsible for the custody or in the custody c due custody thereof,

provided that when the property seezed is subject to speed; and natural deals. or when the expense of keeping it in custody is likely to exceed its value, the attached officer may sell it at once, and

provided also that, when the property attached consists of him stock, agricultural maplements, or other articles which cannot convenently to removed and the attach as officer does not not under the first provide to this rule, he may at the instance of the

judgment delitor or of the decree holder or of any person claiming to be interested in such property leavo it in the village or place where it has been attrehed

(a) In the charge of the person at who o instance the property is retained in such village or place, if such person enters into a hond in the Form No 15A of Appendix L to this schedule with one or more sufficient sureties for its preduction when called for, or

- (1) In the charge of an officer of the Court, if a suitable place for its safe custody be provided and the remuneration of the officer for a period of 15 days at such rate as may from time to time be fixed by the High Court be paid in advance.
- (2) Whenever an attachment inade under the provisions of this rule ceases for any of the reasons specified in rule 50 or rule 57 or rule 60 of this order, the Court may order the restitution of the attached property to the person in whose possession it was before attachment.
 - 43A (1) Whenever attached property is kept in the village or place where it is

the village or place where it is attached under the second provise to that rule, it shall be brought to the Court house and delivered to the proper officer of the Court. 43B (1) Whenever attached property kept in the village or place where it is attached us live-stock the person at whose instance it is so retained shall provide for its main tenance, and, if he fuls to do so and if it is in charge of an officer of the Court at shall

be removed to the Court house Nothing in this rule shall prevent the judgment dehter or any person claiming to le interested in such stock from making such arrangements for feeding the same as may

Bond for safe custody of moveable property attached and left in charge of person interested and sureties

(OBDFR XXI PULF 43)

In the Court of Civil S nt No 1 B of

(D) of

etc and LL of kno vall men by the e presents that we IJ of

ete are jointly and severally bound to the Judge of the etc and M N of to be paid to the said Judge, for which pay Court of In Rupees ment to be made we bind ourselves and each of us in the whole our and each of our heirs executors and administrators jointly and severally by these presents. 191

iq ii ist

Dated this day of

ωf

And whereas the moveable property specified in the schedule hereunto annexed has been attached under a warrant from the said Court dated the day of in suit No

191 in execution of a decree in favour of and the said property has been on the file of 191

aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void otherwise it shall remain in full force

> I.J K.L MN

Signed and delivered by the above bounden

in the presence of H D C RELLI, Registrar

High Court of Judicature, Madras, 6th January, 1913

FORT SF GEORGE GAZETFE

1914, PART II . P 679

Notification

Under the provisions of Pait X of the Code of Civil Procedure, 1908, and with the provious sanction of His Excellency the Governor in Council, the High Court has made the following amendments to rule 13 of Order IX of the first schedule of the sud Code,

Re number rule 13 as rule 13 (1)

(2) Add the following as sub rule (2) to rule 13 --

(2) The provisions of section 5 of the Indian I imitation Act, 1909, shall apply to applications under sub rule (1) '

C G MACHAY. Regi Irar

High Court of Judicature, Madras, 24th March, 1914

TORA ST GEORGE GAZETTE

1914, PART II . P 1115

Votification

Under the provisions of Put \ of the Code of Civil Procedure, 1908, and with the previous synction of His Excellency the Governor in Conneil, the High Court has made the following amendments to rules Jand 4 of Order XXII and I orm No 11 of Appet dix Il to the first schedule of the said Code, viz -

1 For rules 3 and 4 of Order XXXII of Schedule I of the Code of Civil I roce lure,

1908 substitute ---! (1) Where the defendant is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be guardian for the suit for the mu-

..

suit may be obtained upon

e plantiff verifying the fact that ile

propose to thit i further

the groupsons of (4) An uplk not be combined v

i diccised [limbi (5) No order shall be in ale on any application under this rule excel t upon it is to any guardian of the miner of pointed or declared by an authority competent in that behalf, or, where there is no guardian, upon notice to the father or other natural guardian

be served six clear days before the day named in the notice for the hearing of the anni-

cation and may be in Form No 11 set forth in Appendix H hereto 4. (1) Any person who is of sound mind and has attained inviently may act as

next friend of a minor or as his guardian for the suit Provided that the interest of that person is not adverse to that of the minor and that

he is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a planitiff

is for the minor a welfare that another person be permitted to act or be appointed, as the case may be.

(3) No person shall without his consent be appointed guardian for the suit. When

consents

(4) Where there is no othe ..

the Court may appoint any of .

costs to be incurred by that ofnece me an income be home either by the parties or by any one or more of the parties to the suit, or out of any fund in Court in which the miner is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require

(5) When a guardiau for the suit :

to appear to the Court that the guard

for the conduct of the suit on behalf

prejudiced in his defence thereby the Court may, from time to time, order the plaintiff to advance monies to the guare

advanced shall form part of the

that the guardian, as and when a rec co ... received by him

II. For Form No. 11 of Appendix H to the Code of Civil Procedure the following form is substituted :-

Form No. 11.

Notice to guardian appointed or declared or to father or other natural guardian, or to the person in charge of the minor

(ORDER XXXII, RULE 3 (5))

(Title)

 T_0 Guardian appointed or declared, or father or other natural guardian, or person in

are hereby required to take notice that, unless within from the service upon you of this notice an application is made to this Court for the appointment of you or of some friend of the said minor to act as her guardian for the oint some other person to act

Jay of

aforesaid and shall obey any further order of the Court in respect thereof, then this obligation shall be void; otherwise it shall remain in full force

IJ. K.L M N.

Signed and delivered by the above bounden

in the presence of H. D. C Reilli

C REILLY, Recostrar.

High Court of Judicature, Madras, 6th January, 1913

FORT ST GEORGE GAZETTE.

1914, PART II , P 679

Notsfication.

Under the provisions of Pait X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Council, the High Court has made the following amendments to rule 13 of Order IX of the first schedule of the said Code, viz.

(1) Re number rule 13 as rule 13 (1)

(2) Add the following as sub rule (2) to rule 13 —

"(2) The provisions of section 5 of the Indian I imitation Act, 1908, shall apply to applications under sub rule (1)"

C G MACRAL.

Registrar.

High Court of Judicature, Madras, 24th March, 1914

FORT ST GEORGE GAZETTE,

1914, Pant II, p 1115

Notefication

1 For rules 3 and 4 of Order XXXII of Schedule 1 of the Code of Civil Procedure, 1908, substitute:—

J (1) \.
of his minor

(2) An

application 1.

(3) The application shall be supported by an affidavit vertising the fact that the proposed guardian has no interest in the matters in controvers, in the suit address to that of the minor and that he is a fit person to be so appointed. The affidivit shall further state the name of the preson on whom notice has to be served under the proof.

not be co

(5) to us gr

behalf, or, where there is no guardian, upon notice to the father or other natural guardian of the minor, or, where there is no father or other natural guardian, to the person in whose care the minor is, and after bearing any objection which may be urged on behalf of any person served with notice under this sub rule Tho notice required by this sub rule shall be served six clear days before the day named in the notice for the bearing of the application and may be in Form No 11 set forth in Appendix II hereto

4 (1) Any person who is of sound mind and has attained majority may act as

next friend of a minor or as his guardian for the suit

Provided that the interest of that person is not adverse to that of the minor and that be is not, in the case of a next friend, a defendant, or, in the case of a guardian for the suit, a planitiff

is for the miner's welfare that another person he permitted to act or he appointed, as the case may be.

consents

(4) Where there is no of the Court may appoint any

costs to he incurred by that

he borno either hy the parties or hy any one or more of the parties to the suit, or out of any fund in Court in which the minor is interested, and may give directions for the repayment or allowance of the costs as justice and the circumstances of the case may require

that the guardian, as and when directed shall file in Court an account of the monies so received by hun

II For Form No. 11 of Appendix H to the Code of Civil Procedure the following form is substituted :-

Form No. 11.

Notice to quardian appointed or declared or to father or other natural grardian, or to the person in charge of the minor

(ORDER XXXII, RULE 3 (5))

(Title_)

Guardian appointed or declared, or father or other natural guardian, or person in

r. you are hereby required to take notice that, unless within from the service upon you of this notice an application is made to this Court for the

appointment of you or of some friend of the said minor to act as he guardian for the to act

Form No. 11A.

Notice to proposed guardian

(ORDER XXXII, RUIE 4 (3))

(Tulle)

To

residing at

Take notice that the above named petitioner has made an application to this Court to appoint you guardian for the suit of minor defendant No of 191 , and that the said application will be heard on the day of next

Given under my hand and the seul of the Court, this

í:

III In Order XXXII aft 14A. The appointment

minor in a matter pending h

cases under appeal to the King in Council, shall be deemed to be a quasi judicial act within the meaning of Section performed by the Registrar, presented out of tuno shall bo

IV In Order XXII after Rule 11 add the following as Rule 11A :--

11A The entry c appellant or responder jurisdiction, except in a quasi judicial act wit ordure and may be pe and applications preser

S G HEASMAN, Second Assit Registrar

day of

High Court of Judicature, Madras, 29th May, 1914

1 ORT ST GEORGE GAZETTI.

1914, PART II , P 1814

Notrfication

Under the provisions of Part X of the Code of Civil Procedure, 1908, and with the previous sanction of His Excellency the Governor in Conneil, the High Court has made the following additions to the Orders in the Schedule I of the said Code -

e (XXXI). After Orde. \\...

Order XX:

as it thinks fit. of the Court.

(2) The report of the Commissioner shall be evidence in the suit and shall ferm part of the record

(3) Before usuing any Commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the Commission to be, within a time to be fixed, paul into Court by the parts at whose metines or for whose lene it the Commission is usued

C & MICHAIL Legistrat

High Court of Judic sture, Madris, 24 1 October, 1914

FORT ST. GEORGE GAZETTE,

1914, PART II., r. 2038.

Note fication.

Under the pro	ovisions of S	ection 122 o	f the Code o	of Civil Procedure,	1908, and	with
				•		
	1.0		•		: :	

(2) The Judgment may be prenounced by dictation to a short-hand writer in open Court, where the presiding Judge has been specially empowered in that behalf by the High Court,

Fo	r Rule 3, Order XX the follow	ing rule is sub	stituted :-	
۶igr. to				ounced and shall be he altered or added

C G. Mackay,
Registrar.

High Court of Judicature, Madras, 9th November, 1914

Form No. 11A.

Notice to proposed quardian

(ORDER XXXII, RUIE 4 (3))

(Title)

To

residing at

Take notice that the above named petitioner has made an application to this Court to appoint you guardian for the suit of No of 191 , and that the said application will he heard on the day of Given under my hand and the seal of the Court, this

III In Order XXXII a

14A The appointment

minoi in a matter pending cases under appeal to the 1

within the meaning of Section 128 (2) (1) of the Code of Civil Procedure and may be performed by the Registrar, provided that contested applications and applications presented out of time shall be posted before a Judge for disposal

IV In Order XXII after Rule 11 add the following as Rule 11A .-

11A Ti appellant or jurisdiction, a quasi judio codure and r and applicati

S G HENSMAN. Second Assit Registrar

day of

٠:

High Court of Judicature, Madras, 29th May, 1911

FORT ST GEORGE GAZETTF

1914. PART II. P 1814

Notefication

Under the provisions of Part X of the Code of Civil Procedure 1908, and with the previous sanction of His Excellency the Governor in Council the High Comt his male the following additions to the Orders in the Schedule I of the said Code -

After Order XXVI, read the following Order XXVIA.

Order XXVIA (1) The Court may in any suit issue a Commission to such persons as it thinks fit to truislate accounts and other documents which are not in the language of the Court

(2) The report of the Commissioner shall be evidence in the suit and shall for a part of the record

(3) Before issuing any Commission under this Order, the Court may order such sum (if any) as it thinks reasonable for the expense of the Commission to be, within a time to be fixed, paid into Court by the party it whose instance or for whose benefit the Commission is issued

C G MACKALL Registrar

High Court of Judicature, Madras 2n l October 1914

FORT ST. GEORGE GAZETTE, 1914, Part H., r. 2038.

Notification.

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	٠					
		1 10	۱۲ i.			
 د نمه عال	i					

(2) The Judgment may be pronounced by dictation to a short hand writer in open Cut, where the presiding Judge has been specially empowered in that behalf by the High Court.

signt to, savo as provided by Section 152 or on review.

C G Mackay,
Registrar.

High Court of Judicature, Madras, 9th November, 1914

APPENDIX D

ВОМВАУ

Unders, lic, of the Bomban Government and the High Court, Bomban Under the Code of Civil Procedure,

CORRECTED UP TO 1ST DLCEMBER, 1914

Subject Appainting, with reference to Sective corresponding to Section 55 (1) of til Code (Act V of 1908), the Surat Cit Julior the Courts in the Breach Distric	on No 4897, Jud no Dute, 25 9 05 nl	Year and page of the Bombay Gort Gazette Fart I 1905, p 1320
Notification under Section 55 (2) of the Code (Act V of 1908)	40	1910, p 1012
Declaration under Section corresponding to Section 68 of the Code (Act V of 1908) as to the execution of decrees in certain	Date, 24 5 80	1880, p 519
cases	Date, 16 3 81 No 4520, Jud	1881, p 140
	Date, 24 7 82 (No 762, Jud	1882, p 557
	Date, 9 2 92 No 2053, Jud	1892, p 120
	Date, 12 4 92	1892, p 348
	No 8039, Jud Date, 27 11 00 No 5218, Jud Date, 20 9 07, amending the above Nos 3600	1900, p 242)
	762, and 8039	1907, p 1627
	No 5249, Jud Dato, 20 9 97	1907, p 1627
Rules under Section corresponding to Section 70 of the Code (Act V of 1908) for transmission of certain decrees from Court to Collector and for their execution	No 499, Jud Date, 24 1 80	1880, p 96
Ditto new rule for Rule 2 of the above rules	No 1338, Jud Date, 22 2 02	1902, p. 321
Ditto modifying Rule 9 and substituting now rules for Rules 7 and 11 of the above rules		1553, 1 308
Ditto modifying Rule II	No 1133A Jud Date, 16 2 80	1880, p 211

Rules under Section corresponding to Section 70 of the Code (Act V of 1908) for transmission of certain decrees from Court to Collector and for their execu- tion. Amending Rulo 11	Yumber at d date 1 No 6437, Jud Dato, 17 9 83	terra d page of the Bombey Cost Cazette Fart I 1883, p 695
Ditto New Rule 12 \	No 3250, Jud Date, 11 5 85	1885, p 631
Ditto cancelling para 2 of Rulo 12 \	No 2890, Jud Date, 29 5 90	1890, p 510
Ditto cancelling the last para, of Rule 12A.	No 3341A, Jud Date 18 5 95	1895, p 013
Ditto Now Rules 16 and 17	No 92, Jud Date, 8 1 90	1890, p 38
Appointment under Section corresponding to Section 85 of the Code (Act V of 1908)	No 6789, Politica Date, 10 10 89	1889 p 873 1013, p 542
Ditto under Section corresponding to Section 03 of the Code (Act V of 1908)	No 6216A, Jud Date, 20 11 06 No 61, Jud Date, 7 1 07	1000, p 1710 1907, p 36
General Rules, etc., under Section corre sponding to Section 122 of the Code (Act V of 1008)		Rules and Orders compded and issued under the authority of the Bombay High Court
Exemption from personal appearance in Court under Section 133 of the Code (Act V of 1908)		1912, p 1220, and 1913 p 233

Annulments Alterations and Additions to the Rules in the liest Scheduld of the Code made by the High Court Bonday

1HL BOMBAY GOVERNMENT GAZETTI,

1910 PART I, PP 1496 AND 1497

Miscellaneous Notifications Appointments etc., by His Majesty's High Court of Judicature (Appellate Side)

Ature Pro ernor

in Council and are published for general information —

RULE I

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town

where he is residing and may be sent to him by the Court by post registered for acknow ledgment. An acknowledgment purporting to be signed by the defendant or an endorse ment by a postal servant that the defendant refused service shall be deemed by the Court issuing the summons to be prima facie proof of service. In all other cases the Court shall hold such inquiry as it thinks fit and either declare the summons to have been duly served or order such further survice as may in its opinion be necessary '

RULL II

The following be added as rule 4 in Order XLIX :--

"Under Section 128, par igraph 2, clause (1), of the Civil Procedure Code of 1908, the following power is delegated to the Registrar of the High Court, Appellate Side, Bombay

Where on a memorandum of appeal presented within the time prescribed for the same, the whole or any part of the fee prescribed by the law for the time being in force relating to Court fees has not been paid, the

Rmr. III

Clause (a) of rule 2, Order III, be amended to read as follows -

"Persons holding general powers of attorney from parties not resident within the local limits of the jurisdiction of the Court within which limits the appearance, appli cation, or act is made or done, authorising them to make and do such appearances, applications, and acts on behalf of such parties

RULL IV

Form No. 10 in Appendix B, Schedulo I, of the Civil Procedure Code of 1908, be amended to read as follows

To accompany Returns of Summons of another Court (Order V, r 23)

(Title) for warding

Read proceeding from the m Suit No of 19 of that Court for service on

Read Serving Officer's endorsement stating that the and

proof of the above having been duly taken by me on the eath of be returned to the it is ordered that the

with this proceeding has been I hereby declare that the said summons on

duly served

Note —This form will be applicable to process other than summons the service of which may have to be effected in the same manner"

By order of the High Court, P E PERCIVIL Registros

ınd

Bombay, 9th September, 1910.

APPENDIX E.

ALLAHABAD.

UP GOVERNMENT'S ORDERS, ETC. UNDER THE CODE OF CIVIL PROCEDUBL, CORRECTED UP TO DECEMBER, 1914

Authoration under Section 53 (2) of the	Number and date No 654/VII-217	Year part and page of the UP Gazette
Code (Act V of 1908) as to persons who shall not he hable to arrest in execution of decrees	Data 6 6 10	1910, Part 1, p. 550
Rules under Sections 68 and 70 of the Code	No 1887/1-238	
Collector execution of certain degrees	Date 7 10 11	1911, Part I, p 1005
and rules of procedure therefor	Date, 12 7 12 No 2538/1-196	1912, Part 1, p 640
	Date, 20 11 13	1913, Part I, p 1293.
banctioning exercise of powers under Section 93 of the Code (Act V of 1908)	No 1622/V11-447 Date, 6 12 12	1912, Part I, p 1249
Lucing personal appearance in Court	No 1/VII-233	
under Section 133 (1) of the Code (Act V of 1908),	Date, 1 1 09 No 918/VII-83	1909, Part 1 p J
	Date, 8 9 09 No 707/VI1-215	1909, Part I, p 771
	Date, 25 5. 11 No. 1429/V11-521	1911, Part 1, p. 474
	Dato, 16 11 14	1914, Part 1, p. 1626
Empowering certain Courts to appoint Commissioners to take affidavits, vide Section 139 (c) of the Code (Act V of 1903).	No 3869 Date, 7 12 10	1910, Part 11, p 2077
Notification appointing Munsarims of Civil Courts in the Province of Agra- to receive applications for execution under O XXI, r 10, of the Code (Act V of 1908).	No 2207 Date, 29 6, 11	1911 Part II, p 1073
Direction under O AXI, r 45 (1) of the Codo (Act V of 1905) as to service of notice of order attaching the salary or allowance of jubble others.	No 1058 VII-147 Date, 12 & 11	1511, Part I, p. 777

allowance of Jublic officers.

Annulments, Alterations and Additions to the Rulls in the liese Souldule of the Code made by the High Coure, Allemadad

THE UP. GAZLITE,

1913, PART II . P 323

Notification No. 712-35 (a) /5 Dated the 27th February, 1913

In continuation of the Court's notification No 285-35 (a) dated the 23rd January, 1913, and under Section 122 of the Civil Procedure Code, Act V of 1908, the following addition is made to the rules framed by this Court under the provisions of the sad section —

To Order XXI, rule 126, add-

Provided that, when the amount does not exceed Rs.5, it may be paid to the Sahna by money order on requisition by the Amin, and the presentation of the certificate may be dispensed with?

N B -In the above mentioned notification No 285-35 (a) the above addition was

published for information and objection of persons interested.

NB -The above mentioned "Rules framed by this Court" are contained in a book published by the High Court, Allahabad, and reproduced at p 759, post

Notification No 4824/35 (a)-11	Dated Allahabad, the 24th November, 1914
T	
In continuation of	
1914, the High Court	
the provious sanction	

at present in use —

(1) substitute the following for Form No. 5 (H C J Form, Part &XII, No 71) in
Appendix H of the said Code

No 5

List of documents produced by plants (order 13, Rulo 1)
In the Court of , at District

Suit No of 19

_Plaintiff

Versus Defendant

List of documents produced with the plant (or at first bearing) on behalf of plantif defendant)

or deten	dant)			
Lhis	list was filed by	this	day of	19 .
1	2	Ī	3	1
Strai number	Description and date if any of the document		came of the documen	t
		If hought on the record the exhibit mark put on the document		Ite nacks
		1		
			,	ensclope

Signature of party or pleaser producing the list.

(2) Substitute the following for the form already in use (HCJ I orm, Part IV. No 26) under Order AVIII, rule 13, and Order XX, rules 4, 6, and 7 "Evidence, judgment, and decree (Order XVIII, rule 13, and Order XX, rules 4,

6, and 7)." 19

Smt No.

Present

Judge of Small Cause Court.

Date of institution	Name of plaintiff	Name of defendant	\tmo	unt of cl	alm
			Rs	1	r
•					

Decision.

		De							
Date	In whose favour	Against whom	Amo	_	-		10.00	ded	By whom payable
			Ra	A	ľ	Rs	١	1	
									

Orders before first hearing Reply

Claim Tasue

(On reverse of form)

Evidence for plaintiff Finding

Evidence for defendant

By order of the Court, G R MURRAY ICS, Registrar

NB -In the above mentioned notification No 3577 35 (a) the above substituted forms were published for information and objection of persons interested

Book of Rules framed by the High Court of Judicature, North-Western Provinces, under Section 122 of the Code of Civil Procedure; Act No. V of 1908

These rules have been framed under Part A of the Code of Curl Procedure, Act to 1 of 1908, and form part of the First Schedule of the saul 1ct

COMPARATIVE LABIT

Of Reference to Rules of the 1th of April 1844

Reas of the 4th of tpril 1-04

Where to be found

Le Lath

11
3-9
24, Para. 2
45 (3)
to Note
1016
* 2
61

Order VVIII, rule J Order V, rule 31 Note to order V, rak 27 Order XIII, rule 13 Order XIII rule 12 Order \\ 1 rale 22 Order VIV. rule 4

e]

COMPARATIVE TABLE (continued).

Rules of the 4th of April, 1894	Where to be found	Remarks
62	Order XIX, rule 6	-
63	Order XIX, rule 6	
61	Order XIX, rule 7	
65	Order XIX, rulo 8	}
სს	Order XIX, rule 9	
67	Order AIA, rule 10	i
68	Order XIX, rule 11	ł
69	Order XIX, rule 12	ì
70	Order XIX, rulo 13	1
71	Order XIX, rule 14	i
72	Order XIX, rule 15	ì
77 (1)	Order XX, rule 21 (1)	1
77 (2)	Order AX, rule 21 (2)	i
77 (3)	Order AX, rule 21 (3)	
77 (1)	Order XX, rule 21 (4)	1
77 (5)	Order J.X. rule 21 (5)	1
83, Para 2	Order XXI, rule 104	1
89	Order XXI, rule 105	
93, Para, 1	Order XXI, rule 106	i
93, Para 2	Order XXI, rule 108	1
93, Para 3	Order XXI, rule 109	
94, Para 3	Order XXI, rulo 110	!
06	Order AXI, rule 111	ļ
97	Order XXI, rule 112	1
102	Order XXI, rule 113	1
110 110A	Order XXI, rule 114	1
1111	Order XXI, rule 115	ľ
119	Form No 43, Appendix E	
130	Form No 16, Appendix H	
131	Form No 11, Appendix F	
138	Form No 12, Appendix F	
pendix A (1)	Order XLIII, rule 3	
Form No 4	Order A VI, rules 116 to 130 Form No 20, Appendix B	
	2014 410 20, Appendix B	

NOTE TO ORDER V, RULE 27

Order V

31. An application for the issue of a summons for a party or a witness shall be made in the form prescribed for the purpose No other forms shall be received by the Court

Order MIII.

12. Every document not written in the court vermecular or in Digitals, which is addressed (a) with a plaint or (b) at the first hearing or (a) at any other time tendered in ordence in any suit, appeal, or proceeding, shall be accompanied by a correct translation of the document into the court vermecular. If any such document is written in lation of the document into the court vermecular, in the court vermecular is written in the court vermecular but in characters ofter than the ordinary Persain or Nogr characters in use, it shall be accompanied by a correct transliteration of its contents into the Persain or Nagracharacters.

13. When viocument metuded in the list, prescribed by rule 1, has been admitted in condence, the loguet shall, in addition to making the endorsement prescribed in

ís

rule 4(1), muck such document with serial figures in the case of documents admitted as evidence for a plantiff, and with serial letters in the case of documents admitted as evidence for a defendant, and shall initial every such serial number or letter. When there are two or more parties defendants, the documents of the first party defendant may be marked Al, Bl, Cl, Ac, Al, BBl, Ac, and those of the second A2, B2, C2, &c, A42, BB2, &c. When a number of documents of the same nature is admitted, as for example a series of receipts for rent, the whole series shall bear one figure or capital letter or letters and a small figure or small letter shall be added to distinguish each paper of the series.

Order XVI

- 22. (1) Save as provided in this rule and in ride 2, the court shall allow travelling and other expenses on the following scale
 - (a) In the case of witnesses of the class of cultivators, labourers, and menials, six annas a day.
 - (b) in the case of witnesses of a better class, such as zamindars, traders, pleaders, and persons of corresponding rank, from eight annus to two rupees a day, as the Court may direct; and
 - (c) in the case of witnesses of superior rank, including officers of Government in receipt of a salary of not less than Rs.200 a month, from three to five rupers a day.

(2) If a writes demand any sum in excess of what has been paid to him, such sum shall be allowed if he satisfy the court that he has neturally and necessarily incurred the additional expense.

II I USTRATION

I post office employe summoned to give evidence is entitled to demand from the

from dut. The sum so payable in respect of the substitute will be certified by the official superior of the utiness on a slip which the witness will present to the court from which the summons assued.

(3) If a w his detention shall

clause (1) of this rul.

Provided that the court may, for reasons stated in writing, allow expanses on a higher scale than that hereimbefor wrestabed

Order XIX

- 5. Affidavits shall be divided into paragraphs and every paragraph shall be numbered consecutively and as nearly as may be, shall be confined to a distinct portion of the subject.
- 6. Every person making any affidavit shill be described therein in such mainer is shall serve to identify him clearly, and where necessary for this purpose, it shall contain the full name the name of his futher, of his caste or religious persuasion, his runk or degree in life, his profession, calling, occupation or trade, and the true place of his residence.
- 7. Unless it be otherwise provided, an affidavit may be made hy any person baving cognizance of the facts deposed to Two or more persons may join in an affidavit, each shall depose separately to those facts which are within his own knowledge, and such facts shall be stated in separato paragraphs
 - 8. When the declarant in any affidavit speaks to any fact within his own

knowledge, he must do so directly and positively, using the words "I affirm or I make oath and say"

9. Except in interlocutory proceedings, afidavits shall strictly be confined to such facts as the declarant is able of his own knowledge to prove the start of th

from

state , the

reason of persons from whom he received such information. When the application or the opposition thereto rests on facts disclosed in documents or copies of documents produced from any court of justice or other source, the declarant shall state what is the source from which they were produced, and his information and belief as to the truth of the freet disclosed in such documents.

10 When any place is referred to in an affidivit, it shall be correctly described. When in an affidivit any person is referred to, such person, the correct name and address of such person, and such further description as may be sufficient for the purpose of the

identification of such person, shall be given in the indirection of such person laking an affidavit for use in a civil court shall, if not personally known to the person before whem the affidavit is made, be identified to that person by some one known.

at the foot o

identification

12 No verification of a petition and no affidavit purporting to have been made

by a paridal nachin woman who has not appeared unveiled lefone the person before

her

state that he has not read the affidavit or appears not to understand the contents thereof or appears to be ultiterate the person hefore whom the affidavit is about to he made shall read and explain or cause some other competent person to read and explain in his presence, the affidavit to the person proposing to make the same, and when the person before whom the affidavit is about to be made is thus satisfied that the person proposing to make the fact that the person proposing to make the same, and when the person proposing to make the same, and when the person proposing to make the same, and when the person proposing to make the same affects affected the same and the same and the same affects when the same affects affects the same affects affected the same affects affects the same affects affects the same affects affects the same affects aff

4 The person before whom an affidavit is made shall certify at the foot of the

15 If it be found necessary to correct my clemeal error in my affidavit such correction may be made in the presence of the person before whom the affidavit is about to be made and before, but not after, the affidavit is made. Two corrections smade shall be initialled by the person before whom the affidavit is made and shall be initially in such manner as not to render it impossible or difficult to read the original word or words it jure or figures, in respect of which the correction may have been made.

Order A \

21 (1) Excrydecree and order as defined in section 2 other than a decree or order of a court of small causes, shall be drawn up in the court vernacular. As soon as such decree or order has been drawn up, and before it is same 1 the Nuns rim shall cause a notice to be posted on the notice be

that any party or the ple of such notice peruse the Ministring an objection or some accident if defec-

1776

1770

177(

[88

or order is at variance with the judgment or contains some clerical or arithmetical error. Such objection shall state clearly what is the error, defect, or variance alleged, and shall be signed and dated by the person making it

(2) If any such objection be filed on or before the date specified in the notice, the Munsarim shall enter the case in the earliest weekly list practicable, and shall, on the date fixed, put up the objection together with the record before the Judgo who prenounced the judgment, or, if such Judge has ceased to be the Judge of the court,

before the Judge then presiding (3) If no objection has been filed on or before the date specified in the notice,

er if an objection has been filed and disallowed, the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge

for signature in accordance with the provisions of rules 7 and 8 .llowed, the correction prection or alteration

idwriting. A decree by the Judge shall be drawn up, and the Munsarim shall date the decree as of the day on which the judgment was pronounced and shall lay it before the Judge for signature in accordance

Order XXI

104. When the certificate prescribed by section 41 is received by the court which [43, par

sent the decree for execution, it shall cause the necessary details as to the result of

execution to be entered in its register of civil suits before the papers are transmitted

were or with the band there er a mile land is or is not ancestral land within the meaning of Notification No 1887 1 238 10.

dated 7th October, 1911 of the Local Government, and shall fix a date for determining

win secting the extremes and the streets " - ;

whether such land, or any, and what part of it, is ancested land The result of the enquiry shall be noted in an order in a'e for the purpose by the

1 anding Judge in his own handwriting ught to bring to ade to text, as july ager states

, and the decree is not sent to the Con eter " ore order ga sale, shall alore l'apout the tellector in whose district such property is a taste to regard whether the projectly as

that to any (and, if so, to what) outstanding character the part of Cover went

* Thermenitate relatofential e * t Jamare 1-12

Collector

[93 para 8]

[94 para 3]

of the parties or their pleaders, free of charge, between the time of the receipt by the

court and the declaration of the result of the enquiry

109. The reports of the Sub Registrar and Collector shall be open to the inspection

No fees are payable in respect of search and report by the Sub Registrar and

110. The result of the enquiry under rule 66 shall be noted in an order made for the purpose by the presiding Judge in his own handwriting. The court may intelligent discretion adjourn the inquiry, provided that the reasons for the adjournment are stated.

in writing, and that no more adjournments are made than are necessary for the purposes of the inquiry [96] 111. If after proclamation of the intended sale his been made any matter is brought to the notice of the court which it considers material for purchasers to know the court shall cause the same to be notified to intending purchasers when the property is put up for sale [97] 112. The costs of the proceedings under rules 66, 106 and 108 shall be paid in the first instance by the decree holder, but they shall be charged as part of the costs of the execution, unless the court, for reasons to be specified in writing shall consider that they shall either wholly or in part be omitted therefrom [102] When permission has been given to a decree holder to hid for property the court ordering the sale shall inform the officer appointed to conduct the sale whether there are any persons in addition to the decree holder, entitled to share in the sale mocced-[120] Whenever any civil court has sold, in execution of a decree or other order, 114 any house or other building situated within the limits of a Military Cantonment or station it shall, as soon as the sale has been confirmed, forward to the Commanding Officer of such a intonment or station for his information and for record in the Brigade or other proper office, a written notice that such sale has taken place, and such notice shall contain full particulars of the property sold and of the name and address of the pur chaser ≠ 1 fylen [110A] Whenever guns or other ar " 115 due notice to the Magistrate of the district of the names and addresse, of the purchasers and of the time and place of the intended delivery to the purchasers of such arms 50 that proper steps may be taken by the police to enforce the requirements of the India Aims Act When an application is made for the astachment of his stock or other Append x A moverable property, the decree holder shall pay into court in each such sum as will cover (1)1 on accerving a suport thereof from the proper officer may usue an order for the will di swal of the attachment and direct b whom the costs of the attachment ar to be pard Live stock which has been attached in execution of a decree shall order ruly |Appendix A be left at the place where the attachment is made either in custody of the judgment debtor on his furnishing security, or in that of some land holder or other respectable person willing to undertake the responsibility of its custody and to produce it when required by the court If the custody of live stock cannot be provided for in the maner described Appendix A in the last preceding rule, the annuals attached shall be removed to the nearest poin established under the Cattle Frespa's Act, 1871, and committed to the custody of the pound keeper, who shall enter in a register -(a) the number and description of the innerels, (b) the day and hour on and at

For every annual committed to the custody of the psumi keeps as of re

(c) the name of the attaching of mutted to his custedly a

119

[Append x A

said, a charge shall be levied as rent for the use of the pound for each fifteen or part of fifteen days during which such custody continues, according to the scale prescribed under section 12 of Act No 1 of 1871

And the sums so levied shall be sent to the Treasury for credit to the Municipal or District Board, as the case may be, under whose jurisdiction the pound is All such sums shall be applied in the same manner as fines levied under section 12 of the said

Cattle Trespass Act A xidanahad [Appendix A

In any case, for special reasons to be ment to be made for mamtenance at

121 The charges herein authorised for the maintenance of live stock shall be [Appendix A paid to the pound keeper by the attaching officer for the first fifteen days at the time the anumals are committed to his custody, and hereafter for such further period as tho

court may direct, at the commencement of such period Payments for such maintenance so made in excess of the sum due for the number of days during which the animals may lo in the custody of the round keener shall be refunded by him to the attaching officer

you o and ounces all from the of which on their being so released, shall sign a receipt for them in the register mentioned in rulo 118

123. For the safe custody of ineveable property other than has stock while under (Appendix A the court, make such

place one or more [Appendix A

(1)1

persons in special charge of such property 125. The fee for the services of each such person shall be pay able in the manner (Appendix A prescribed in rule 116 It shall not be less than two annas, and shall ordinarily not be

mere than three and a half aunas per diem The court may at its discretion allow a higher fee, but if it do so, it shall state in writing its reasons for allowing an exceptional rate 126. When the services of such person are no longer required the attaching officer (Append a A

shall give him a certificate on a counterful form of the number of days he has served and of the amount due to him , and on the presentation of such certificate to the court which ordered the attachment the amount shall be paid to him in the presence of the Provided that, where the amount does not exceed Rs 5 at may be paid to the Sahna

by money order on requisition by the Amm, and the presentation of the certificate may

be dispensed with 127. When in consequence of an order of attachment being with drawn or for some Appele A other reason, the person has not been employed or has remained in charge of the projerty for a shorter time than that for which payment has been made in respect of has

MINKES, the fee paid shall be refunded in whole or in part as the case may be 128. Lees paid into court under the loregoing rules shall be entered in the Register 14, pages A

of Petty Receipts and Repayments 129. When an sum levied under rule 119 is remitted to the treasure, it shall be Appear A accompanied by an order in triplicate (in the form given as form 9 of the Managed

becount Code), of which one part will be forwarded by the Ireasory U acads to the Di tract or Municipal Board, as the case may be A note that the same has been just into the Treasury as rent for the use of the pointd, will be recorded on the extract fr

the pass book 120. The cest of preparing attached preperty I reade, or of conveying it to the Assaura A place wherein to be kepter seld shall be paral'els the decree healer to the a saline have In the event of the decree solder falle to provide the accessor facility the

attaching officer shall report his default to the court, and the court may thereupon is an order for the withdrawal of the attachment and direct by whom the costs of the attachment are to be paid

Order XXVII

9 In every case in which the Government Pleader appears for the Government as undertaking, under no visions of rule 8 (1), the defence of a suit against an officer of the Government, he shall in heu of a vikalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall be as nearly as may be in the terms of the following form

TITLE OF THE SUIT. ETC

I, A B, Government Pleader, appear on behalf of the Secretary of State for Ind i cortion (or the Government of the United Provinces, or as the case may be) Respondent (or &c). In the suit

or, on behalf of the Government [which, under Order 27, rule 8 (I) of Act No \ of 1908, has undertaken the defence of the suit, respondent (or, &c), in the suit

Order XLIII

[128] 3—In overy uppeal under rule 1 in overy miscellaneous case, and in every set diemissed for default a formal order shall be drawn up stating clearly the determination of the appeal or case, the costs incurred, and the parties, if any, by whom such costs are to he paid.

FORMS

APPENDIX B

No 20

APPLICATION 1 OR ISSUL OI SUMMONS TO A PARTY OR WITNESS

NO OF SUIT

Names of parties
In the Court of the
Date fixed for hearing

Form No +)	1		3		4	,	6
	in ber of tnesses to be mimoned	Varie and full address of each jerson to be summoned	Rank or oc upat on	Distance (from	resi leuce Court Road	tash to liter—	At oa la aldress of person to will be travelli be evice as let de returned
	1						

APPLNDIX 1.

No. 43.

The security to be furnished under section 55 (4) shall be, as	nearly is may be, by	111]
a bond in the following form —		,

In the Court of

at. Sunt No against

of 19

A. B of C D of

Plantiff. Defendant.

Whereas in execution of the decree in the suit aforesaid, the said C. D. has been

be released from custody if the said C D furnish good and sufficient security in the sum of Rs. that he will appear when called upon and that he will within o e month from this date apply under section 5 of let No III of 1907, to be declared an insolvent Therefore I. L. F . infiabitant of

caccutors

self my he ra a 1 and his successors

m off co th by the said court and will at ply in the manner and within the time hereinbefore set forth at d in d 'sult of su h appearance or of such application. I bind myself my lears at lexiculors to lay to the said court on its order, the sum of Rs

Witness my hand at

lay of

With cases

(NI) L. F. Surdy

MIPENDIN I

this

No 11

Il e security to be furnished under Ord r XXXIIIf rul 1 s all be as accurity as may be ly a bord in the following form

In the Court of

5 13

of LJ Hant I attaching officer shall report his default to the court, and the court may thereupon is an order for the withdrawal of the attachment and direct by when the costs of the attachment are to be paid

Order XXVII

111) 9 In every case in which the Government Pleader appears for the Government as a party on its own account, or for the Government as undertaking, under the provisions of rule 8 (1), the defence of a suit against an officer of the Government, behalf in lieu of a vakalatnama, file a memorandum on unstamped paper signed by him and stating on whose behalf he appears. Such memorandum shall he, as nearly as may be, in the terms of the following form:

TITLE OF THE SUIT, ETC

I, A B, Government Pleader, appear on behalf of the Secretary of State for India m Council (or the Government of the United Provinces, or as the case may be) Respondent (or &c.). in the sub.

or, on behalf of the Government (which, under Order 27, rule 8 (1) of Act No \ of 1908, has undertaken the defence of the sunt, respondent (or, &c), in the sunt

Order XLIII

dismissed for default, a formal order shall the same patterns, it only by are to he paid

FORMS.

APPENDIX B

No 20

APPLICATION FOR ISSUE OF SUMMONS TO A PARTY OR WITNESS

No or Surr

Names of parties
In the Court of the
Date fixed for hearing

Form No

4]	1		3	 	4	.		0
		Name and		Distance of from	of 14-aldenec Co art	(ash] 4	l for—	Na is at 1 address of person to who ur expe d d
	tinesses to be tumoned	full address of each person to be summoned	Rank or occupation	الد 1	Road	Iravellu a expenses	(vienee)	travellita experses ar dietro en should be returned
	\							

APPENDIX 12.

No. 43.

The security to be furnished	under section 55	(4) shall be, as marly as may be,	և չ (111
a bond in the following form :-			
In the Court of	at		
	Smt No	of 19	

Sut No. of 19

Sut No. of 19

against

A. B, of ... Plaintif,
C. D. of ... Defendant

WHEREAS in execution of the decree in the suit aforesaid, the said C. D. has been arrested under a warrant and brought before the court of

sufficent security in the , and that he will system I of 1907, to be declared

of such appearance or of such application, I bind myself, my heirs and executors, to pay to the said court, on its order, the sum of Rs

Witness my hand at this day of

(\1) 1. 1',

Witnesses .

APPENDIX P

No 11

The security to be furnished under Order XXXVIII, rule 9, shall be as nearly as the may be, by a bond in the following form

In the Court of

ıt

.....

a sufficient sum to cover the amount of suit with costs and the costs of the attachment) as the said court may adjudge against the said defendant.

Witness my hand at

day of

Witnesses

19 (Signed) Surety

No. 12.

[131] The security to be furnished under Order XXXIX, rule 2 (2), shall be, as far as may be, by a bond in the following form :-

In the Court of

Suit No. of 19 .

> Plaintiff, Defendant

Where is, in the suit above specified, instituted by the said plaintiff. to restrain the said defendant. , from (here state the breach of contract or other injury), the said court has, on the application of the said plaintiff, an injunction to restrain the sud defendant from the repotition (or the continuance) of the said breach of contract (or wrongful act complained of), and required security from the said defendant agamst such repetition (or continuance):

, inhabitant of , have volunt unly become securit Therefore I, as Judge of the sal and do heroby bind myself, my heirs and executors, to , shall abstam from court and his successors in office that the said defendant, the repetition (or continuance) of the breach of contract alorosaid (or urongful act, c from the committal of any breach of contract or injury of a like kind, arising out of the sam contract, or relating to the same property or right), and in default of his so abstaining, bind myself, my heus and executors to pay into court, on the order of the court, such , as the court shall adjudge against the sax sum to the extent of runces defendant

Witness my hand at

day of this

(Signed) Surety

Witnesses:

APPENDIX II.

No. 4.

Notice to show cause (General Form)

IN THE COURT OF DISTRICT AΤ

CIVIL SUIT NO.

ot 19 of 19 Miscellaneous No.

resident of

111848 resident of

.

WHERLAS the above named

tiven und

application to this court that to appear in this court in person or by a pleader duly instructed on the

application, failing wherem, the said applic and it will be pre ur I that you consent t nd the sculot

o'clock m 19 , at

; you are hereby warned noon, to show cause against the be heard and determined ix parts, d guardian for the suit.

dry of

Judge

his mide

19 .

APPENDIX F

PUNJAB.

Annulments, Alterations and Additions to the Rules in the Ferst Schedule of the Code made by the High Court, Punjab

The Punjab Government's Orders, etc.

Under the Code of Civil Procedure corrected up to December, 1914.

-	
Rules under Section 128 (b) of the Code (No. 5 G. (Act V of 1908) for the maintenances and oustody of live stock, etc (Date, 12 5 91)	1909, Part III, p
Extension of the Code (Act V of 1908) to No 1 A the Scheduled districts in the Punjab Date, 1 1 00	1999, Part I, p 12
Cancelling 11 former Notifications under No 1 B the Codes of 1877 and 1882 Date, 1 1 99	Ditto
Appointment with reference to Section 2 (7) No 1 C of the Code (Act V of 1908) Date 1 1 09	Ditio
Rules under Section 70 (1) (e) of the Code No 1 D (Act V of 1998) as to appeals from Date 1 1 99 certum orders	Ditto
Sanctioning exercise of powers under No I E Section 93 of the Code (Act V of 1901) Date, I 1 09	1909, Part I, p 13
Exempting personal appearance in Court No 1 F under Section 133 of the Code (Act V Date, I 1 0) of 1901)	Ditto
Pmpowering District Judges to appoint No 1 G Commissioners to take affidavits, tide Date, 1 1 09 Section 139 (c) of the Code (Act V of 1993)	Ditto
Under O XXVII,*r 2, authorsing persons No 1 II to act for Covernment Date, 1 1 09	1):110

[.] In the Cazette it is O XXVI which is apparently wrong

CHIEF COURT, PUNJAB. THE PUNJAB GAZETTE.

1909, Pant Iff, r. 2.

Notification No. 6 G, dated I 1. 09.

In accordance with the provisions of Section 23 of Act N, 1897, the General Clauses Act, the following draft rules made under section 122 of the Code of Givil Procedure, 1993, by the Hon ble the Chief Court of the Pumpit to regulate its own procedure and the procedure of the civil courts subject to its superintendence, are published for the

After rule 7 of Order II, Insert :-

"S. (1) Where an objection, duly taken, has been allowed by the Court, the plantiff shall be permitted to select the cause of action with which he will proceed shall be permitted to select the cause of action with which he will proceed

(2)

plaintiff "

ceed, the

the Court-ices that had be lacesses; with the Court's order, the Court shall proceed as provided in rule 18 of Order VI and as required by the provisions of the Court fees Act."

To rule 10 of Order V, the following provise should be added :-

"Provided that in any case if the plaintiff so wishes, the Court may attempt to serre the summons in the first instances by registered post instead of

n na siri

Order IX, rule 9 (1):—To rule 9 (1) the following provise should be added:—
Two vided that the plantiff should not be procluded from bringing another suit for redemption of a mortgage, although a former suit may have been dismissed for default "
order XVI, rule 2")—After rule 29 of Order XXI the following rule should be inserted:—

"29A. When a suit under rule 63 of this Order is pending, the Court in which such suit is filed may, if it considers that execution of the former decree should be stayed, intimate the fact to the overuting court, which shall thereupon stay execution intil the suit is decided."

In Order XXI, rulo 75, after the word "stored shall be added the words "or can be old to greater wheat or gram"

or og reafer advantage in an intripo state, sien as great when so greater dvantage in an intripo state, sien as great with a state of the order NXX the following explanation shall be added:—

Explanation ' The rule applies to a joint Huidu fundy trading partnership."
Order XXXII, rule 1. To tube I the following paragraph shall be added:
"Such person may be ordered to pay any costs in the suit as if he were the

1st Schedule, Order V, rule 18, form 11 .- For the 3rd and 4th parts of (3) in the form read:-

(3) The said personally known to me pointed out to me by

and there on the day of

I went to said house in

o'clock in the fore noon, I did not find the said neighbours.

I enquired from $\begin{cases} (a) \\ (b) \end{cases}$ I was told that

had gone to

and would not be

19 .

back till

(Signature of process server) By order, &c, A L DANSON, Registrar

and his house in which he ordinarily resides being

THE PUNJAB GAZETTE.

1909. Pant III, p. 571.

Notification No. 2212 G, dated 12. 5. 09:-

The draft rules made under section 122 of the Code of Civil Procedure, 1908, and published with this Court's notification No 6 G, dated the 1st of January, 1909, have, subject to the under-mentioned amendment, been confirmed by the Local Government, and are published for general information :-

AMENDMENT.

In notification No 6 G, dated the 1st of January, 1909, for "In Order XX, rule 75 (2), otc ," read " In Order XXI, rule 75, ctc "

By order, &c, A. L. DANSON, Registrar.

APPENDIX G.

RURMA

ANNULMENTS, ALTERATIONS AND ADDITIONS TO THE RULES IN THE PRIEST SCHEDULT OF THE CODE WADE BY THE HIGH COURT, BURNEY

Burma Government Notification, etc.,

Under the Code of Civil Procedure corrected up to December 1914

Number an I date

Subject

Lear and page of Burina Garette Lart J

Cancellation of notification issued under the old Code	λο 31 Date, 23 2 1910	1910, p 163
Under Section 2 (7) of the Code (Act V of 1903) appointment of Officers to perform functions imposed on the Government pleader under O XXXIII, rr 6 and 9 of the said Code	No 32 Date, 23 2 1910	Ditto
Under Section 55 (1) of the said Code for the detention of persons ordered to be detained by Court.	No 33 Date, 23 2 1910 No 43 Date, 6 3 1912	Ditto 1912, p 155
Under Section 55 (2) of the said Code directing notice to be given before arrest of certain employees	No 60 Date, 20 4 1910 No 14 Date, 17 1 1912 No 94 Date, 12 6 1913	1910, p. 217 1912, p. 21 1913, p. 357
Under Section 57 of the said Code fixing scale of subastence allowance	\a 35 Date, 23 2 1910	1910, p. 166
Under Section 61 of the said Code deel iring partial exemption of certain agricultural produce from attachment or sale in execution	No 116 Date, 4 8 1913	1 43 р 185
Under Section 93 of the said Code appointing Government Advocate to exercise Advocate General's powers under Section 91 and 92 of the said Code	No 36. Date, 23 2 1 dec	140, p. 10s.
Likempton from personal appearance in Court under Section 133 (1) of the said	No. 37 Date 23, 2, 1510.	1310, p. 366

Under Section 137 (2) of the said Code	Number and date (No 38	Year and page of Burma Gazette, Part I
declaring what the language of certain Courts shall be	Date, 23 2 1910	Ditto
COME OF BUILDING	No 128 Date, 15 8 1910	1910, p 764
Under Section 138 (1) of the said Code directing in whit cases evidence shall be taken down with the Judge's own hand in the English language	No 39 Date, 23 2 1910	1910, p 166
With reference to Section 139 (c) of the said Code empowering District Courts to appoint Commissioners to take uffidavits	No 40 Date, 23 2 1910	1910, p 166
	No 77 Date, 10 6 11	1911, p 394
Rules under O XXVI, r 9 (prov) of the said Code as to the persons to whom commissions shall be issued	No 38 Date, 17 3 1913	1913, p 148
	No 41 Date, 23 2 1910	1910, p 166

THE BURMA GAZETTE,

March 19th, 1910, PART IV, P 291

The 15th March, 1910

No 3 (General) -Under the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the previous sanction of the Local Government, the Chief Court of I ower Burma directs that the following alterations shall be made in the Liest Schedule Appendices E and F -

(1) In the heading of Form No. 5 of Appendix E, for the words and figures 'Order 21,

Rule 6 the word and figures "section 41" shall be substituted

(2) In Appendix F the last two forms shall be numbered respectively 9 and 10 instead of 6 and 7

P C S KITH, Registrar

Dated Ran joon, the 17th March, 1910

No. 4 (General) - In exercise of the powers conferred by section 122 Code of Code Pr seeding, 1908, and with the sanction of the Local Government the third Court of Louge Burma directs that for sub-rule 1 of Rule 18, Order XVII, Tark & I chile 1 the Code of Civil Procedure, 1908, the following shall be substituted—

When a commission is issued under this order, the parties to the sint shall appear bef re the Commissioner in person or by the agents of I leaders, and section a direct l

Ly the Court, within fifteen days

The 30th March, 1910.

No. 7 (General) —In exercise of the powers conferred by section 122, Code of Civil Procedure, 1998 and with the sanction of the Local Government, the Chief Court of Lower Burma directs that for Rule 13, Order XXI, First Schedulo to the Code of Civil Procedure, 1908, the following shall be substituted:—

(1) When application is mide for execution of a decree relating to immove able property included within the Cudastral or Town Survey and the decree does not contain

regarding the filling up of forms of process concerning immove-ble property, must also be furnished so far as they are not given in the plan. In the case of other immoveable property a plan is not required, but such of the particulars in the annexed instructions as can be given must be supplied—

taken), and revenue last assessed upon the land, must be given

2 In the case of other agricultural hand, the area and village tract within which it falls, distance and direction from nearest town or village and boundaries should be specified.

on the land, must be given

In the case of buildings stunted in a large town when the land on which such buildings stand is not affected, the name or number of the street, or, if the street has neither no new the street of the street, or, if the street has neither no new the street of the street, or, if the street has neither no new the street of the

R C S Kritil Registrar

THE BURNA GAZETTE,

July 16th, 1910, Part 1V, r 769

The 12th July, 1910

Code ourt

Court, Lower Burma' shall be Inserted after the word Appendices in Rune 3 of Order XLVIII in the First Schedule to the Cor's

W B. BRINDL .
OJ I parat

THE BURMA GAZETTE.

September 17th, 1910, PART IV, r 991

Dated Rangoon, the 12th September, 1910

No 17 (Ceneral) -In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, the Chief Court of Lower Burma directs that the following alterations and additions which are specified in Part I of this Notification shall be made in the Orders and Rules contained in the First Schedule of the said Code

[See List of Chief Court Notifications.]

PART I

In Order V, the following shall be inserted as Rule 21A:-

21A. When any summons is sent for service by a Court to any Court situated beyond the Limits of Burma, it shall unless it is written in English, be accompanied by a translation in English or in the language of the locality in which it is to be served

In Order V, the following shall be adde l as Rule 23A -[Substituted by No 15 General of 19 8 11]

To Order XIII, Rule 1, the following shall be added as sub rule (3) -

"(3) The Chief Court of Lower Burma directs that such lists shall be prepared in Form Jud chal which will be given free of charge to parties wishing to tender documents in evidence

To Order XIII, Rule 4, the following shall be added as sub rules (3), (4) and (0) -(3) The Court shall mark the documents which are admitted on behalf of the plaintiff or plaintiffs with capital letters in the order in which they are admitted, thus,

A B, C etc, and the documents admitted on behalf of the defendant with figures thus

1, 2, 3, etc (4) When a number of documents of the same nature are admitted as, for example, a series of receipts for rent, the whole series shall bear one number or capital letter a

small number or small letter being added to distinguish each paper of the series ' (5) I very document on admission shall be entered in a list in Form Total pre

pared by the Bench Clerk and signed by the Judge" To Order XIII, Rule 5, sub-rule (3), the following shall be added i note of the return should be made in the list in Form negral 27 to Order XIII, Rule 7, sub-rule (2), the following shall be added -Who shall give a receipt for them in column 6 of the list in Form General's In Order XIII, Rule 10, sub-rule (3) shall be re-numbered as (5) and tie

In Order XIII, the following shall be inserted as Rules 10A and 10B -101 Publits, with their recompanying lists shall not be filed with the record

until after the termination of the trail 10B If any exhibit included in the index of contents of the trial record is with

dr wn after judgment, the fact should be noted in the column of remarks of the index and it should be stated whether a copy has been substituted or not. In Order XVI, Rule 2, the following shall be substituted for sub-rule (3) .-(3) Subject to the provisions of sub-rule (2) travelling and other expenses of witnesses, in Courts subordinate to the Chief Court other than the Court of Small Causes of Rancoon shall be payable on the following scale:-

"(a) Ordinary labouring class of Natures - The actual railway or steam boat fare

to au: the السام المحاسب وبالرسام فالمداري سسيره فا each day a absence from home, including one day in attendance at Court, of six annas to those who are residents of places either than the place where the Court is held, and of

four annas to those who are residents of the place where the Court is held "(h) Petty villare officers - Double the above rates of daily allowance, same rates as above for railway or steam boat fare or actual travelling expenses by boat or road up

to the limit of Rs.2 a day by beat and of four annas a mile by read "(c) Persons of higher ranks of life, such as Clerks, Trades people, Ywathugyis and Circle Thuques -- Second class railway or steam boat fare to and from the Court or, where the journey cannot be performed by rad or steam boat, actual travelling

expenses up to a limit of Rs.4 a day by boat and of six annas a mile by road, and an allowance not to exceed, except in special cases, Rs. 3 for each day a absence from bon c to Europeans or Eurasians and Rs. I to Natives. " York -- I non official who does not pay income tax, even though he may describe

humself as a clerk or a tradesman, is not entitled to be treated as falled tacket class(c) (d) Persons of superior rank - The actual sum likely to be spent in transmitted and from the Court, with an allowance, according to circumstances, but to exact,

except in very special cases, its 5 for each day's absence from home to En your or Eurasians and Rs 2 to Nativo gentlemen.

"(e) Witnesses following any profession, such as Mulicine or La -A burnel allowance to circumstances

"Note -When the journey has to be performed partly by rad or samp load and partly by road or boat, the fare shall be paid in respect of the form ramil the filler I sor boat allowance in respect of the latter part of the journey Railway arrange i minimpiers by a Civil Court as witnesses, and travelling by rail to attend the Court, around by Jours the railway fare to which they are entitled under the rules for the tage went of your under without regard to the fact that they may have travelled under a pass and see the action payment of the fare '

To Order XVI, Rule 9, the following shall he added :--

"Where the person summoned is a public officer or servant of the line was from the sufficient time shall also be allowed in order to give the witness an opposit i ty of some municating with his departmental superior, so as to arrange for the dark was of the duties during his temporary absence from his post.

In Order XVIII, the following shall be inserted as Rule 6A .-

"64. Where there are no interpreters paid by Government, and it at a sary to employ an interpreter in a Civil case, he shall be paul such fee, 110. ... exceeding Rs 2 per diem, as the Court may fit The fee shall be whateld be a at whose instance the interpreter is required and shall be treated as an Ill payments of interpreters fees shall be made through the tourt and BaılıfFs Reg⊵ter IL '

To Order XIX, the following shall be added as Rules 4 to 12:

4 The officer adminutering the oath to the declarant of at make the declarant take the oath or affirmation. Then he the all a repeat the whole of the statement written in the affidavity is , the declarant should sign the affidavit, and lastly the off or w should sign and date it.

" i. Every affidavit to be used in a Court of Justice and a second Court of

در وه If there is a case in Court, the affidavit in support of or in respecting it must also be entitled. In the case of

'If there is no case in Court the athdavit should be a ... jetition ∢f

b. I very iffidavit containing any statement of ,...

pur graphs, and every paragraph shall be numbered on as . may .

tion 1 ____, manufe an amount snam be described in such a manner as will serve to identify him clearly, that is to say, by the statement of his full name, the name of his father, his profession or trade, and the place of his residence.

"8 When the declarant in any affidavit speaks to any fact within his own know lodge, he must do so directly and positively, using the words 'I affirm' (or 'Make oath)

'and say'

"9 When the particular fact is not within the declarant's own knowledge, but 15 stated from information obtained from others, the declarant must use the expression I am informed ' (and if such be the case, should add) ' and verily believe it to be true, or he may state the source from which he received such information. When the state ment rests on fact disclosed in documents or copies of documents procured from any Court of Justice or other source, the deponent shall state what is the source from which they were procured and his information or belief as to the truth of the facts disclosed in such documents

"10 Every person making an affidavit, if not personally known to the Commissioner, shall be identified to the Commissioner by some person known to him, and the Commissioner shall specify at the foot of the petition, or of the affidavit (as the case may be), the name and description of him by whom the ide t fleat or a made as well

- mented ton starth states as a is lead and explained as herein provided, the Commissioner shall certify in writing at the foot of the Ph

. .. .

mterpreter 12

be guided

To Ore : Mix

21 As soon as the decree of a Court of first instance in a suit relating to land in a district in which there is a Land Records establishment has become final, or if the decree has been appealed against, when the decree in appeal has become final and the interest of any party of the suit in any land included in the survey has been affected

'22 The certificate shall be in Form (Civil) 96, and shall be signed by the presiding officer of the Court

"23 Copies of all certificates sent to Superintendents of Land Records and Sub

Registrars under these rules shall be kept in a separate annual file "

In Order XXI, the following shall be inserted as Rule 10A :-

38A. The actual cost of conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borne by the conveyance of a civil prisoner shall be borned by the civil prisoner shall be conveyance of a civil prisoner shall be borned by the civil prisoner shall be

XVI. II

decree holder he shall only receive the same allowance for his subsistence as if to were det mued in confinement upon the application of one deere holder. Luch decree coller shall, however, pay the full allow mee for sub-usence, and when the debtor is reliased the balance shall be divided rateably among the decree holders, and paid to them"

In Order XXI, the following shall be inserted as Rules 45A, 45B, 46A, and 57A respectively -

[45A and 45B substituted by Notification No. 11 (General) of 15-10-12 (see p. 1541,

46.1 When a debt alleged to be due by a third party to a judgment debtor has been attached under Rule 46 and has not been paid into Court under sub rule (3) of a notice to such third party in Form Civi.

such third party in Form Civi.

such third party in Form Civi possible, be served on the judgment debtor third party shows no eause, and admits th

shows no cause, and admils the should pay unlo Court the amount admitted by him to be due, or so much thereof as may be sufficient to satisfy the decree, and that if he fails to do so, he may he subjected to a suit

"57A. A judgment debtor may secure release of his attached property by giving

security to the value thereof to the Court"

In Order XXI the following shall be substituted for Rule 65

"65 (1) Sales shall be conducted by the Bahiff or Deputy Bahiff, but the duty may be entrusted to a process serier when the property is move-tile property not exceeding Ba 50 in value, and when, in the opinion of the Court, for reasons recorded in the diary of the press, the Bahiff or Depuly Bahiff cannot personally conduct the

"(2) Subject to the terms of the provise to Rule 43 and of Rule 74, some one dry in each work shall be set apart and regularly observed for holding sales in execution of decree, and some well known place in the vicinity of the Court house or the public

decree, and some well known place in the vicinity of the Court house or the public bazaar shall be selected for the purpose "(3) Subject as aforesaid, and unless the Court is of opinion that for any special

reason a sale on the spot when, and causes one coder is o planted will be more beneficial to the judgment deblor, all property, whether moveshie or immercable, attached motecution of decree shall he sold at the time and place selected

'The day to be set apart, and the place selected for holding the sales, and any

changes therein, shall be reported for the information of the Chief Court

(4) The following scale is laid down as to the amount which may be deducted from the proceeds of the sale of property sold in execution of the decree, as the expenses t as his

Where they exceed Rs 500 and do not exceed Rs 5000-5 per cent on the first Rs 500 and 2 per cent on the remainder

Where they exceed Rs 5000-at the above rate on the first Rs 5000 and one per cent on the remainder

[f he 14th March, 1914

No 3 (General)—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the following addition shall be in ide to Rule 65 of Order XXI of the First Schedule—

The following shall be added to sub rule 4 -

"The calculation of the commission shall be on the whole amount realized in pursuance of one application for execution]

"(5) Subject to the provisions of sub rule (13) of Rule 45B, no further sum beyond this authorized commission and the cost of conveyance of property to the place of

sale shall be deducted from the sale proceeds.

NOTE.—As regards the travelling allowance of Build's going out to will property
on the spot, see Article 1039 and item 23 of Appendix 20, Cri d Service Regulations

(6) When a sale of numericable property is set a ide under the provisions of Rule 92 (1) below, no commission at all be paid to the Bathif for client the property.

"(7) No officer of a subordinate Court shall rec in respect of any sale of property (mortgaged or ot) suance of any decree or order of the Court directing allowed by sub rule (4) above

"(8) The gross proceeds of sales shall be entered in Register II and in Bailiffs Register I and shall be paid into the Treasury '

In Order XXI the following shall be inserted as Rule 81A and added as Rule 104

respectively -

"81A Whenever guns or other arms in respect of which licences have to be taken by putchasers under the Indran Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the requirements of the Indian Arms Act."

'104 If, in execution of a decree, any interest in land which has been surveyed is sold the names and addresses of the purchaser or purchasers, and the interest thereby acquired, shall be certified to the Superintendent of Land Records as soon as the sile

h w been confirmed under Rulo 92 (1) '

To Order XXVI the following shall be added as Rules 19 to 26 respectively -

1 LLES TO COMMISSIONERS FOR LOCAL INVESTIGATION, AND COMMISSIONERS OF PARTITION OR TO TAKE ACCOUNTS, OR FOR THE EXAMINATION OF WITNESSES

'19 [As amended by Notification No 24 (General) of 23 10 11] Civil Courts m issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for the expenses of the commission

20 Under Government of India Resolution in the Home Department (Judicial No 101101, dated the 21st July, 1875) Judical Officers are prohibited from accepting any remuneration for executing commissions issued by Courts of other provinces

21 It is to be understood that no part of the fee sent for the execution of a com mission is to be accepted, either personally or on behalf of Government The execution of a commission is an official act which Judicial Officers are bound to perform when called upon, and is not work undertaken for a private body

22 In all cases the unexpended balance, which remains after all charges have been

deducted, should be returned to the Court issuing the commission

" 23 accounts.

Comn

for the first two hours and one gold mobur for each succeeding hour

' I LES TO COMMISSIONERS FOR ADMINISTRATE ON OATH OR BOLEMN APPRIMATION TO A DECLARANT OF AN APPRIDAVIT

the said declarant

" Provided that --

(a) the administration of the eath or of solumn affirmation claushere than in Court shall be authorized by the Court by order in writing ,

(b) if more than one affidavit is taken at the same time and place, the fee shall be Rs 8 for each affed wit after the first .

(c) in no case shall the fees for taking any number of affiducits at the same time and place exceed Rs SO.

(d) in purper suits and appeals, when the affidavit of 14 injec is taken, to be

shall be charged 25 Athd wits taken under Rule 24 shall be taken out of Court hours shall be retained by the Commissioner for administering the oath or solemn afternation

se order

s as the ned and

Court-fees on plaint and petitions—the full value of the stamps necessary. Process fees-the full value of the stamps necessary.

· MANUE, J. before."

of

Dated

To Order XLI, Rule 1, the following shall be added as sub-rule (3) :-

" FORM 15A.

Form of Certificate of the Payment of Fees for the Custody of Attached Property. COURT OF IN THE

of 19 .

TO THE BAILIFF.

Civil Case No Reference The warrant of attachment of issued for execution on the

in the po-session

19. Certified that a further sum of Rs. has been paid in stamps for custody fees under Rule 2, Article 3 (b), of the Process fee rules in respect of the above mentioned attachment.

Court Cler1 "

THE BURMA GAZEFIE.

DECEMBER 38D, 1910, PAPT IV. PP 1250-1251

The 25th November, 1910

No. 22 (General) -In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the following amendments shall be made in Order XXXIV of the First Schedule to the Code

(1) The following shall be substituted for Rule 2:-

In a suit for foreclosure, if the plaintiff succeeds, the Court shall pass a preliminary decree cither-

(a) declaring the amount due to the plaintiff for principal and interest on the mortgage at the date of the decree and for his costs of the suit (if any) awarded to him, or

(b) ordering that an account be taken of what will be due to the plaintiff for principal and interest on the mortgage on a day within three months of the date of such decree to be fixed by the Court, and for his costs of the suit as aforesaid, and directing-

(c) that if the defendant pays into Court the an ount declared by the decree to be due or the amount found due on the account ordered on or before a date

"(7) No officer of a subordinate Court shall receive any larger commission or fee in respect of any sale of property (mortgaged or otherwise) held in execution or pur suance of any decree or order of the Court directing or authorizing such sale than that allowed by sub-rule (4) above

"(8) The gross proceeds of siles shall be entered in Register II and in Bailiffs

Register I and shall be paid into the Treasury."

In Order XXI the following shall be inserted as Rule 81A and added as Rule 104 respectively --

"81A. Whenever guns or other arms in respect of which heenees have to be taken by purchasers under the Indian Arms Act, 1878, are sold by public auction in execution of decrees, the Court directing the sale shall give due notice to the Magistrate of the district of the names and addresses of the purchasers, and of the time and place of the intended delivery to the purchasers of such arms, so that proper steps may be taken by the police to enforce the roquirements of the Indian Arms Act "

"104 If, in execution of a decree, any interest in land which has been surveyed is sold the names and addresses of the purchaser or purchasers, and the interest thereby acquired, shall be certified to the Superintendent of Land Records as soon as the sale

has been confirmed under Rule 92 (1)

To Order XXVI the following shall be added as Rules 19 to 26 respectively -

"FLES TO COMMISSIONERS FOR LOCAL INVESTIGATION, AND COMMISSIONERS OF PARTITION OR TO TAKE ACCOUNTS, OB FOR THE EXAMINATION OF WITNESSES

"19 [As amended by Notification No 24 (General) of 23 10 11] Civil Courts in issuing commissions will be guided by the provisions of Rule 15, and subject to the provisions of Rule 23, will exercise their own judgment in fixing a reasonable sum for

> India Resolution in the Home Department (Judicial ,, 1875). Judicial Officers are prohibited from accepting

of a commission is an official act which Judicial Officers are bound to perform when called upon, and is not work undertaken for a private body

"22. In all cases the unexpended balance, which remains after all charges have been

deducted, should be returned to the Court assume the commission partition or to take

d three gold mohurs

"I LES TO COMMISSIONERS FOR ADMINISTERING ON OAPH OR SOLEMN APPRIMATION TO A DICLARANT OF AN AFRIDAVIT

the said declarant.

" Provided that-

(a) the administration of the eath or of solemn affirmation elsewhere than in Court shall be authorized by the Court by order in writing ,

(b) if more than one affidavit is taken at the same time and place, the fee shall be Rs 8 for each iffed wit after the first .

(c) in no case shall the fees for taking any number of affidents at the same

(d) in pauper suits and appeals, when the affidavit of a paper is taken, no fee shall be charged

25 Mild wits taken under Rule 24 shall be taken out of Court hours shall be retained by the Commissioner for administering the oath or solemn affirmation. 26 No fee shall be charged for the administration of an eath under the order of any Court other than those specified in Rule 21'

In Order XXXVII, Rule 2, the following shall be inserted as sub-rule (1A):-

(IA) The sum which shall ordinarily be entered in the form of summons as the sum which the plantiff will be allowed for costs in the decree, shall be ascertained and fixed by adding up the amounts of the following.

Court fees on plaint and petitions-the full value of the stamps necessary

Process fees-the full value of the stamps necessary

In Order XXXVII, Rule 2, sub-rule (2), the Iollowing shall be inserted after the words 'pursuance thereof

"or of his applying for such leave within ten days from the service of the summons on and on proof that the summons was duly served on him more than ten days before"

To Order XLI, Rule 1, the following shall be added as sub-rule (3) :-

as many

" FORM 15A.

Form of Certificate of the Payment of Fees for the Custody of Attached Property
IN THE COURT 01

Civil Case No of 19

TO THE BAILIFF.

Reference The warrant of stachment of

in the pose sion

of issued for execution on the

19
Certified that a further sum of Rs has been paid in stamps for custody
flost under Rulo 2, Articlo 3 (b), of the Process fee rules in respect of the above mentioned
attachment.

Dated (rt Cl rk

IRL BURNA GAZLIII.

DICLMBER JRD, 1910 PART IV 17 12:0-12:1

The 2s h Vote ber, 1310

To 22 (General)—In excress of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Gaverna of the Clark Court of Lower Burns directs that the following amendments shall be made in Order XXXIV of the lirst schedule to the Code

(1) The following shall be substituted for Rule 2.

ha a suit for foreclosure if the Haminf succeeds the Court shall 12.52 from mark

(a) declaring the amount due to the 1 limital for 1 minipal and into a tion the mortgage at the date of the decree and f r lise costs of the sunt (if any) awanted to him or

(1) ordering that an account be taken of what will be due to the paintid for principal and interest on the mortgage on a day within three months of the date of such decree to be fixed by the Court, and for his cutsefilters that direction

(r) that if the defend int pays into Court the an ount declared by the decrete to be deed the amount found due on the about terdered energies as

six months from the date of the decree, or, in the case of an account bing ordered, six months from the date of declaring in Court the amount found due, together with interest on the amounts payable at the rate of 6 percent per annum from the date of the decree, or from the date up to which the account has been taken until . I deliver up to

s in his posses

- -- warmane, re-transfer to him, free from mortgage and from all incumbrances created by the plaintiff or any person claiming under him, oi, where the plaintiff claims by derived title, by those under whom he claims, and shall also, if necessary, put the defendant in possession of the

(d) that, if payment of such amounts is not made on or before the day fixed for payment, the defendant shall be debarred from all right to redeem the

(2)(3)

xed" in Rule 3 (1). xed " in Rule 5 (1).

(4) ' -: 1 sun not bearing In a suit for redemption, if the plaintiff succeeds, the Court shall pass a preliminary decree, eithor-

(a) declaring the amount due to the defendant for principal and interest on the mortgage at the date of the decree, and for his costs of the suit (if any) marded to him, or

(b) ordering that an account be taken of what will be due to the defendant for principal and interest on the mortgage on a day within three months of the date of such decree to be fixed by the Court, and for his costs of the sub as aforesaid, and directing-

(c) that if the plaintiff pays into Court the amount declared by the decree to be due of the amount found due on the account ordered, on or before date see months from the date of the decree, or in the case of an account being ordered, six months from the date of declaring in Court the amount found due, together with interest on the amounts payable at the rate of 6 per cent, per annum from the date of the decree or from the date up to which the account has been taken until payment, the defendant shall deliver up to the plaintiff or to such person as he appoints all documents m his possession or power relating to the mortgaged property, and shall, if so required by the plaintiff, to transfer to him free from mortgage and person cluming , by those under

iff in Possessien 427 242 (d) that, if payment of such amounts is not made on or before the day fixed for payment, the plaintiff shall be debarred from all right to redeem the

property. (5) The words "for pryment" shall be meeted after the word "fixed" in Rule 8 (1).

THE BURMA GAZLIIL,

PART IV

The ISth August, 1911

No 11 (General)-In exercise of the powers conferred by section 122 of the Cele of Civil Procedure, 1908, and with the sanction of the Local Government, the Clark Court of Lower Burma directs that the following addition shall be made to Order XXI of the I arst Schedule .-

In Rule 66 the following shall be added at the end of sub-rule (2)

Provided that no such notice shall be necessary in the case of moveable property not exceeding Rs, 250 in value.

The 19th Amost, 1911.

No. 15 (General).—In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sauction of the Local Government, the Chief Court of Lover Burns directs that the following afterations shall be made to Order V of the Flow Schedule.—

the Court shall either take down the deposition of the peen serving the summons as to the time when, and the manner in which the summons was served; or cause the year to make an aindicate before the Bailiff at the Bailiff has been empowered to administer oaths; and shall transmit the same, together with the summons, to the Court whence the summons our remails passed.

(2) In the case of process received from India and Upper Burma if the person on whom the summons is to be served is not personally known to the process server an adiabatic or deposition by the person who pointed out to the process server the said personal five ordinary readence or place of husiness shall also be attached to the summons,

(3) When a process is forwarded for service by one Court in Lower Burms to another Court in Lower Burms and when the person on whom the process is to be served is not personally known to the process serve the case, in connection with which the process was issued, shall not be heard experte without an affidavit or deposition of some person who pointed out to the process server the person to be served or his ordinary residence.

The onus shall be upon the person at whose instance the summons is issued, either himself or by an agent, to point out to the process server the person on whom the process is to be served or his ordinary residence or place of humess.

(4) When the summons has been returned by the process-error under Rule 17, a behavior of due service or of ladure to serve shall be recorded in Form (Civil) 40, and sent with the summons to the Court by which it was esseed.

The 4th April, 1912

No. 0 (General).—In excreme of the nowers conferred by section 122 of the Code of vernment, the Chiel Court he made in Order XXXIV

The following shall be substituted for Rule 2:-

In a suit for loreclosure il the plaintiff succeeds the Court shall either-

mortgage and from all membranees created by the plaintill or any person claiming under him, or, where the plaintill claims by derived title, by those under whom he claims and shall also if necessary put the defendant in possession of the property, but

(B) that if such payment is not made within the said period the delendant shall be

(2) . and mte above.

The Iollowing shall be sub-fituted for sub-rule (1) of Rulo 3. Where the defendant pays into Court the amount declared due as aforesaid, within the said period,

together with such subsequent costs as are mentioned in Rule 10, the Court shall pass a decree-

- (a) ordering the plaintiff to deliver up the documents which under the terms of the preliminary decree he is bound to deliver up, and if so required .-
- (b) ordering him to re transfer the mortgaged property as directed in the saiddecree, and, also, if necessary,-

(c) ordering him to put the defendant in no a

excel v in a mistian of the direction contained in clause B thereof, there shall be the following direction -

That if such payment is not made within the said period the morigized property and the proceeds of the sale (after defraying thereout into Court and applied in payment of what is due to

-- with subsequent interest on the said amount at the rate of six per cent per annum from the last day of the said period up to the actual date of scales stion by the plaintiff and subsequent costs, and that the balance (if any) be paid to the defendant or other persons entitled to receive the same

the following shall be substituted for sub-rule (1) of Rule 5:-

Where the defendant pays into Court the amount due as aforesaid within the said poulod together with such subsequent costs as are mentioned in Rule 10 the Court shall pass a decree-

(a) ordering the plaintiff to deliver up the documents which under the terms of

the preliminary decree he is bound to deliver up.

and if so required,-

(b) ordering him to se transfer the mortgaged property as directed in the said decree, and, ilso, if necessary,-

sion of the property

the Court shall either-

(A) that if the plaintiff within the said period pays into Court the said amount

mortgago and from all incumbrances created by the defendant or any person claiming under him, or, where the defendant claims by derived title, by those under whom he claims and shall, if ucce-sary, put the plaintiff in possesion of the property, but .

(B) th

property be sold, or (2) Order that an account be taken of the unount due to the defendant on the mort one for principal and interest and, after the taking of the said account, pars a preliminary decree is above

The following shall be substituted for sub-rule (1) of Rule 8 .-

Where the plaintiff pays into Court the amount due as afores ad within the said period together with such subsequent costs us are mentioned in Rule 10 the Court shall pass a decree-

(a) ordering the defendant to deliver up the documents which under the terms of

the prehumary decree he is bound to deliver up,

(c) ordering him to jut the jlustiff in possessin of the projecte

THE BURMA GAZETTE.

OCTOBER 19TH, 1912, PART IV. P 1121.

The 15th October, 1912

No. 11 (General). - In exercise of the powers conferred by section 122 of the Code of Civil Procedure, 1908, and with the sanction of the Local Government, the Chief Court of Lower Burma directs that the following alterations shall be made in Order XXI and in Appendix E of the Tirst Schodulo of the said Code -

For Rule 45A substitute the following:-

"45A (1) Before issuing a warrant for the attachment of moveable property which

the Bailiff considers should be employed

(2) In sending the warrant for execution to the Bashiff the Court Clerk shall certify at the foot of the warrant that the recept granted by the Bailiff for the necessary fees has been filed in the record, the Bailiff shall then endorse on the warrant the name of the process server to whom it is issued for execution. If a temporary peon is employed for the custody of the attached property, the process server shall state in his report of the attachment the name of the temporary peon employed and the date from which his duties commenced

of any such further amount shall immediately be certified to the Court (lerk by the Bailiff in Form 15A of Appendix E

holder as costs

the amo

on recen entry to that effect in the diary

into the Treasury to Process servers Fees (XII) Law and Justice of Law '-' Court I ces realized in eash)

(6) The remuneration of temporary poons employed to take charge of attached property shall be paid direct by th

Before passing such order, th

report of the attachment and mu-

the peon or peons concerned, whose acknowledgment of receipt shall be taken in Bailiffs Register I.

amount that is chargeable for peons including the amount of the last payment, he shall direct that the excess be refunded to the payer.

is in the hands of the Bailiff that officer shall make the refund in the ordinary way prescribed in his Register II for re payments. If the amount has been credited into the Treasury, be shall prepare a bill for the amount to be refunded in the prescribed treasury form and shall lay it before the Judge for signature with the record of the case in the same way as a bill for the remuneration of temporary peons Before signing the refund order, the Judge must satisfy himself that the amount is available for refund by examining Bailiff's Register I and the record The bill when signed by the Judge will be given to the payee, with instructions to present it for payment at the Treasury or sub treasury "

For Rule 45B substitute the following :-

"45B (1) In addition to the fees payable before a warrant issues for the attachment of moveable property under Rule 45A, the Bailiff shall require the attaching decree holder to deposit a sum of money sufficient to cover the cost of attachment other than the pay of peons employed to take charge of it, for such period as the Balliff may think ft

whiel place tonding ,

(2) If the attaching decree holder fails to comply with the Builiff's requisition, the warrant shall not be issued.

(3) Sums thus deposited shall be entered in the Buliff's Registers I and II and any re payments thereof shall be made according to existing orders

In the monant a men for the sums demonsted the Brilliff shall state the period

given may be subsequently withdrawn by order of the Court

so firme 18

waiting the expiry of the term prescribed in Rule 69, the officersh in receive it consent and forward it without c ho Baduf, en ha If the property

own sole responsibility, i comot from its nature c person denstody of the

(9) When properly is remove

arrangement for its safe custody under his own supervision as may be most convenient

and economical.

(10) If there be a Government pound in or near the place where the Court is held, the Bailiff shall be at hierty to place in it such attached have stock as can be properly there kept, in which case the pound keeper will be responsible for the property to the Bailiff and shall receive the same rates for accommodation and maintenance thereof as are paid in respect of impronded cattle of the same description.

(11) Whenever property is attached, and any person other than the judgment-debter shall claim the same, or any part of it the officer shall nevertheless, unless the decree holder cleares to withdraw the attachment of the property so claimed, remain in

possession and shall direct the claimant to prefer his claim to the Court

(12) If the decree helder shall withdraw an attachment, or if it shall cease under

it shall be refunded to the decree helder in the manner prescribed for such refunds in sub-rule 9 of Rule 45. Any difference between the cost of attachment of moveable Preperty (other than cost referred to in Rule 45.) and the sums deposited by attaching decree helder shall, unless the difference is due to the fault of the Bahiff, be recovered from the sale proceeds, of the attached property, if any, and if there are no sale proceeds, from the attaching decree helder on the application of the Bahiff. If there is still a debenore, the amount shall be paid by Government

Appendix E .- For Form 15A substitute the following -

No. f5A.

FORM OF CERTH ICATE OF THE PAYMENT OF LEES FOR THE CUSTODY OF ATTACHED PROPERTY

In the Court of

Civil Case No. of 19

То

The COURT CLLRK

REFERENCE—The warrant of attachment of in the possession of issued for execution on the

Certified that a further sum of Re has been paid in each for custody fees under Rulo 17 (1) (b) (2) of the Process Lees Rules in respect of the above mentioned attachment

Dated Burleff

THE BURNA GAZETTE.

TERRUARY 4TH, 1911 PART IV P 91

The 31st January, 191t

mule to a Deputy Registrar Provided that -

(i) When a Deputy Registrar shall refuse my unconfested application under this

rule, the matter shall, at the request of the applicant or his Advocate or Pleader, te referred to the Judge

(u) A Deputy Registrar may refer to the Judge any matter which he considers to be a fit and proper one to be so referred by reason of its importance or difficulty or novelty or by reason of the order to be made thereon being appealable or for any other Canas --

(1) (2)

written statements.

(3) Applications for special leave of the Court to file plaint when such leave is

(4) Applications under Order I, Rule 8 (1) for leave to sue or defend on behalf of,

(5) le 3 of Rule 2

(6) .. where where 11, 15418 4, to join causes of art on in a sat for the

(7)

(8) Applications for the admission or appointment of a next friend or guardian ad lifem of a minor or new next friends or guardians ad lifem

(9) Applications for fresh summons or notice and for short date summonses and notices.

(10) Applications for orders for substituted service of summons, notice, or order (11) Applications for transmiss on of men acc f " " (12)

undefended list of causes (13) Applications for transfer of suits from the lists of contested suits to any other

(14) Applications arising from the death, marriage, or insolvency of parties to suits or petitions or from the assignment, creation, or devolution of any miterest, estate, or title, pendente lite

(15) Applications to amend plaint, petition, or subsequent proceedings wl ere the amendment asked for is purely formal All amendments whether made by order of a Judge or under this rule shall be attested by a Deput Registrar

(10) Applications for further and better statement of particulars under Order 11,

Rule 5 (17) Applications for leave to file further written statements

(18) Applications for orders for discovery and for orders concerning the admission,

(19) (20)

sale or otherwise, with power to order issue of notice under Order XXI Rules 16, 22 or 37, or where notice is otherwi e neces ary or considered

desirable (21) Applications for order for the transmission of a decree with the presented certificates, etc., with power to issue notice under Order XXI, Rule 16

and Rule 22 (22) Applications for the execution of a document or for the endorsement of a

negotrable instrument under Order AMI, Rule 31 (23) Applications for examination of judgment debtor is to his property ander Order XXI, Rule II

(21)

(25)(24)

(27) Applications for confirmation of sale and certificate of sale to preface of immoventio property

- (28) Applications for poss-sion under Order XXI, Rules 95 and 96.
- (29) Applications for special costs in connection with the attachment and side of minoveable property
- (30) Applications for special directions to the Bailiff as to the service or execution of any process of the Court.
- (31) applications for order for withdrawal of attachment or for return of a
- (32) 11
- (33) --- S until Divis Asia. uses for the day, and
- (3t) .
 - (35) Applications for statement of names and disclosure of patrices and residence under Order XXX, Rules 1 and 2
 - (36) Applications for have to issue execution under Order XXX, Rule 9
 - (37) Applications for leave to suo or defend in forma painters, and investigation as to the painters in of petitioner for leave to suc or defend a suit or to appeal as a painter.
 - (38) Applications by receivers and other relating to the management and distoral of property
 - (30) Applications for orders of reference to arbitration unless the suit is in one of the lists of causes for the day
 - (40) Applications for orders requiring a party to a suit or matter to produce and leave with the Chief Clerk any document not in the English language in
 - (41)
 (42)
 Chief Court, or accounts filed in such records to the
 - (43)

 officer for the production of a public record or register
 - (44) Annications for inspection of copy of a will
 presoners and others under the
 - (46) of applications under the Indian

 of applications under the Indian

 for the Data and Administration Act 1881 the Court

THE BURMA GAZETTE, OCTOBER 21st, 1911, Part IV, F 922 CHIEF COURT OF LOWER BURMA. NOTIFICATION

Dated Rangoon, the 19th October, 1911

No. 19 1908, and w makes the fo

in the exercis ... Original Civil Jurisdiction -

" Order Llll

mentioned

ORDER LIIL

Original Side Rules of Procedure.

Preliminary.

- In these rules unless there is something repuguint in the subject or context —
 The word "Judge" means any Judge of the Chief Court.
- (1) Ine word "Judge" means any Judge of the Unier Court.

 (2) The words "plaintiff" and "defendant" respectively include petitioner and respondent in miscellaneous proceedings
- 2 In the absence of a Doputy Registrar an Assistant Registrar shall exercise all the
- functions of a Deputy Registrar under these rules
 3 Except upon close holidays the offices of the Court shall be open to the public for business from 10 30 a m until 4 30 p m on all week days except Saturdays, and on Saturdays from 10 30 m until 2 p m

specified in Rule 1 abovementioned. In the event of the absence of both the Deputy Registerrs, such applications if of an ingent nature, may be made to the siting Judge in Chambers

Institution of Proceedings

The matter shall be divided into paragrapha numbered consecutively, and each paragraph shall contain a nearly as may be a separate alteration. Dates and figures of the

6 The first two paragraphs of the preceding rule apply to copies of documents intended to be served upon other parties to a suit or proceeding Press copies shall not be ancented?

proceeding

8. No correspondence relating to suits or proceedings before the Court can be attended to, but any person having business in the Court or its office shall transact the same in

person or by a duly authorized agent, advocate or pleader

9 Except in plaints and in potitions initiating miscellineous proceedings, the names, descriptions and places of residence of the plaintiffs and defendants, other than the first plaintiff, defendant, petitioner or respondent, need not be set out, but the words "and another" or "and others," whichever may be applicable, shall be added after the name of the first plaintiff or defendant.

10 In every document relating to a suit or proceeding already instituted, the number

of the suit or proceeding shall be entered before the document is presented 11. A party, advocato or pleader presenting a written statement, affidavit, or petition, except in matters as of course, shall send a copy or copies thereof to the other party

or parties to the suit or proceeding or their advocate or pleader within 24 hours from the time of presentation of the document 12 In overy petition the section or sections of the Act (if any) under which the

anniegnt clause the order asked for by him shall be stated

in the Chief Court The senior Interpreters shall exercise the power conferred by this rule only within the precincts of the Court.

14 If the document does not comply with Rules 5, 6, 7, 9, 10, 11 and 12, or if it is defective in grammar, form, or otherwise it shall be returned to the person presenting it.

15 Plaints, writton statements and affidavits shall be presented to a Deputy Registrar Potitions of all ordinarily be presented to a Deputy Registrar, but when

examine the correctness of the court fee and if, in his opinion, it is insufficient no snan inform the advecate or party tendering the same and return the document to him if the advocateorp 15 mocessary of the Code v party contends that the court for on the document is correct the Deputy Rogi was shall submit the de properly stamped. section 30 of the Ca

1 1 mgs 1 are to offer regarding the same, บรากับเรื

He shall then submit the plant or petition to the Judge for olders, as

a matter of right and of course, notice shall ordinarily be assued to the other party interested to show cause why the order asked for should not be granted. If a party making an application desires that the order he asks for be made without notice to any other party interested, reasons for making the order without such notice should be set out in his petition

20 When application is made for the Court's permission to a plaint or application being verified by some person other than a plaintiff or person on whose behalf the applica tion is made, the application must be accompanied by an affidavit by the person pro posing to verify, showing clearly his connection with the facts alleged in the plant or

upplication

21 If an agent desires to institute or defend a suit or proceeding on behalf of his principal, he shall at the time of presenting the plaint or filing his written statement produce any original power of attorney which ho may hold, if it is not already filed in tho Court

A Deputy Registrar shallox upmo the power of attorney and if it contains the neces Sary powers shall make an entry to that effect at the foot of the application for leave to verify or the affidavit filed in support thereof under Rule 20 and return the power of attorney, provided always that any plantiff or defendant shall, on receiving notice requiring him to do so, forthwith produce and leave such power of attorney at the Office of the Di

22 .

of the C mutuls, .

languago, a duly authenticated translation by a licensed translator of the Court must be

copy ' Compared with the original and found correct" and shall initial the same 24 When a plaint or document mitiating a proceeding has been admitted and registered, its number in the register shall forthwith be entered on the face of it, and on a

execution of decree, or clair property under Order XXI. is not already a party to a pressously instituted built or proceeding, except an application to be ma

26

for servic

or deposited within ten days of the date of the order on which such summons, I office, process or advertisement is to be issued. In default of that being done, the plant of

threeting the issue of the process

28 When a petitioner for Letters of Administration or probate or the 100cm appointed a guardian of the person and property of a minor on giving security fails to complete the scenity required to be furnished by him within three ment's miles the time for furnishing security has been extended from the date of the order requiring the scently to be given the jettit in for lettersor i roll its or the appaintment of such guad in is aforesaid as the case may be, may be taken off the file provided that notice has been

given by its inclusion in one of the Denuty Registrar's lists An endorsement to the effect that it has been taken off the file shall be signed by a Deputy Registrar under and by virtue of this rule and without further order. The applicant or his advocate or pleader is expected to ascertain and shall be presumed to know the date of the order requiring security to ho furnished

29 A plaint or petition taken off the file under Rules 27 and 28 may be restored to the file, as of the dato ou which it was originally filed, on the application of the plaintiff or petitioner and on sufficient grounds being shown to the satisfaction of the Court, or the

Sitting Judge in Chambers

30 When a plaint or petition is so taken off the file, the plaintiff shall be at liberty, subject to the Law of Limitation, to present a fresh plaint or petition for the same matter.

31 Copies of decrees of other Courts transmitted to the Chief Court for execution under section 39, shall, if the decree holder fails to apply for execution within six months after the receipt of the copy of the decree by the Chief Court, he returned with an endorsement to that effect signed by a Deputy Registrar and a certificate of non satisfaction

12 Whom a sattack of ore later fails to bring the attached property to sale for a

or pleader be referred to the Judge in Chambers

33 Ordinarily and unless the Judge otherwise directs the summons shall be for had disposal of the suit

of A plaintiff who desires that a summons for settlement of issues shall issue, or that a summons shall be in Form 1 of Appendix B to the Code, shall intimate such desire in writing on the plaint

35 Ordinarily the summons shall require the defendant to appear on the fourth or

37 A notice to a party to show cause against an application shall require min to show ant of a day after the date of issue of the notice C11 nn 41 4

for the time heing been assigned. If the said Judge is absent or not sitting Original Side, any motion in the suit, if urgent, in w be made before any other Judet sifting on the Oran 18 de

An Withards All of the following on anto plaintiff against him

40 Unless otherwise ordered no suit for final disposal shall be heard-

(a) If the delendant resides or all the defendants reside within the local limits of the original jurisdiction of the Court until after seven clear days from the service of the summons .

(b) If the delendant resides or all the defendants reade in Burnas but the defends a er any of the defendants resides beyond the local limits of the or omal period etten of the

Court, until alter twenty one clear days from such service . (c) If the defendant or any of the defendants resides in the Province of Le gal and il any of the defendants who does not reade in bergal reades in lurna, un'il twenty-

Calit clear days after such service.

- (d) If the defendant or any of the defendants resides in India elsewhere than m Bongal or Burma, until forty-two clear days after such service; and
- (c) In all other cases, until such date as a Deputy Registrar shall fix, having regard to the place where the summons is to be served.

11. All acts which may be done by the Co.

busine name peen ordered by the Court.

Process.

Do not use available, the Halliff shall cause the process to be served forthwith. If the porty desiring to have the process error and if forthwith communicate with the party desiring to have the process served or with his advocate or pleader, appointing a time at which one of his officers will be available and ready to proceed to effect server, and requesting that some one who personally know the property his control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the process of the control and approximate the control and

some for service as provided by section 28, Order V Rules 21-23 and 25 of the Code to the Court named by the party

46 Unless otherwise ordered a second or subsequent summons or process shall not be usued until after the one previously issued has been returned.

17. A special list shall be prepared for a Doputy Registrar every Monday under the

of the summens, notice or citation. At such enquiry which may, if necessary, by adjourned from time to time, affidavits or further affidavits may be received or whence taken true roce. A Deputy Register on being satisfied as to the due service of the summens, notice or citation shall deal with the case as provided in Rule 52 or 50 or cause it to be set.

48. The summons m

of service of

19 No summons or other process shall be served or executerion Sunday, Christian's Day or Good Friday except by leave of a Judge or a Deputy Registrar.

Address for Service

all notices and other judicial processes required to be served on any such party shall be decimed to have been duly served on him if left at his address for service.

Cause Lists, Proof of Service, Hearing, and Disposal of ex-parte Suits and Matters.

- 51 Lists of pending cases shall be kept under the following heads:---
 - (1) Suits for appearance of defendants. (2) Uncontested suits.

 - (3) Miscellaneous proceedings.
 - (4) Insolvency proceedings
 - (5) Contested short suits.
 - (6) Contested Commercial auts.
 - (7) General contested suits.
 - (8) Postponed cases.
 - (9) Dady list of cases for hearing.

necessary to prove the claim ex parie and may be tendered on behalf of the plaintiff, and shall if he so records evidence submit the ease to the Judge or one of the Judges in Chambers with (a) a draft of the minutes of the decree to be passed in the suit or (b) a report as lo the amount of damages which in his opinion may be awarded to the plaintiff, for an ex parte decree or for such order as may be deemed proper, and the Judge may lhereupon other pass an ex-parte decree ur such order as he may deem proper, or adjourn the case into Court for hearing and disposal.

53. Suits other than those for a houndaled demand or damages which are not defended by the defendant or any of the defendants shall be set down for ex-parte hearing and disposal by the Court on the next or any subsequent motion day after the summens

has been declared duly served.

54. Cases to be set down in Court under one or other of the last two preceding rules shall be entered in Last 2

55. If a written statement has been put in by the defendant or any of the defendants, the Deputy Registrar on being satisfied as to the due service of the summons on the

duly served the Denuty Registrar shall on annihilation being made therefor order a iresu

the notice-board of the Court.

61. Every case appearing on the Daily List shall be deemed to have been fixed or adjourned for hearing on the day on which it appears in such list

62 A party who desires that a case shall not be brought on to the Daily List in its

turn or before a certain date, must promptly apply for an order to that effect. 63 Cases on the Daily List shall be called on for hearing in turn as they appear in

the lists

61 The hearing of a suit entered on the Daily List shall not be postponed except on good cause shown 65 A copy of the lists shall be kept affixed to the notice hoard of the Court and the

Chief Clerk and the Bench Clerks shall be responsible that the lists are properly kept from

day to day, 66 Nothing herembefore contained shall affect the power of the Judge to fix any case for hearing on any particular date, or to order that a case shall be entered in any particular place in any list A Deputy Registrar shall take the orders of the Judge as to entering in the lists cases in the Admiralty jurisdiction of the Court, and cases in which

the Government and Government Officers are concerned 67 Each written statement shall, by way of list or schedule, refer to any documents not then filed, by which it is intended to be supported. No documents not referred to m such statement or filed in the suit, shall be received in or idence at the hearing unless by

consent or by leave of the Judge

68. When a ground of defence arises after the defendant has filed his written state ment the defendant may, within eight days after such ground of defence has arisen, or at any subsequent time by leave of the Court or a Judge, file a further written statement setting forth the same, and in such case shall forthwith serve a copy thereof upon the plaintiff or his advocate

69 Whenever any defendant in his written statement or any further written state commencement of the

No 1 hereto annexed, apply to the Judge m

Chambers for, and obtain a decree for, his costs up to the time of filing such written state ment, or further written statement as the case may be, with leave to withdraw his suit, unless the Judge shall either before or after the filing of such confession, otherwise order

70 Amendments in pleadings, which are made only for the purpose of rectiling some clorical error or criors in n inics, dates or sums, may be made on in order of a Deput

Registrir without notico

71 If in any amendment the new matter does not exceed in any one place one follows

7.2 The attestation of any muchdment under Order II, Rules 6-7, Order VI, Rule 17, and Order VII, Rule 11, Order VI, Rules 16-17, or Order AAI, Rule 17 of the Code of Civil Procedure shall, unless otherwise ordered by the Court, be done by a Deputy Registrur.

Commercial Suits

7.3 In contested commercial for direction returnable in not kest in the schedulo of forms hereto a require, and shall be addressed to and served upon all parties to the suit or matter, as ın 13

orde. suit follo

nation of witnesses, place and mode of tred. Such order shall be in form No. 3 in

the schedule of forms horsely accessed with such a visitions as commissioners may resume

75 Nan hlavitabill be no learneed a stilled caming of the said an imona except by special order of the Judge

Why application, subsequently to the engined surmers for any directions as to any interlocutory matter or thing for any party, shall be made under the summ or a by two clear days notice to the other party, stating the grands of the application—such application must be made to the bulk and in it to a Deputy Registra.

78. Any applicate in by any party which me left have been made at the hearing of the original summens shall, if granted on any subsequent application, be granted at the costs of the party applier guides the full geal all be of epimen that the application could not reported have been made at the bearing of the enginal summens.

Name at 1 Sails

79 When an order has been made groung leave to the defendant to defend a suit field under ONAVII (c) the Color C (c) Proceeding, the defendant shall, within one west from the date of such order (l) his written statement unless the ludge, who gruits leave, orders the affiliast of the defendant to be taken as his written statement and the suit shall be set d win in Lat Xu S 6 or 7 referred to in 18ulo 51.

Ikeunents ple lan Cnuts

80, A Deputy Regutrar may perform the functions of the Court under Order VIII,

Rule 9 (1), referring in case of d mbt to the Judge

81 The Judge or a Deputy Registrar may at any time require a party to a suit or proceeding to produce and Leavo with a Deputy Registrar any document not in the beginh language in the preservoin, for the purpose of its being translated by a heened translater of the Court and may order that the translation when made shall be filed with the record.

52 The Bench Clerk shall make and sign the andorsements enjouned by Order XIII, Bules 4 and 6 of the Code on documents admitted or rejected. The list of documents and articles admitted in evidence shall be prepared in form Jaissi by the Bench Clerk and shall be secred by thus

87 Copies of entries in public records or in books of account shall be examined, compared and attested by a 18-just or an Assistant Registrator the Chief Clerk when the entry is in English, or by an Interpreter of the Court when the entry is in a language of which there is a Court Interpreter, before 118 record or book of account is returned to the person producing it under Order VIII, Rulo 5 () of the Code I fit he outry is not in such language of must be examined, compared and attested by an Interpreter duly sworm for that purpose

Discovery and Inspection

such affidarit made by all or any of the absent parties personally, ho shall be at literity to dy Registrar setting forth the grounds for r after hearing the opposite party, may if

86 Any party seeking discovery by interrogatories, shall, before delivery of interrogatories, pay into Court, to abide further order, the sum of Rs 34, or such greater sum as the Judge may direct. Any party seeking discovery otherwise than by interrogatories shall, if so ordered, pay into Court, to abide further order the sum of Rs 34 and may be

ordered further to pay into Court as aforesaid such additional sum as the Judge shall

covery shall in all cases commence from the date of the service of the interrogators or order for discovery. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment, if so ordered as aforesa d has been made.

87 Unless the Judge shall at or before the trail otherwise order, the amount padim under the preceding rule shall, after the suit or matter has been finally disposed of be pad out to the party by whom the same was paid in, if appearing in person, on his request, or

costs of the suit or matter, the amount in Court shall be subject to a lien for the costs ordered to be paid to any other party

88 A Deputy Registrar is authorized to allow any party to a suit or proceeding or his advocate or pleader or agent

convenient time any document fi Rule 1 of the Code, or any docu-

Summonses to Witnesses

89 A summons to a witness may be applied for by a party to a suit or proceeding or his advocato or pleader at any time after its institution, and during its pendency

The application should be made to a Deputy Registrar

90 The party applying shall, within 24 hours from the time when the application is field pay to the Bailif, or if the summons is to be served beyond the limits of the conjudium selection of the Court, to the Accountant, such sum for the trivelling and other expenses of the person or persons summoned as may be requirate according to the following scale—

	Maria	um	MI	_
Soldiers manners labourers extriers domestic servants success tradesmon Michants managers of banks zeminders, gentlemen of property Auctioneers brokers professional accountants Professional mental didners engineers and surveyons. Otherway in early employ drawing not less than Rs 500 a month according to Natl officers, according to runk. Shroffs, butumes schoolmasters come analysis, and officers of ships Articled and other clerks. Police Inspectors petty officers, multiary or marino tustoms house officers and engine dravers. Customs house officers and engine dravers. Customs house officers and engine dravers.	Rs 1 2 8 8 6 12 10 10 11 12 0 12 0 12 0 12 0 14 0 14	0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0 0	Rs A 0 12 1 0 4 0 3 0 9 0 0 5 0 0 2 0 0 2 0 0 2 0 0 2 0 0 2 0 0 0 0	1000000000000000

In special cases or in cases not provided for in the scale, the Court stall allow such fees as it thinks fit.

21. A Denuty Register sh.

22. Sall in after (10 Railoff)

91 A Deputy Registrar shor the Accountant has endorses

ordinarily without reference to scale of travelling and other expenses which should be tendered to a witness,

on that day deposit with the Buliff of the Court tac will s

allowed for the next day of hearing, and if on that day his evidence is not taken or completed, his allowance for the next day of hearing shall be deposited, and so on until the witness has been discharged, or until the case has been concluded.

to the Bailiff for their expenses allowed for

1 included in the costs allowed, except such as have been paid through the Bailiff or the Accountant or certified by the Judge or by a Deput. Registrar.

Examination of Parties and Witnesses by the Court.

55 The substance of the examination held by the Court under Order X, Rulo 2, shall be reduced to writing by the Judge or a Gazetted Officer of the Court and shall form part of the record

narrative. Such evidence when completed shall be read over by or to the witness in Court as soon as possible after his statement has been recorded and the Judge shall, if necessary, correct the same and shall sam it

97 In cases in which an appeal is not allowed other than those dealt with under Rule 52 it shall not be necessary to take down the ovidence of the witnesses in writing

record.

Commissions.

99. The hearing of a suit in which a commission has been issued under Order XAVI of the Codo shall be postponed until the return of the commission unless the Judgo or a Deputy Registrar otherwise directs.

within four days from such service and shall serve a copy on the other party or his advocate

102 if the commission is to take evidence crit rorr, the party obtaining the order shall pay the necessary costs of and medental to the same, and both parties shall file a bit of their respective witheress, and all necessary papers and documents within one week

from the date of the order

ordered further to pay into Court is aforesaid such additional sum as the Judge shall direct

into Cou

the recer

covery shall in all cases commonee from the date of the service of the interregatores or order for discovery. The party from whom discovery is sought shall not be required to answer or make discovery unless and until the said payment, if so ordered as aforesaid has been made.

87 Unless the Judge shall at or before the trial otherwise order, the amount paid in inder the preceding rule shall, after the suit or matter has been finally disposed of, be paid to the party by whom the same was paid in, if appearing in person, on his request or to his Advocate on such Advocate or request where such party is represented by Advocate in the ovent of the cests of

as to costs hemg made, bu

costs of the suit or matter.

Summonses to 11 stnesses

89 A summons to a witness may be applied for by a party to a suit or proceeding or his advocate or ploader at any time after its institution, and during its pendency

The application should be made to a Deputy Registrar

is it i utile cour, or my docul the mile temperature continue a

O The party applying shall, within 24 hours from the time when the application is filed, pay to the Bahlif, or, if the summens is to be served beyond the limits of the original jurisdiction of the Court, to the Accountant, such sum for the travelling and other expenses of the person or persons summened as may be requisite according to the following scale —

	Va	zimi	um	A namus
Soldiers marmers labourers extress domestic servant, succass etc Iradesmen Merchants managers of banks zemindvis gentlemen of property Auctioneers, brokers professional accountants Professional men Littors engineers and surveyots Officers in evil employ drawing not less than Rs 500 a month	Rs 2 8 12 10 16 12 12	A 8 0 0 0 0 0 0 0	P 0 0 0 0 0 0 0 0 0	18 A P 0 12 0 1 0 0 4 0 0 0 0 0 0 0 0 0
Attitled and other clerks Police Inspectors pettry officers, military or marine (ustonis house officers and engine drivers Codown sircars Temales according to station	12 8 6 4 4 4 5	000000	0 0 0 0 0 0	6 0 0 2 0 0 2 0 0 2 0 0 2 0 0 2 0 0 1 0 0

In special cases or in cases not provided for in the scale, the Court shall allow such

fees as it thinks fit

91 A Deputy Registrar shall issue summonses as soon as possible after the Bailif

91 the Accountant has endorsed the application with his receipt for the money paid and

or the Accountant has endorsed the application with his receipt for the money paid and

allowed for the next day of hearing, and if on that day his evidence is not taken or completed, his allowance for the next day of hearing shall be deposited, and so on until the witness his been discharged, or until the case has been concluded.

93 Witnesses must apply in person to the Bailiff for their expenses allowed for

attending on overy day after the first day.

91. No expenses of witnesses shall be included in the costs allowed, except such as have been paid through the Bahiff or the Accountant or certified by the Judge or by a Denut Recistrar.

Examination of Parties and Witnesses by the Court.

95 The sub-tance of the examination held by the Court under Order N, Rule 2, shall be reduced to writing by the Judge or a Gazetted Officer of the Court and shall form part of the record

96. In cases, in which an appeal is allowed, other than those dealt with under Rule 52

narrature. Such oxidence when completed shall be read over by or to the writness an Court as soon as possible after his statement has been recorded, and the Judge shall, aftereastry, correct the same and shall sign it.

97 In cases in which an appeal is not allowed other than those dealt with under Rule 52 it shall not be necessary to take down the oxidence of the witnesses in writing

record.

98 Nothing in Order XVIII, Rules 5, 7, 8, 9, 13 and 14 shall apply to the Chief Court in the excress of its Oriental Civil Introduction — In the case of such Court acting

down or made under the rules hereinbelore set out

Сомил сегона.

99 The hearing of a suit in which a commission has been issued under Order XXVI of the Code shall be postponed until the return of the commission unless the Judge or a Denity Register of the commission of the C

101 When an order for the issue of a commission to take evidence on interrogatories has been made, the party obtaining the order shall

file his interrogatories and the documents, if any,

serve a copy of the interrogatories with the documents, if any to accompany the same shall file his cross interrogatories with the documents, if any to accompany the same within four divis from such service and shall serve a copy on the other party or his within four divis from such service and shall serve a copy on the other party or his

102 If the commission is to take evidence time roce, the party obtaining the order shall pay the necessary costs of and incidental to the same, and both parties shall file a list of their respective entitiesses, and all necessary papers and documents within one week from the data of the order.

101 When--

(a) A Commission is issued by the Court for a local investigation or to examine accounts under Order AAVI, Rule 9 or Rule I1 of the First Schedule or by the Court under paragraph 3 of the Second val Procedure,

tho . e ere may le, shall gave notice to the parties to the suit or proceeding of the filmg of his report or award and, in submitting his report or in ird, shall inform the Court in writing that he has given such notice

Arran sement of Records

105 The records of regular suits shall be divided into four parts each having a separato facing sheet, namely -

(1) The man file

- (2) The document file
 - (3) The interlocutory file (4) The process file
 - 106 In the main file shall be filed in the following order the-
 - (I) Diary
 - (2) Pleadings
 - (3) Issues.
 - (4) Evidence for the plaintiff taken in the Court and upon commission,
 - (5) Affidavits (if any) read for the plaint iff at the hearing under Order All Rule ! of the Code,

(6) Interrogatories administered by bim and the answers thereto,

(7) Evidence taken in Court and upon commission for the defendant or each defendant in order.

(8) Affidavits read as aforesaid for him or them.

- (9) Interrogatories administered by him or them and answers,
- (10) Evidence of witnesses called by the Court under Order AVI, Rule 14 of the Code.
 - (11) Judgment.
- (12) Decree NOTE -The 1 recedings upon or leading up to the issue or return of a commission or 1a connection with interrogatories and answers shall be file i in the interior for file

or figures are obliterated or defaced, and they shall be fastened in such a manner that

upon every petition shall be kept together, but as far as possible, consistently with the above, every petition shall be filed in order of date

109 The process file shall contain besides the flylerf with table of contents -

(a) Powers of attorney,

(b) Summonses and other processes and affiduats relating thereto, (c) I 1 to of matries as

(d)

mam file

has expired, or if an appeal is preferred, until after the record has been received from 116 Appellate Side

Tle Diary.

111 The diary shall be framed so as to show as concisely as possible every stage of, Levery proceeding taken in the suit, and the parts or parties present in person or by

Clerk should put up a judgment form with the tile when submitting it to the Judge.

The Jud ment

112. When judgment is given orally a note thereof in writing or in shorthand shall be taken by an Officer of the Court, or is roon authorized by the Judge Such note shall be subunited to the Indge for correction, and for signature

Decrees and Fermal Orders

that a torn will made llameous proceedings an order is made by the 112 111

order was pronounced, but the date on which a Judge or a Deputy Registrar has actually a anglette I - a an store to all he a steel here of he has signature

If it is not objected to within four days from the date or the horizo, a decree in the terms of the draft shall be submitted to a Judge or a Doputy Registrar for aignature

If the parties do not as bo set down upon the dids _

minutes of decree 116 If a party or an advocate intimates to a Deputy Registrir immediately after

au order has been passed by a Judgo that he wastes to see the formal order before it is salimitted to the Judge for signature, the same procedure as for decrees shall be adopted in respect of the draft formal order

117 Every decree or order for the payment of money out of a fund subject to the order of the Court shall, for the purpose of such payment, be deemed to authorize the sale and subdivision of the securities belonging to the fund or of a sufficient portion therenf

118 In a decree for maintenance ou allowance the Court may appoint subject

a Receiver thereunder with directions, in c

to take possession of the property and sell the same, and out of the

, liberty to apply shall be implied th hberty to bring a fresh suit on ect, the order shall be drawn up so

as to make the payment of the costs of the suit that has been withdrawn a condition precedent to the plaintiff bringing a fresh suit

Time

day also, and any succeeding day or days on which the offices continue closed pro vided that written statements due in vacations may be filed on the day the Court reopens

122 Whereby these rules, or in any decree or order time for doing any act or taking any proceedings is limited by months, and where the word "month" occurs in any document which is part of my legal procedure under these rules, such time shall be computed by eilendar months, unless otherwise ex men's

o or a comor time attended to plead, answer interrogatories, or take any other proceeding in the suit or matter

Laccution Proceedings

124 Applications under section 39 of the Code to send a decree or order for execution to mother Court shall be made by a verified pointion in which the reasons for transfer shall be set out and particulars mentioned in clauses (a) or (b) of the section, if either applies shall be clearly stated. Every application shall be accompanied by a certified copy of the decise or order

saio shall be inneved to every application for execution by attachment and sale of monerty

127 In every application for the attachment of moveable property the approximate viluo of the property sought to be attached shall be stated according to the best of the undicint a belief

128 In applications for execution by attachment of moveable property it shall be expressly stated whether the property sought to be attached is in the possession of the judgment debter or not, and the place where the property is situated shall be fully doscribed

Sale of Immorcable Property

129 An application for the sale of mimove the property attached must be accompained by an affidavit of some person who has searched the register of deeds for entries log widing the property In the affider it the result of the search must be stated An abstract of the title of the judgment debtor, so far as it can be ascertained from the register of deeds must also be furnished, and if the original title deeds are in the bands of the decree holder they must be produced and loft with a Deputy Registrar

130 A Deputy Registrar shall prepare every proclamation of sale of immoveable property and the party seeking to have the property sold shall be bound to furnish him with all the particulars he may require to enable him to prepare the proclamation

judgment debtors title to the projecty, and that the title deeds or in abstract of the judgment dobtor's title will be open for inspection at the Office of one of the Deput) Rogistrars

19 11

1 equ

in the proclamation 133 After completion of the modulumation it hall be sent with a warrant for k

to the Bashif | The warrant for sale may be signed by a Deputy Registrar 134 No proclamation of sale of immoverble projects shall assue until after the person upplying for sale has deposited with the Buliff an mount sufficient to defret the expense of advertising it daily for one month in a local newstaper or advertiser

135 Sales shall be conducted by the Bathif of the Comt, and shall ordinarily be

held within the precincts of the Court-house. If the party at whose instance the property is to be sold downs that it should be sold on the spot, he must state his wish in his application for sale and deposit with the Builiff the precitod for for attendance at the spot. After the place of sale has been stated in the proclamation, it shall not be aftered.

130. The name of each holder at the sale of mimov cable property shall be noted by the Basiff and the am no bid, or the luchest

sale and record the re

be equal to or higher than the received price (if any), the Bailiff shall make an entry in the sale-book to the following effect -

inspection for four days, and that, if not objected to, it will be returned to the purchaser

as approved of by the Court

If the draft is objected to, the Deputy Registrar shall settle the draft after considering
the objections to it, and shall then if so required by either party subunit it to the Judge

Sale of Moycable Properly

139. As soon as possible after an attachment of moveable property, the Builif simil report to the Court the fact of the attachment and shall furnish a list of the articles attached and their approximate value and shill note if any of them are not lable to

apply for a sale order. A warrant for sale shall be transmitted to the Bathff, who shall forthwith prepare and issue a proclamation

141. Every proclamation shall be advertised in a local newspaper or advertiser for at least 15 days (except in the case of property mentioned in the process to Order XXI, Rule 43 of the Code), and the cost of advertising shall be deducted from the process of sale.

XX1, Rule 43 of the Code, ttached Other moveable is which the proclamation

shall have been fixed up in the Court

for orders.

Garnishee Orders.

143. A Deputy Registrar may in the case of any debt (not secured by a negotiable instrument), any noveable property not in the possession of the judgment-debtor, or any negotiable instrument, which has been attached under Order XXI, Bule 46, 51 or

to pay such uest, or deliver such move able property, or if he does not appear in answer to the notice, then a Deputy Registrar may order the garmshee to comply with the terms of such notice, and on such order execution may issue as though such order were i decree against him.

145 If the garmshee disputes his hishity, the Deputy Registrar, instead of making the order abovement oned may order that any issue or question necessary for determining his litbility be tried is though it were in issue in a suit and may unless either party shall before the hearing desire the trial to be before a Judge, proceed to determine such issue, and upon the determination of such issue, shall pass such order upon the notice as shall bo just

146 Whonever in any proceedings under Rules 143 to 149 inclusive it is suggested

. . . . room last and trashianic Such third or other person shall have the same right to require that the trial so far as it may affect his interests shall be before a Judge as is conferred by Rule 145 upon the parties therein named

Laccution

1 b

152. An appeal to the Court shall be allowed from all orders of a Deputy Registrar under Rules 143 to 150

Motions-Injunctions

his advocate, to pay such sum by way of damages as the Court may award as compensation in the event of a party affected sustaining prejudice by such injunction

Framu ali ms " de bene es e'

106. The examination of a witness under Order XVIII, Rule 16 shall ordinarily betaken by a Deputy Registrir or Assistant Registrir undess the Judge shall otherwise direct

17. The officer taking in examination de bene as e shall have regard to the protisons of the Indrun Evidence Act and shall, in case the Advocate or other person examining the writness press any question which such officer shall have dusallowed, record such question and the answer thereto for the consideration of the Judgi before whem the deposition may thereafter be part in evidence.

15s. After the deposition of any witness shall have been taken down and before it is signed by him, it shall be distinctly read over and when necessary translated to the

The deposition

Security to C art

1.9 When security is required to be given it shill be taken in the form of a bond with or without sureties as the Judge shall direct and shall be in favour of the senior

amount of the security required

.

100 No survices shall without the order of the Judge or a Deputy Pegistrar, be accepted unless they mike an affidavit or affidavits stating that the property which each of them posses or or that their properties combined are equal in value to the amount of the security ilemanded over and above any meambrances to which such properties may be inble and over and above the amount for which they may have previously given security and for which they are at the time hable as surviess

Bailiff & Commission on Sales of mortgaged and attacked Property

163 The commission to be drawn by the Bailiff on sales of mortgaged or attached property shall be at the following rates —

(1) •

5 per cent. 5 per cent on the first Rs 500 and 2 per cent. on the

When they exceed Rs. 5 000

At the above rates on the first Rs 5 000 and I per cent on the lalance

191

5 per cent 5 per cent on the first Rs. I0 000 and

first Rs. 10 000 and I per cent on the balance

one notice, then a Deputy Registrar may order the garnishee to comply with the terms of such notice, and on such order execution may issue as though such order were a decree (gainst him.

before the hearing desire the trial to be before a dudge, proceed to determine such issue, and upon the determination of such issue, shall pass such order upon the notice as shall be just

146 Whonover m any proceedings under Rules 143 to 149 inchasts et is siggested or appears to the Judge or a Deputy Registrar to be probable, that the debt or property attached or sought to be attached belongs to some third person, or that any third person has a hien or charge upon, or an interest in it, the Judge, or a Deputy Registrar may order such third person to appear and state the nature of his claim (if any) upon such debt or Percentry, and prove the same, if necessary

147 After hearing such third person, and any other person who may subsequently be ordered to appear, or in the case of such third or other person not appearing when ordered, the Judge or a Deputy Registrat may pass such order as a break-fire provided, with respect

Judge or a

49 1t

parties therein named

148 Payment or delivery made by, or execution levied upon the garnishee under any such order as aforesard shall be a valid discharge to him as against the judgment-

_xecutaon

152 An appeal to the Court shall be allowed from all orders of a Deputy Registrat under Rules 143 to 150

Motions-Injunctions

,,,

may be nor any affidavit

155 A party to who issued, unless the Judge otherwise directs, give an ondertaking in writing, or through

his advocate, to pay such sum by way of damages as the Court may award as com pensation in the event of a party affected sustaining prejudice by such miunction

Laminations " de bene esse"

1.6 The examination of a witness under Order VIII, Rule 16 shall ordinarily be taken by a Deputy Registrar or Assistant Registrar unless the Judge shall otherwise direct

1.7 The officer taking an examination de bene esse shall have regard to the pro-

deposition may thereafter be put in evidence

Los After the deposition of any witness shall have been taken down and before it is some I by him it shall be distinctly read over and, when necessary, translated to the

Security to Coart

1.9 When security is required to be given it shall be taken in the form of a bond with or without sureties as the Judge shall direct and shall be in favour of the semior

Judge of the Court for the time being 160 When surcties are required and persons resident within the jurisdiction of the Court are tendered, a report shall be called for from the Bailiff as to whether the principal and sureties possess within the jurisdiction of the Court property of value equal to the

amount of the security required

101 No surcties shall without the order of the Judgo or a Deputy Pegistrar, be accepted, unless they make an affidavit or affidavits stating that the property which each of them possesses or that their properties combined are equal in value to the amount of the security demanded, over and above any incumbrances to which such properties may be liable and over and above the amount for which they may have 1 f . I ch they are at the time liable as sureties îmîn larin

Bailiff's Commission on Sales of mortgaged and attached Property

163 The commission to be drawn by the Bailiff on siles of mortgiged or attached property shall be at the following rates -

(1) On sales of mortgaged property-When the proceeds of sale do not exceed Rs. 500 When they exceed Rs. 500 but do not exceed Rs. 5 000

When they exceed Rs. 5 000

JET COL 5 per cent, on the tirst Rs. JU) and 2 per cent on the It the above rates

on Hafrit Ra o 000 and I per cent. on the balance

(2) On sales t attached property-When the proceeds of sal do not exceed Rs. 10 (0) When the proceeds of sal exceed Ra. 10 000

a lateral Sprunt, cathe Lot 1 & 10 (11) and I per cent on to Labore

164 When a side of immercable property is set aside under the provisions of Order YMI, Rule 89, 91 or 92 of the Code of Civil Procedure, no commission shall be paid to the Bailiff for selling the property

165 Whenever a sale of immeveable property is held by the Bailiff elsewhere than within the precincts of the Court-house, on the application of the party at whose instance the property is to be sold, a fee of Rs 5 shall be paid by the said party at the time of

making the application and shall be credited to Government 166 Subject to a maximum which shall be the difference between the substantive

p w and emoluments of the Bashiff and the sum of Rs 250, the fees paid each month under the preceding rule shall be drawn and disbursed to the Bailiff at the end of the month

SCHEDULL OF FORMS

No 1 (Rule 69)

IN THE CHILF COURT OF LOWER BURMA

Original Civil Jurisdiction

Suit No of 19 .

Plaintiff

vs Defendant The plantiff confesses the defence stated in the paragraph of the defendant a written statement (or of the defendant s further written statement) filed on the

day of

(Signed)

Plaintiff

(Signed)

Plaintiff a Advocates

No 2 (Rule 73)

IN THE CHIEF COURT OF LOWLR BURMA

Original Civil Jurisdiction

Smt No

Plaintiff

of 19

Defendant

Let all parties concerned attend before me in Chambers on the noon, on the hearing of an application on the part of o clock in the at to show cause why an order for direction should not be made

in this suit as follows deliver within Particulars [That the

and that in default all further proceedings in this suit be particulars of stayed until such particulars are delivered (or that the defendant be precluded from giving ovidence in support thereof at the hearing of the sont) and that the after delivery of days to deliver his

such particulars 1

m ten days] file an affidavit of documents That the Interrogatories (For leave to interrogate, the univers to be filed within

ten days) Inspection of documents Inspection of property

Commissions

Examination of witnesses Any other interlocutory matter or thing

Dated the day of

No. 3 (Rule 74)

IN THE CHIEF COURT OF LOWER BURNA.

Orizinal Civil Juriodiction

Suit No of 19 .

Pluntiff,

Upon hearing the Advocates on both aides and upon reading the affidavit of tiled herein the following directions are hereby Riven —

Particulars — Defendant in a week to give particulars of .idmissions.—That the plaintiff is

Discovery - Defendant in a week to produce

Interrogatories - Plaintiff may interrogate as to only interrogatories to be initialled by me

Inspection of Documents -Plaintiff undertakes to produce at the hearing.

Inspection of Property - None, Commissions - None

Examination of Il tineses -- Io be examined on commission or otherwise as the case may be,

No. 4 (Rulo 143)

IN THE CHIEF COURT OF LOWER BURMA.

Octomal City Jurisdiction

1.8

Civil Execution Cise No of 19 .

Plaintiff,

Defendant.

To Take notice that you are hereby required on or before the to pay to the Bailiff of this Court the sum of

day of

wnercof an order for payment may be passed against you

19

Dated this

Demdy Registrar.

1HE BURVIA GAZETTE,
OCTOBER 21st, 1911, PART IV, r 945
Chlef Court of Lower Burma.

day of

NOTIFICATION

Dital Rangoon, the 19th October, 1911

A *** . 7.19

~ ~ ~ Atures of 1 rocedure

Benches-Claves of cases to be heard by and composition of

24 The following classes of cases shall be heard and determined by a Bench of at least two Judges, namely -

(a) Application for review of judgment by a Bench of two Judges

(b) First appeals from original decrees and orders of Divisional and District Courts (c) Second appeals in cases exceeding Rs 3,000 in value

(d) References made under Order XLVI, Rule 1

(e) References and inquiries under the Legal Practitioner's Act 1879, and rules thereunder, into the conduct of Advocates and Pleaders

(f) Matters connected with oppeals to His Majesty in Council.

(g) Any appeal, review, rovision, or original suit which the Senior Judge may order to be heard or determined by a Bench of Judges

Note. - This rule must be read subject to the operation of express provisions of law, such as section 18 of the Indian Press Act, 1910

25 A Full Bench shall consist of oll the Judges, or of such number of Judge not being less than three, as the Senier Judge man determine

and precedence of a Full Bench

27 Unless other orders are given, oll Bench cases, when the hearing is completed and they are roady for judgment, shall be laid before the Senior Judge of the Bench He will then arrange for the consideration or writing of the judgment

Lists to be maintained by the Assistant Registrar

28 The Assistant Registrar will maintain oud keep posted up three lists of pending Civil appeals, applications for revision, and miscellaneous applications --

A В

The Chief Clerk shall be responsible that the lists ore properly kept from day to day 29 No case shall be put on the B or the C lists until the notice on the respondent

has been duly served 30 The Blist shall contain all cases ripe for hearing in which any party is not known

to be represented by an Advocate or Pleader

31 Any case in which the Assistant Registrar receives intimation, before the date fixed for hearing, that all parties are represented by Advocates or Pleaders shall forth

for heari

34

daily list of the next court day appropriate to such case, unless the Judge, or Bench, will en postponing it directs that it sl

35 On overy Friday the on the lists for disposal during

on a day in such week, and cr proper cause before him as to non inspection of records or non payment of copying,

translation or process fees 36 A daily list shall at a be issued showing the lay of the previous well ning list issued on th shara At the close of

unless the (ourt ht ferred to the ter

imo 'the weeks li ! cut or ving week s time t sen a case n

Davorco Act, 1

r the day taken from the

ordered, the remaining of cases for hearing for

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nullity of marriago has been passed, as submitted for confirmation, a letter shall invariably be addressed to the Divisional Judge who passed the decree, asking him to inform the parties that this Court will take the decree into consideration at the expri of six menths from the date on which it was pronounced with a view to confirming it or passing such order as may seem fit, that if other party wishes to make any application relating to the decree be or she must do so within the said period of six months, and that if no such application is made, the Court will proceed to pass orders in the absence of the parties.

The Diary

39 The diary shall be framed so as to show as concisely as possible every stare

sence there should put up a judgment form with the file when submitting it to the Judge

The Judament

When by an

Decrees and Formal Orders

(are must be taken that each decree is in itself clear and intelligible. It should not be necessary to refer to any other documents to ascertain what it really means or implies

42. When in interlocutory and miscellaneous proceedings an order is made by the dudge after stating his reason therefor, and in any case in which a party may desire it, a formal order shall be drawn up containing the number of the case, the names of the parties, the order or result of the order made the costs incurred and by

on which the judgment or the Judge or an Assistant r, a decree aliah ke in tid

beneath his signature

4). When the drift of a decree is ready a notice shall be posted on the Court is the board that the drift is ready for inspection in the Assistant Registrar woff of the not objected to within four days from the date of the notice a decree in the terms of

the dreft shall be submitted to a Deputy Registra for signature.

If the parties do not agree to the form which the decree shall take the case shall be et down upon the duth late on a early it date a man be convenient to speak to the

numbers of decree

45. If a party or an advocate intimates to the Assistant Registrar in a clastely
after an order has been passed by a Judge that he wishes to see the formal order before
a submitted to the Judge for signature, the same procedure as for decrees that he
defend the project of the derif formal order.

General

40. In every appeal and petition if any Burmese name is not specied in accordance with the Covernment system of transliteration, the Assistant Legis rariefall cause time

1. 10 du les vidu les whi passed at les misple to the Carl Court floor band and an iteration by the Carl Court floor bands it is a misple to the Carl Court floor bands it court for the splittle product in the Carl Court floor bands it court for the splittle product in the Carl Court floor bands in the Car

spelling to be corrected unless the advocate concerned shows any good reason to the

If the name was incorrectly spelled in the Lower Court it should nevertheless be cornectly spelled in the Chief Court, the name as previously incorrectly spelled being added in brickets, if necessiry, to provent confusion The same rule shall be applied is far as practicable to names of natives of India. But any person who writes English has the right to spell his own name in any way he likes, and the spelling of his ordinary signature should be idepted in all documents in Court

47 No correspondence relating to cases before the Court can be attended to but my person having husiness in the Court or its office shall transact the same in person

or by a duly anthonized agent, idvocate or pleader

48 The Registrur, Deputy Registrurs, Assist int Registrars and the Senior Inter preters attached to the Chief Court for Burnese, Handustani, Gujarati Chinese Tamil and Telugu, are empowered to administer the outh to deponents of affidavits to be filed in the Chief Court

The Senior Interpreters shall exercise the power conferred by this rule only within

the precincts of the Court

49 The Chief Clerk shall certify the comes referred to in Order ALI, Rule 37

Appeals to the Pray Council

50 Petitions for leave to appeal to His Majesty in Council shall be presented to the Assistant Registrar, who, if the potition is in order, will issue notice in the form attached on the respondent to show cause before a Bench consisting of at least two Judges (see Rule 24 above), why the certificate prayed for should not be granted

51 When a cortificate is granted, the appellant shall, within the period prescribed by Order XLV, Rule 7, give security for the costs of the respondent to the extent of Rs 4,000 In cases of special magnitude and importance, the Court may require

to the amount required or, subject to the provisions of Rule 54 by a first mortgage of immovoable property Cash deposited under this rule shall be paid to the Builiff of the Court Government securities so deposited shall be made over to the Registral or a Deputy Registrar

53 Whon cash or Government securities are deposited under Rule 52 a security bond shall be executed in Form A or Form B attached as the case may be

'n 1 . . insured 55 shall be within a

56 shall be so informed

57 In every security bond, the appellant shall hand himself to pay such costs of the opposite party as may be allowed by the Court in the event of the appeal not being prosecuted

58 Within the period prescribed by Order XLV, depent with the Bailiff of the Court the sum of Rs 1, Registrar may determine to defray the expenses of pa

60 are the a

- 6) When the Court has declared the as peal admitted, the Registrar shall serve upon the parties notice calling on them to specify within one month what accounts attached to the record they wish to be included in the cony It shall be in the discretion of the Registrar or the Assistant Registrar to muit from the transcript any accounts which have not within the time specified, been expressly asked for by the parties Assistant Registrar shall also on payment to him of a fee of Rs. 16 furnish to the parties a list of the papers, which make up the record, and shall require each party within fourteen days to indicate any paper which he considers immaterial If the parties are agreed as to the papers to be omitted, those papers shall not be transcribed Assistant Registrar thinks that any paper, as to the omission of which the parties are not agreed, should be omitted, he shall refer the matter for the determination of the Court. Where it is decided to include any paper against the wish of any party, the transcript shall show clearly that the melusion of the paper was objected to by that party
- 62. The Assistant Registrar shall arrange the papers in the transcript in the order specified below and shall prefix an index to the transcript. He shall also attach to the index a certified list of all naners umitted from the transcript under Rule 61 -

Order of arran serient of Paners

1	Diary sheet of the Original Court
2.	Plaint
3	Written statement
	Framinations by the Court under Order \
5	Issues settled
	0-1 - 1 - 1 - 1 - 1 - 1

Oral ovidence for the party beginning, including evidence given by a witness for such party on commission

7 Oral ovidence for the opposite party or parties including evidence given by a witness for such party or parties on commit ion

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Document iry cyclenes for the party beginning
9
10
11
12
13
                                                            LI Rule 22
14
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   The application for a certificate and for leave to appeal to His Majesty in Council
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to this Majesty in Council shall be authenticated by the person by whom they are made

(u) The size of the paper used shall be such that the sheet, when folded and trimmed shall be 11 inches in length and 81 inches in width.

10 TT #3

⁶⁰ When the record is to be printed the style to be adopted shall be as follows -(i) The form known as Demy Quarto (; c., 54 ems in length and 42 in width) shall be followed

- (iii) The type to be used in the text shall be Pica type but Long Primer shall be used in printing accounts, tabular matter and notes
- (iv) The number of lines in each page of Pica type shall be 47 or thereabouts, and every tenth line shall be numbered in the margin
- 66 When the record is printed in India, 100 copies of the transcript shall be struck off t whose cost the record is printed Any c opies of the record on payment of the co fied A charge of Re 1 for every

750 words shall be made for proof reading. Money paid for proof reading shall be credited to Government

67 When the transcript is ready, if it is to be printed in Lingland, one certified copy shall be transmitted to the Registrir of His Majesty's Privy Conneil, Whitehall, at the expense of the appellant. Where the transcript has been printed in India, and 100 copies struck off under Rulo 66 forty copies shall be sent, at the expense of the appellant to the Registrar of His Mijesty's Privy Council, one of which shall be certified to be correct by the Registrir or a Dopuly or initialling overy eighth mage then

Where part of the record is printed if ____

inle shall, is far is practicable, apply to such parts as are printed in India and such as tro to be printed in Lugland respectively

68 All costs mentred in Bertish India whether allowed by the Court under Rule 57 or otherwise shall be recoverable as if they were the amount of a decree for mone;

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO HIS MAJESTY IN COUNCIL SHOULD NOT BE GRANTED (Rule 50)

Code of Civil Procedure, Order XLV, Rule 3 (2)

IN THE CHILL COURT OF LOWER BURMA

(IVII MISCELL ALOUS ALLER ATION AO or 19

Arising out of Civil Appeal No (f 10 . A11 heart,

15 Responder t

Lo Lake notice that the applicant abovenamed Court for a certificate that as regards amount or the requirements of section 110 of the Code of Ci ht one for appeal to His Mujesty in Council

is fixed for you to show cause why the Lhe day of Court should not grunt the certificate asked for

Given under my hand and the seal of the Court this day of Process fee, Ra rentized

Issistant Registrar

FORM A (Rulo 53)

BOND BY AN APPLICANT TO HIS MAJESTY IN COUNCIL FOR SECURITY FOR THE COSTS OF THE RESPONDENT WHEN CURRINCY NOTES ARE OR CASH IS DEPOSITED

son of KNOW ALL MEN by these presents that I

now residing at native of am held and firmly bound to the Semor Judge of the Chi f to lo pad to the

Court of Lower Burma in the sum of Rupces and Somor Judge his succes ors in office or assigns for which payment well and truly to be made I bind myself my here and legal representatives

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File and the City of Appeal Na of Is in the said Chai Com AND WITHIELD the order is of the Court types the suffraged having been aftered to me I provented a petition to the said Court praying for a commute on which an appeal to Had Kingsty in Corn. I must be admirted upp within the or a certail are was granted మాలు ఉంది. ئى تىڭ 12 And white I was called up a to family wears of cothe costs who a may be meaned by the respondent makin Comand before His Mi, way a Prote Come I type or more everyone e of my said appeal to He River to the imput of flateer AND WHILLIES CO.

dig ct 14 I depend in the said Chief Court the ram of Re-N with entire value of the above white boad is saud taut if tur end mege murat edulf de gaad en meete ar l'en me deur ce brail regerwanteres that is releved to your to be by the overres entire of His Mayory in Control مع المراجعة على المراجعة على وربية المراجعة المراجعة والمراجعة المناع عدد المناعدة المناعدة عند المناعدة المناعدة المناعدة المناعدة عدداته المناعدة = 121 the unit ratio and I many agree and order that the and an earlier and by me as all result sand remain more the occasil of the said Cheef Court as and fire المنا في المنافية المنافية المنافية عن المنافية المنافية المنافية المنافية المنافية المنافية المنافية المنافية the to pay to a am one to am one the Come may cover that her said amount tres to the constitute of the state of the control to the part by the color فيتعلق فيونون والمناجع والمناع

FORM B Raids.

DOND BY AN APPELLANT TO HIS REJESTY IN COUNCIL FOR NEUTRITY DIR THE OUSTS OF THE RESPONDENT WHEN GOVERNMENT PRO-

MINORY NOTES ARE DEPOSITED As wear made to their present that I

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THE STREET TO CAT OF ASTRAL TO The said Chief (com And waters are done and the Com op a the said appeal having been norther to me I re-wared a retira moto the sam C and jesting fres cer and e

(iii) The type to be used in the text shall be Pica type 1 at I am Pr - 1 all le (1V) , and

overy with the spair be numbered in the margin

co of the transcript shall be struck off hose cost the record is printed Any c s of the record on payment of tho co A charge of Re I for every

750 words shall be made for proof reading. Money paid for proof reading shall be credited to Government

shall be t expense of the appearant. Where the transcript has been printed in India, and 100 copies struck off under Rufe 66 forty copies shall be sent, at the expense of the appellant to the Registrar of His Majesty & Privy Council, one of which shall be certified to be correct by the Registrar or a Deputy Registrar of the Court by his signing his name on, or untilling, every eighth page thereof and by affixing the scal of the Court thereto Where part of the record is printed in India and part is to be printed in England, il s sule shall, as far as practicable, apply to such parts as are printed in India and such as ue to be printed in England respectively

68 All costs mourred in British India whother allowed by the Court under Rule 57 or otherwise, shall be recoverable as if they were the amount of a decree for money

NOTICE TO SHOW CAUSE WHY A CERTIFICATE OF APPEAL TO HIS VAJISTY IN COUNCIL SHOULD NOT BE GRANTED (Rule 50)

Code of Civil Procedure, Order XLV, Rule 3 (2)

IN THE CHIEF COURT OF LOWER BURMA

CIVIL MISCELLANEOUS APLIE ATION NO

Arising out of Civil Appeal No of 19 . Applicat l.

28 Responder ! iο

apphed to this Take notice that the applicant abovenamed has through Court for a certificate that as regards amount or value and nature the above case felilis the requirements of section 110 of the Code of Civil Procedure, or that it is otherwice ht one for appeal to His Maresty i Cor of

s fixed for you to show cause why the

19 _ourt, this day of

realized

Process fee, R.

Issistant Registrar

TORM A (Rule 53)

BOAD BY AN APPELLANT TO HIS MAJESTY IN COUNCIL FOR SECURITY I OR THE COSTS OF THE RESPONDENT WHEN CURRENCY NOTES ARE OR CASH IS DEPOSITED son of

KNOW ALL MLY by these presents that I now residueg at native of

am held and firmly bound to the Senior Judge of the Chaf

IN WITNESS WHEREOF I have hereunto set my hand at day of 19 .

thus

Signature of Appellant,

Signed by the said

in the presence of

Address. Occupation.

son of

WHEREAS I the above-bounden was the respondent in Civil 1st Appeal No

of 19 in the said Chief Court

IND WHERE'S the decision of the Court upon the said appeal having been adverse to me I presented a petition to the said Court praying for a certificate on which an appeal to His Majesty in Council might be admitted AND WHERE is such certificate was granted to me on the day of 19 AND WHEREAS I was called upon to furnish security for the costs which may be incurred by the respondent in this Court and before His Majesty's Privy Conneil upon or in consequence of my said appeal to His Majesty to the amount of Rupees AND WHEREAS ON

day of I denosited in the said Chief 19 Court the sum of Rs Now the condition of the above written bond is such that if the said respondent shall be paid such costs as I or my heirs or legal representatives shall be ordered to pay to him by the decree or order of His Majesty in Council

meno wing t hewrest often and decision in as it a sind amonte del asireq by me as aforesaid shall remain under the control of the said Chief Court as and for socurity for payment by me or my heirs or legal representatives of such amount or amounts as may be made payable by me or them as costs as aforesaid and that upon my

FORM B (Rule 53)

BOND BY AN APPELLANT TO HIS MAJESTY IN COUNCIL FOR SICURITY TOR THE COSTS OF THE RESPONDENT WHEN GOVERNMENT PRO MISSORY NOTES ARE DIPOSITED

KNOW ILI MEN by these presents that I

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am held and firmly bound to the Semor Judge of the Chief Court of Lower Burma in the sum of Rupees to the said Senior Judge his successors in office or assigns for which payment well and truly to be made I band my self and my heirs and legal representatives

IN WITNESS WHEREOF I have bereunto set my hand at

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Signature of Aggal'ant.

bigned by the said in the presence of

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on which an appeal to His Majosty in Council might be admitted And whereas such certificate was granted to me on the day of day of And whereas I was called upon to furnish security to the costs which may be neurical by the respondent in this Court and Lefoio His Majosty s Privy Council upon or in

consequence of my said appeal to His Vajesty in Council to the amount of Rupees
AND WHEREAS on the
day of
19 Iendorsed and
delivered to the Registrar of the suid Court the Government Promiseory notes
particulars of which are set out in the Schedule hereunder Now the constitution of the

, quenco of my suid appeal then the above written bond shall be youd and of no effect otherwise the same shall be and remain in full force and virtue

AND I BEREIL agree and declare that the Government Promissory notes deposited by me as aforesaid or such other Government Promissory notes as may be held in her thereof and the interest which may accrue thereon shall remain under the control of the Chief Court of Lower Burma as and for security for payment by me or my has or legal representatives of such amount and amounts as may be made payable by me or them as costs as aforesaid, and that upon my or their failure to pay such amount or amounts the said Court may order that thesame be sold and that the proceeds be applied so far as they may extend towards the discharge of the said amount or amounts Pao 101DD that if no costs shall be ordered to be paid by me or my hens or legal representatives to the respondent on my said appeal the said Government Promissory notes or such Government Promissory notes as they may have been replaced by shall unless of therwise detained be returned to me or them.

The Schedule above referred to-

10	Date	Rate of Intere t	in ount
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THE BURNA GAZETTE

21st Ociobal 1911 Part IV r 9.2

CHIEF COURT OF LOWER BURMA

NOTIFICATION

Dated Rangoon, the 19th October, 1911

No 21 (GENERAL) —With reference to section 122 of the Code of Civil Procedure 1908, and with the sanction of the Local Government the Chief Court Lower Burma makes the following rules of procedure to be followed in the Court of Small Causes at Rangoon —

The rules shall be inserted in the Lirst Schedule to the Code as "Order LV—\mail
Cause Court Rules of Procedure?

The rules contained in the First Schedule to the Code of Civil Procedure 1908 of all so far as they are meansistent with or centrary to the Rules herewith public led, and so far as the practice and procedure of the Small Cause Court only are concerted be deared to have been altered or supersected by the rules secondly above ment oned.

ORDER LV.

THE COURT OF SMALL CAUSES, RANGOON.

RULLS RELATING TO ITS PROCEDURE.

Preliminary

- I In these rules, unless there is something repugnant in the subject or context,-
 - (1) the word "Judge ' means the Judge or Additional Judge of the Small Cause Court, Rangeon, (2) the words "plaintiff" and "defendant ' respectively include positioner and
- respondent in miscellaneous proceedings
- In the absence of the Chief Clerk the second clerk shall exercise all the functions
 of the Chief Clerk under these rules
- 3 Except on close holidays the offices of the Court shall be open to the public for business from 10 30 a.m until 4.30 p.m on all week days except Saturdays, and on Siturdays from 10 30 a.m till 2 p.m.

Institution of Proceedings

- 4 Plaints, written statements, petitions and affidavits shall be printed, type written or written in a clear hand in the English language on durable white foolscap paper on one side only of the paper, and so as to leave a margin one inch and a half wide on the left side.
- Provided that, in preceedings to which all the parties are Burmans and in which the relication sought does not exceed Rs 500, the pleading, petitions or affidavits may be in Burmese
- 5 The matter shall be duvided into paragraphs numbered consecutively, and each paragraph shall contain as nearly as may be a single allegation. Where a native date is given, the corresponding English date shall be added.
- 6 Material corrections or alterations shall be initialled oither by the signatory or his pleader
- 7 In plaints and in petitions initiating miscellaneous proceedings the names, descriptions, and places of residence of the parties must be fully set out or the omission to do so
- must be explained to the satisfaction of the Judge

 8 In overy document relating to a suit or proceeding already instituted, the number
- of the suit or proceeding shall be entered before presentation

 9 The Chief Clerk is empowered to administer affidavits to the deponents of
- affidavits to be filed in the Court

 10 Copies of pleadings, petitions and affidavits must be served on the opposite
- for the opposite party not less than twenty four hours before the date fixed for hearing
- 11 Plaints, written statements, petitions and affidavits shall be presented to the Chef Clerk. Urgent applications may be presented to the Judge on his taking his seat on the bench. On a close holiday urgent applications may be presented to the Chef Clerk, who will forward them to the Judge.
- 12 Upon receiving a document bearing a court fee label the Chief Clerk shall examine it. If the court fee be insufficient, he shall return the document, if it be sufficient, he shall exneel the stamp. If the Chief Clerk and the party presenting the document are not agreed as to the sufficiency of the stamp, the matter shall be placed before the Judge for determination.
- 13 If a plant or petition be defective in grammar, form or otherwise, it shall be returned, under the orders of the Judge or the Additional Judge, to the person presenting it.
- s.nting it.

 14 A dary form shall be used in every proceeding, and the Chief Clerk shall enter
 on it the name of the person presenting the plaint or petition and the date of presentation
- 15 No correspondence or telegrams relating to suits or proceedings before the Court with be attended to, but any person having business in the Court or its office shall transact the same in person or by a duly anthorized agent or pleader.

16 11 (a) (b)

(c) all other plants __ Rs 500

for admission and disposal

or bolief

20 An agent desiring to institute or defend a suitshall, at the time of presenting the

plaint or written statement, produce his power of attorney for the scrittiny of the Chief Clerk, who shall examine it and note its production on the diary

The power of attorney shall be returned with a warning that it must be produced

proceedings are in Burmese) be accompanied by an authenticated translation by a translator in accordance with the rules as oxtended to the Court of Small Causes, Rangoon

, the Chief

23. When a plaint or document initiating a proceeding has been admitted itshall

attachment, for review of judgment, to restore a suit to the file, for sanction to prosecute, or intscellaneous applications which necessitate separate judicial proceedings or in which the petitioner is not a party to the suit

24 The Chief Clerk shall fix a day for the defendant's appearance, and upon receipt of the process fees shall sign and issue the process as required by Order's of the Civil Procedure Code. Unless the necessary process fees are paid within 48 holfs from the admission of the suit or peti

suits the value of which exceeds Rs

issues, and shall require a written stat the appearance of the defendant. In all other cases summonses shall be for final

disposal
25 The date for the appearance of a defendant shall be fixed with due regard to

the provisions of Order V, Rule 6 of the Code 26 Ordinarily there shall be at least the following intervals lotated the date of

issue of process and the day fixed for hearing —

(a) Where all the defend into reside within the local limits of the purisdiction of

(1) In suits the value of which occords Rs 1,000 — foreign days

(2) In all other cases—oven days

(b) Where my one defendant resides in Burma but beyond the local limits of the unradiction of the Court.—twenty cu lit days

(c) Where any one defendant resides in India -cight weeks

(d) Where any one defendant resides out of India —three menths Miscellaneous and execution up hections will ordurally be heard in Mondays and 27 Ordinarily a defendant residing within the local limits of the jurisdiction of the Court shall not be deemed to have had sufficient time to appear and answer unless the process was served on him not less than three clear days before the day inced for hearing.

process was served on him not less than three clear days before the day fixed for hearing
28. All processes and warrants shall be signed, sealed and issued by the Chief Clerk,

except warrants committing persons to or releasing them from jad, and warrants of commissions issued to other Courts, which shall be signed by the Judge

29 Processes and warrants for service or execution within the local limits of the jurisdiction of the Court shall be delivered to the Bailiff for service or execution, who shall endorse thereon the date of receipt by him

If the person to be served as known to the Bahlf or to any of his staff, the Bahlf shall cause the process to be served forthwith. If the person to be served is not so known, the Bahlff shall require the party applying for the process to provide some person to identify the person to be served, and shall fix a time when one of his officers will be ready to proceed to effect service.

to the Code to the

31 Unless otherwise ordered, a second or subsequent process shall not be issued

until the previous one has been returned

32 Proof of service may he made by affidavit. Such affidavits must state fully all particulars which must necessarily be proved before the summons or process can be held to have been duly served. The Buthiff and Deputy Bahiff are empowered to

administer the eath to the deponents of such affidavits

33 Assummens or other process shall be served or executed on a Sunday, Christmas

Day, or Good Friday except hy leave of the Judge

Неогапа

34 On the day fixed for hearing if the defendant appears the Judge shall ascertain from him what is his defence, if any

If it appears to the Judge that a written statement lie it and shall defence stated defence stated

Daily File and Cause List

35 All underposed of cases shall be entered in the daily file under the respective dates fixed for bearing

36 A daily cause list shall be prepared from the daily file and shall show the causes

for hearing in the following order .-

(1) Executions

(2) Viscellaneous applications
(3) Regular suits—

(a) ler settlement of issues

(b) For disposal—

(1) dolended (11) undefended

37 Cases in the duly list shall be called on in turn in the order in which they appear in the list.

38 The daily cau e list shall be affixed to the notice board in the Court and the

Documents filed in Court

40 Documents not impounded under the Stamp Act or ordered by the Judge to be retained shall, on application made, be returned after fifteen days from the date of

judgment, unless the proceedings have in the meanwhile been sent for by the Chi Court

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41 Except in cases in which the proceed no

. ., .. van Cour on accuments admitted or rejected

Inspection of Documents filed

43 The Chief Clerk is authorized to permit the inspection of any document filed; Court by a party or his pleader in the presence of an officer of the Court

Summons to Witnesses

44 A summons to a witness may be applied for by a party to a suit or proceeding or his pleader at any time after its institution and during its pendency The application shall be presented to the Chief Clerk If he thinks that for any reason it shall not b granted, he shall take the orders of the Judge on the point

45 The party applying shall within twenty four hours from the time when the application is filed, pay to the Bailiff such sum for the travelling and other expenses of the person or persons summoned as may be requisite according to the following

scale -

	Maximum	Minimum
Soldiers mariners labourers carriers domestic servants sucara, etc nidemen of property i i i s Editors engineers and surveyors not less than Rs 500 a month	Rs A P 2 0 0 4 0 0 12 0 0 10 0 0 10 0 0 10 0 0 12 0 0	Rs A P 0 4 0 0 1 0 0 0 0 0 0 0 0 0 0
Shroffs bunnas schoolmasters commanders and officers of ships Articled and other clerks and marine Lemales according to station	12 0 0 6 0 0 4 0 0 4 0 0 2 0 0 4 0 0	6 0 0 2 0 0 2 0 0 2 0 0 2 0 0 3 0 0

In special cases or in cases not provided for in the scale, the Court shall allow such fees as it thinks fit

46 The Chief Clerk shall issue summonses as soon as possible after the Bailiff has

to the Court to which the summens is to be sent for service

49 The Builiff shall receive all money sent by other Courts as expenses of wime and commissions 50

shall sen

received then make an order for the assue of the summons

- ii. On receipted a commission for the examination of a winces from another Court, the Chief Cieth shall send it to the Radiff, who shall note on it whether any and what more you reprime a has been received, as expensed the winters. If sufficient money has been received, the Chief Cieth shall reake an order for the issue of the aummons to the winters.
- 52. Any money received as expenses of witnesses remaining unexpended shall be returned by the Italial, under the orders of the Judge, to the Court of issue.

Commissions

- 53 The heating of a suit in which a commission has been issued under Order XXVI of the Code shall be postpaned until the return of the commission, unless the Judgo otherwise directs.
- 51. An application for commissions shall be made promptly after the grounds on which it is asked for are known, and the petitions for it shall be accompanied by an affiliarit or affiliarit, acting out the fac.

 commission, and when they are became a
- 55 In communication for the examination of stances and a superstance of the formusesoners duties to an Advocate or Pleader!

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 - 56 ct 2 st a steen of compershalf within 100 reasons in com-

four days from such service, and shall serve a copy on the other party or his picture.

37. If the commission is for the examination of witnesses that reer, the party obtaining the order shall pay the necessary costs of and medent to the same, and both parties shall tile a list of witnesses, and all necessary papers and documents within one week from the date of the order.

58. On default in the observance of these rules by a party obtaining an order for a commission, the commission had not used without taxe of a Judge, and on default by the opposite party, he shall not be allowed to join in the commission without such large.

Arrangement and Numbering of Records.

33 The records shall be arranged in the following order -

.1 -Regular Sust File.

- (1) Facing sheet (5) Evidence taken on commission.
- (2) Dury (6) Documents tendered in evidence.
- (3) Pleadings. (7) Judgment (4) Evidence taken by the Judge (8) Decree.
- (9) Processes in the regular suit.

B -Miscellaneous Proceedings File

- (1) Facing shoet. (3) Evidence.
- (2) Application (4) Order.
 (5) Processes in the miscellaneous proceedings.

C -Execution File.

- (1) Facing sheet (3) Order-
- (2) Application. (4) Processes in the execution.
 (4) The diary shall be framed so as to show as concisely as possible every stage of
- and every proceeding taken in the suit, and the party or parties present in person or by pleader at every proceeding, and shall ordinarily be signed by the Bench Clerk. But

if it is the sole record of a judicial order other than that of a postponement or of an adjournment or of a direction for the issue of process, then it shall be signed by the Judge.

Judgments, Orders and Decrees.

61 Judgments and orders shall only be pronounced after they are written, and shall be ir the date on which they are delivered.

Decrees shall bear the date of delivery of judgment, and also the date of signature

in the hand of the Judge

If a party or his pleader intimates to the Chief Clerk immediately after a decree or order has been passed by the Judge, that he wishes to see the formal decree or order before it is sulmitted to the Judge for signature, he may be allowed to do so, and if there is any disagreement as to the form of decree or order, or the taxing of the costs, the case shall be set down on the daily list, on as early a date as may be convenient, to speak to the minutes of decree

Pauper Suits

62 After the disposal of every suit in which a pauper is concerned, the Chief Clerk shall send to the Collector of Rangoon a memorandum of the Court fees due and payable by the pauper

Execution Proceedings

63 Applications under section 39 of the Codo to send a decice or order for execution to mother Court shall be made by verified petition, and shall be accompanied by a certified copy of the decree or order.

64 The certified copy, together with the other documents mentioned in Order AAL

Rule 6, of the Code shall be sent hy registered post.

65 The process fees prescribed for the warrant of attachment and for the order of sale shall be annexed to every application for execution by attachment and sale of pro

66 In overy application for the attachment of movemble property the approximate value of the property sought to he attached shall be stated according to the best of the applicant's behef

indicated

68 The second clerk shall examine overy application for execution and shall report whether the requirements of the Code and of these rules have been complied with before the application is submitted to the Judge

Sale of Attached Property

69 As soon as possible after an attrebment of moveable property, the Buhil shall report to the Court the fact of the attachment and shall furnish a list of the articles attrached and their approximate value, and shall note if any of them are not hible to attachment or sale

If any of the articles or things fall within the provise of Order XXI, Rule 43, of

the Code, it shall be so stated in the report and list

70 The report and list shall be submitted to the Judge, who shall pass such order for sale as he may think fit, although the decree helder may not apply for a sale order A w ur not for sale shall be transmitted to the Buhff, who shall forthwith prepare and 15500 a proclamation

71 Every proclumation shall be advertised in a local nowspaper or adverticer for at least fifteen days (except in the case of property mentioned in the provise to Order AM, Rulo 43, of the Code), and the cost of idvertising shall be deducted from the proceeds

of sale 72 Moveable property falling within the provise to Order X VI, Rule 43, of the Code, shill be sold as soon as may be concerned after it has been attached. Other more allo property shall be sold on the third Saturday after the day on which the proclamation shall have been fixed up in the Court

Security to Court.

73. When security is required to be given it shall be taken either in cish or in the form of a bond. Such bond shall be with or without sureties as it o Judge may direct, and shall be in favour of the Bailiff of the Court for the time being.

74 When sureties are required and persons resident within the juri-diction of the Courtare tendered, a report shall be called for from the Balliff as to whether the principal and sureties possess within the jurisdiction of the Court property of value equal to the

amount of the security required

3. No survives shall, without the order of the Judge, be accepted unless they make an affidavit or affidavits stating that the property which each of them powerses, or that their properties combined, are equal in value to the amount of the security demanded, over and above any incumbrances to which such properties may be hable, and over and above the amount for which they have previously given security and for which they have previously given security and for which they have previously given security.

Bailiff's Commission on Sales of Attached Property

77 The Bahiff's commission on sales of attached property is the same as in Order LHI, Rules 163, 164, 165 and 166

THE BURMA GAZETTE.

26TH AUGUST, 1911, PART IV P 760

CHIEF COURT OF LOWER BURMA

NOTIFICATION

Dated Rangoon, the 22nd .lugust, 1911

of this Court's Notification No. 44, dated the 17th November, 1904 as amended by Notifications Nos. 1 and 4 (General), dated the 9th January, 1906, and 25th January, 1906, published for the state of t

"Order LV1-Rules

RULES.

I - Classification of Records

divided into the following four classes -

Class I -Records of-

(a) suits and cases affecting immoveable property, including suits for fore closure, redemption, or sale,

- (b) suits in respect of the succession to an office or to establish or set aside an adoption, or otherwise to establish the status of an individual,
- (c) suits relating to public trusts, charities, or endowments,

(d) administration suits.

(e) suits between landlord and tenant to determine the rate of rent, or in which a question of right to enhance or vary the rent of a tenant, or any question relating to a title to land or to some interest in land as between parties having conflicting claims thereto, is in issue

Class II - Records of the following suits and cases except such of them as affect mmoveable property-

- (a) contested and uncontested suits and cases for probate and letters of adminis tration and for the revocation of the same,
- (b) cases under the Guardians and Wards Act, 1890, relating to the guardian ship of minors and the administration of their property,
- (c) cases under the Lunaey (District Courts) Act, 1858, relating to the guardian ship of lunatics and the care of their estates

6280

V -

Class III -Records of-

- (a) all suits which do not como under Class I or Class II,
- (b) cases under the Succession (Property Protection) Act, 1841 eases under the Succession Certificato Act, 1889. cases under Parts III and IV of the Land Acquisition Act, 1894, cases under the Provincial Insolvency Act (III of 1907) for a declaration of

tion for execution is pending,

(c) such other cases as the Chief Court may from time to time direct to be included

> of Carl Procedure for the restoration of a suit or receedings in the suit or appeal and must form part

Class IV -Records of execution proceedings

In this rule the word suit, case or proceeding includes in appeal

II - Irrangement of Records

2 Every record under Class I, Class II, and Class III shall be divided as the trial proceeds into two files, A and B

The A shall be called the Trial Record and, in cases other than appeals, al all contain besides the flylcaf with index of contents-

(a) Diary

(b) Plaint or patition instituting the case

(c) Plans attached to the plant to define the land sued for

(d) I set of documents produced with the plant when not endorsed on the plant,

(c) List of documents relied on by plaintiff, but not produced, Order VII, Rule 14

- (f) List of documents produced by the parties at the first hearing, Order XIII, Rule 1 (2).
- (g) Written statements or counter petitimns of the parties
- (h) Petitions, proceedings, and orders in interlocutory matters
- (1) Opening proceedings
- (j) Issues
- (1)
- (m)
- (n)
- (p)
- (q) Report of Commissioner appointed under Order XXVI
- (r) Award of arbitrators or petition of compromise
 (s) Report or account of a Receiver
- (1) Judgment
 - (u) Decree
 - (t) Final decree in mortgago or administration suits
 - (w) Copies of orders and decrees in appeal and revision
- (z) Order absolute for sale in mortgage cases, together with proclimation, sale report, order of confirmation, and certificate of sale Tho judgment of the Appellate Court, if any, shall be filed after the decree and any

further ovidence recorded and any finding of the lower Court, together with the final order in appeal, shall be filed thereafter in that order Tile B shall be called the Process Record and shall contain beaches the fishes with

- table of contents—
 (a) Powers of attorney
 - (b) Summonses and other processes and ishdivits relating there to §
 - (c) List of witnesses
 - (d) Petitions relating to adjournments, attendance of witnesses etc
 - (c) Other papers not included in Trial Record
 - (f) Letters, etc., calling for records, etc

3 Every record under Class IV shall consist of two files, A and B. File A shall contain besides the five of with table of contents—

- (a) Diary
- (b) Application for execution
- (c) Papers received from Court which passed the decree, Order \\\ Rule 6
- (d) Plans of lands to be attached
- (e) Petitions, proceedings, and orders in interlocutory matters
- (f) Petitious objecting to the execution, other than claims maker Order VVI, Rule 58
- (g) Warrants and prohibitory orders resuch to effect execution by an ichaent or delivery of property and returns thereto
 - (h) Warr int of sale
 - (1) Proclamation of sale
- (1) Report of result of sale
- (L)
- (l) (m) : and the orders thereon
- (n) Receipts or icknowledgments of satisfaction
- (o) I mal order
- (p) Copy of order in appeal or reseason. I ile B shall contain all other papers.
- 4 halana 1 e ana e a e a a a a a
- * Abstrate defendant if sefendant be ains. † Abstrate | lamitif if defendant be ins.
- Documents not admitted in evidence must not be ited a thithe recent but ab .'I be
- returned to the party who produced them.

 I dilidaritate process servers growing serves mass punctions about he carbo I men

4 The A file of the trial record of an Appellate Court shall contain, besides the flylorif with tables of contents—

(a) Diary

(b) Memorandum of appeal

(c) Copy of judgment and decree of Lower Court

(d) Written statements, if any

(e) Potitions, proceedings, and orders in interlocutory matters

(f) Oral evidence, if any

(g) Judgment (h) Decree

(1) Copy of judgment and decree in second appeal or revision

The B file shall contain all other papers

5 The record of suits decided by Small Cause Courts, or tried under Small Cause Court procedure, shall consist only of one file

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